LAW AND LEGAL STUDY 1

1.1 INTRODUCTION

There are a number of possible approaches to the study of law. One such is the traditional or formalistic approach. This approach to law is posited on the existence of a discrete legal universe as the object of study. It is concerned with establishing a knowledge of the specific rules, both substantive and procedural, which derive from statute and common law and which regulate social activity. The essential point in relation to this approach is that study is restricted to the sphere of the legal without reference to the social activity to which the legal rules are applied. In the past, most traditional law courses and the majority of law textbooks adopted this 'black letter' approach. Their object was the provision of information on what the current rules and principles of law were, and how to use those rules and principles to solve what were by definition, legal problems. Traditionally, English legal system courses have focused attention on the institutions of the law, predominantly the courts, in which legal rules and principles are put into operation, and here too the underlying assumption has been as to the closed nature of the legal world – its distinctiveness and separateness from normal everyday activity. This book continues that tradition to a degree, but also recognises, and has tried to accommodate, the dissatisfaction with such an approach that has been increasingly evident among law teachers and examiners in this area. To that end, the authors have tried not simply to produce a purely expository text, but have attempted to introduce an element of critical awareness and assessment into the areas considered. Potential examination candidates should appreciate that it is just such critical, analytical thought that distinguishes the good student from the mundane one.

Additionally, however, this book goes further than traditional texts on the English legal system by directly questioning the claims to distinctiveness made by, and on behalf of, the legal system and considering law as a socio-political institution. It is the view of the authors that the legal system cannot be studied without a consideration of the values that law reflects and supports, and again, students should be aware that it is in such areas that the truly first-class students demonstrate their awareness and ability.

1.2 THE NATURE OF LAW

One of the most obvious and most central characteristics of all societies is that they must possess some degree of order to permit the members to interact over a sustained period of time. Different societies, however, have different forms of order. Some societies are highly regimented with strictly enforced social rules, whereas others continue to function in what outsiders might consider a very unstructured manner with apparently few strict rules being enforced.

Order is therefore necessary, but the form through which order is maintained is certainly not universal, as many anthropological studies have shown (see Mansell and Meteyard, 2004).

In our society, law plays an important part in the creation and maintenance of social order. We must be aware, however, that law as we know it is not the only means of creating order. Even in our society, order is not solely dependent on law, but also involves questions of a more general moral and political character. This book is not concerned with providing a general explanation of the form of order. It is concerned more particularly with describing and explaining the key institutional aspects of that particular form of order that is *legal* order.

The most obvious way in which law contributes to the maintenance of social order is the way in which it deals with disorder or conflict. This book, therefore, is particularly concerned with the institutions and procedures, both civil and criminal, through which law operates to ensure a particular form of social order by dealing with various conflicts when they arise.

Law is a *formal* mechanism of social control and, as such, it is essential that the student of law be fully aware of the nature of that formal structure. There are, however, other aspects to law that are less immediately apparent, but of no less importance, such as the inescapable political nature of law. Some textbooks focus more on this particular aspect of law than others, and these differences become evident in the particular approach adopted by the authors. The approach favoured by this book is to recognise that studying the English legal system is not just about learning legal rules, but is also about considering a social institution of fundamental importance.

1.2.1 LAW AND MORALITY

There is an ongoing debate about the relationship between law and morality and as to what exactly that relationship is or should be. Should all laws accord with a moral code, and, if so, which one? Can laws be detached from moral arguments? Many of the issues in this debate are implicit in much of what follows in the text, but the authors believe that, in spite of claims to the contrary, there is no simple causal relationship of dependency or determination, either way, between morality and law. We would rather approach both morality and law as ideological, in that they are manifestations of, and seek to explain and justify, particular social and economic relationships. This essentially materialist approach to a degree explains the tensions between the competing ideologies of law and morality and explains why they sometimes

conflict and why they change, albeit asynchronously, as underlying social relations change.

Law and Morality

At first sight it might appear that law and morality are inextricably linked. There at least appears to be a similarity of vocabulary in that both law and morality tend see relationships in terms of rights and duties and much of law's ideological justification comes from the claim that it is essentially moral. However that is not necessarily the case and much modern law is of a highly technical nature (such as rules of evidence or procedure) dealing with issues that have very little if any impact on issues of morality as such. Opinions about the relationship between law and morality diverge between two schools of thought:

- One side adopts a 'natural law' approach which claims that law must be moral in order to be law, and that 'immoral law' is a contradiction in terms. Natural lawyers usually base their ideas of law on underlying religious beliefs and texts which are in the very literal sense sacrosanct, but this is not a necessity and opposition to specific law may be based on pure reason or political ideas.
- The other side can be characterised as 'legal positivists'. They argue that law has no necessary basis in morality and that it is simply impossible to assess law in terms of morality.

These issues feed into debates as to what is connoted by the rule of law, which will be considered in some detail in Chapter 2 of this text.

The Legal Enforcement of Morality: the Hart v Devlin Debate

This aspect of the law and morality debate may be reduced to the question: does the law have a responsibility to enforce a moral code, even where the alleged immorality takes place in private between consenting adults? Consider this example: in Britain there are over two million cohabiting gay couples. Homosexual sex was legalised in 1967 (for 21 year olds, lowered to 18 year olds in 1994), and consensual heterosexual anal intercourse was decriminalised by s 143 of the Criminal Justice and Public Order Act 1994. In British legal debate the moral issue was fought out in the 1960s by Lord Devlin and Professor HLA Hart. Devlin argued that 'the suppression of vice is as much the law's business as the suppression of subversive activities'. A shared morality, he argued, is the cement of society, without which there would be aggregates of individuals but no society. Hart argued that people should not be forced to adopt one morality for its own sake. He repudiated the claim that the loosening of moral bonds is the first stage of social disintegration, saying that there was no more evidence for that proposition than there was for Emperor Justinian's statement that homosexuality was the cause of earthquakes.

In any event it might be said that Hart 'won' the debate in the sense that it was his influence that led to the passing of the 1960s legislation liberalising the law on abortion, prostitution, homosexuality, and abolishing capital punishment. However such issues can still arise – as was seen in the *Brown* case, considered later, and the ongoing issue of

the 'rights' relating to assisted suicide as considered in *R (on the application of Purdy) v Director of Public Prosecutions* (2009).

The Morality of the Law Maker

One particular aspect of the debate that will be repeatedly highlighted in what follows is the way in which certain individuals, particularly judges, have the power not just to make and mould law, but to make and mould law in line with their own ideologies, i.e. their individual values, attitudes and prejudices – in other words their moralities.

> Morality *vis à vis* the law constitutes an external environment which interacts with the lawmaking process, not because law makers are blessed with divine insight into the 'general will', but rather because laws tend to be based on value-loaded information which percolates to the law-makers (*whose own individual values have a disproportionate influence upon the process*). [L Bloom-Cooper and G Drewry, *Law and Morality* (1976), p. xiv]

This issue is central to the Royal College of Nursing case considered in Chapter 3 and on the companion website at: www.routledge.com/textbooks/9780415480963/txtupdates.asp.

1.3 CATEGORIES OF LAW

There are various ways of categorising law, which initially tend to confuse the non-lawyer and the new student of law. What follows will set out these categorisations in their usual dual form, while at the same time trying to overcome the confusion inherent in such duality. It is impossible to avoid the confusing repetition of the same terms to mean different things and, indeed, the purpose of this section is to make sure that students are aware of the fact that the same words can have different meanings, depending upon the context in which they are used.

1.3.1 COMMON LAW AND CIVIL LAW

In this particular juxtaposition, these terms are used to distinguish two distinct legal systems and approaches to law. The use of the term 'common law' in this context refers to all those legal systems that have adopted the historic English legal system. Foremost among these is, of course, the United States, but many other Commonwealth and former Commonwealth countries retain a common law system. The term 'civil law' refers to those other jurisdictions that have adopted the European continental system of law derived essentially from ancient Roman law, but owing much to the Germanic tradition.

The usual distinction to be made between the two systems is that the common law system tends to be case-centred and hence judge-centred, allowing scope for a discretionary, *ad hoc*, pragmatic approach to the particular problems that appear before the

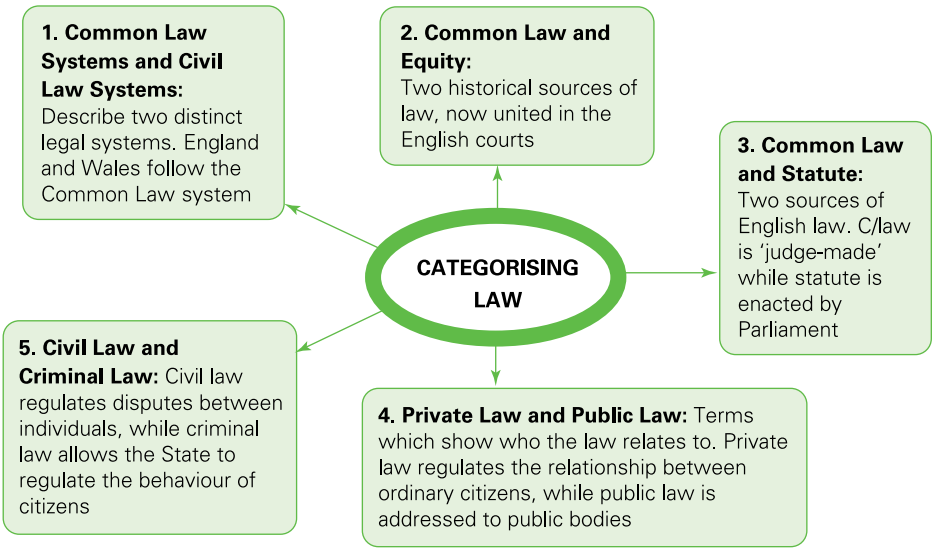

FIGURE 1.1 *Categorising Law.*

courts, whereas the civil law system tends to be a codified body of general abstract principles which control the exercise of judicial discretion. In reality, both of these views are extremes, with the former overemphasising the extent to which the common law judge can impose his discretion and the latter underestimating the extent to which continental judges have the power to exercise judicial discretion. It is perhaps worth mentioning at this point that the European Court of Justice (ECJ), established, in theory, on civil law principles, is in practice increasingly recognising the benefits of establishing a body of case law.

It has to be recognised, and indeed the English courts do so, that, although the ECJ is not bound by the operation of the doctrine of *stare decisis* (see below, 3.6) it still does not decide individual cases on an *ad hoc* basis and, therefore, in the light of a perfectly clear decision of the European Court, national courts will be reluctant to refer similar cases to its jurisdiction. Thus, after the ECJ decided in *Grant v South West Trains Ltd* (1998) that Community law did not cover discrimination on grounds of sexual orientation, the High Court withdrew a similar reference in *R v Secretary of State for Defence ex p Perkins (No 2)* (1998) (see below, 15.3, for a detailed consideration of the ECJ).

1.3.2 COMMON LAW AND EQUITY

In this particular juxtaposition, the terms refer to a particular division within the English legal system.

The common law has been romantically and inaccurately described as the law of the common people of England. In fact, the common law emerged as the product of a

particular struggle for political power. Prior to the Norman Conquest of England in 1066, there was no unitary, national legal system. The emergence of the common law represents the imposition of such a unitary system under the auspices and control of a centralised power in the form of a sovereign king; in that respect, it represented the assertion and affirmation of that central sovereign power.

Traditionally, much play is made about the circuit of judges travelling round the country establishing the 'King's peace' and, in so doing, selecting the best local customs and making them the basis of the law of England in a piecemeal but totally altruistic procedure. The reality of this process was that the judges were asserting the authority of the central State and its legal forms and institutions over the disparate and fragmented State and legal forms of the earlier feudal period. Thus, the common law was common *to* all in application, but certainly was not common *from* all. (The contemporary meaning and relevance and operation of the common law will be considered in more detail later in this chapter and in Chapter 3.)

By the end of the thirteenth century, the central authority had established its precedence at least partly through the establishment of the common law. Originally, courts had been no more than an adjunct of the King's Council, the *Curia Regis*, but gradually the common law courts began to take on a distinct institutional existence in the form of the Courts of Exchequer, Common Pleas and King's Bench. With this institutional autonomy, however, there developed an institutional sclerosis, typified by a reluctance to deal with matters that were not or could not be processed in the proper *form of action*. Such a refusal to deal with substantive injustices because they did not fall within the particular parameters of procedural and formal constraints by necessity led to injustice and the need to remedy the perceived weaknesses in the common law system. The response was the development of *equity*.

Plaintiffs unable to gain access to the three common law courts might directly appeal to the sovereign, and such pleas would be passed for consideration and decision to the Lord Chancellor, who acted as the king's conscience. As the common law courts became more formalistic and more inaccessible, pleas to the Chancellor correspondingly increased and eventually this resulted in the emergence of a specific court constituted to deliver 'equitable' or 'fair' decisions in cases that the common law courts declined to deal with. As had happened with the common law, the decisions of the Courts of Equity established principles that were used to decide later cases, so it should not be thought that the use of equity meant that judges had discretion to decide cases on the basis of their personal idea of what was just in each case.

The division between the common law courts and the Courts of Equity continued until they were eventually combined by the Judicature Acts (JdA) 1873–75. Prior to this legislation, it was essential for a party to raise an action in the appropriate court – for example, the courts of law would not implement equitable principles; the Acts, however, provided that every court had the power and the duty to decide cases in line with common law and equity, with the latter being paramount in the final analysis.

Some would say that, as equity was never anything other than a gloss on common law, it is perhaps appropriate, if not ironic, that now both systems have been effectively subsumed under the one term: common law.

Common law remedies are available as of right. Remedies in equity are discretionary: in other words they are awarded at the will of the court and depend on the behaviour and situation of the party claiming such remedies. This means that, in effect, the court does not have to award an equitable remedy where it considers that the conduct of the party seeking such an award has been such that the party does not deserve it (*D & C Builders v Rees* (1965)).

1.3.3 COMMON LAW AND STATUTE LAW

This particular conjunction follows on from the immediately preceding section, in that the common law here refers to the substantive law and procedural rules that have been created by the judiciary through the decisions in the cases they have heard. Statute law, on the other hand, refers to law that has been created by parliament in the form of legislation. Although there has been a significant increase in statute law in the twentieth and twenty-first centuries, the courts still have an important role to play in creating and operating law generally and in determining the operation of legislation in particular. The relationship of this pair of concepts is of central importance and is considered in more detail in Chapter 3.

1.3.4 PRIVATE LAW AND PUBLIC LAW

Private law deals with relations between individuals with which the State is not directly concerned nor involved in. Public law, on the other hand, relates to the inter-relationship of the State and the general population, in which the State itself is a participant. Somewhat confusingly, under the English legal system the State can enter into private law relationship with individuals, so the term public law is more accurately restricted to those aspects where the State is acting in a public capacity.

There are two different ways of understanding the division between private and public law. At one level, the division relates specifically to actions of the State and its functionaries vis-à-vis the individual citizen, and the legal manner in which, and form of law through which, such relationships are regulated: public law. In the nineteenth century, it was at least possible to claim, as AV Dicey did, that under the common law there was no such thing as public law in this distinct administrative sense and that the powers of the State with regard to individuals were governed by the ordinary law of the land, operating through the normal courts. Whether such a claim was accurate or not when it was made – and it is unlikely – there certainly can be no doubt now that public law constitutes a distinct and growing area of law in its own right. The growth of public law in this sense has mirrored the growth and increased activity of the contemporary State, and has seen its role as seeking to regulate such activity. The crucial role of judicial review in relation to public law will be considered in some detail in Section 10.5, and the content and impact of the Human Rights Act 1998 will be considered later in Chapter 2.

There is, however, a second aspect to the division between private and public law. One corollary of the divide is that matters located within the private sphere are seen as

purely a matter for individuals themselves to regulate, without the interference of the State, whose role is limited to the provision of the forum for deciding contentious issues and mechanisms for the enforcement of such decisions. Matters within the public sphere, however, are seen as issues relating to the interest of the State and general public, and as such are to be protected and prosecuted by the State. It can be seen, therefore, that the category to which any dispute is allocated is of crucial importance to how it is dealt with. Contract may be thought of as the classic example of private law, but the extent to which this purely private legal area has been subjected to the regulation of public law, in such areas as consumer protection, should not be underestimated. Equally, the most obvious example of public law in this context would be criminal law. Feminists have argued, however, that the allocation of domestic matters to the sphere of private law has led to a denial of a general interest in the treatment and protection of women. By defining domestic matters as private, the State and its functionaries have denied women access to its power to protect themselves from abuse. In doing so, it is suggested that, in fact, such categorisation has reflected and maintained the social domination of men over women.

1.3.5 CIVIL LAW AND CRIMINAL LAW

Civil law is a form of private law and involves the relationships between individual citizens. It is the legal mechanism through which individuals can assert claims against others and have those rights adjudicated and enforced. The purpose of civil law is to settle disputes between individuals and to provide remedies; it is not concerned with punishment as such. The role of the State in relation to civil law is to establish the general framework of legal rules and to provide the legal institutions to operate those rights, but the activation of the civil law is strictly a matter for the individuals concerned. Contract, tort and property law are generally aspects of civil law.

Criminal law, on the other hand, is an aspect of public law and relates to conduct which the State considers with disapproval and which it seeks to control and/or eradicate. Criminal law involves the *enforcement* of particular forms of behaviour, and the State, as the representative of society, acts positively to ensure compliance. Thus, criminal cases are brought by the State in the name of the Crown and cases are reported in the form of *Regina v . . .* (*Regina* is simply Latin for 'queen' and case references are usually abbreviated to *R v . . .*) whereas civil cases are referred to by the names of the parties involved in the dispute, for example, *Smith v Jones*. In criminal law, a prosecutor prosecutes a defendant (or 'the accused'). In civil law, a claimant sues (or 'brings a claim against') a defendant.

In distinguishing between criminal and civil actions, it has to be remembered that the same event may give rise to both. For example, where the driver of a car injures someone through their reckless driving, they will be liable to be prosecuted under the Road Traffic legislation, but at the same time, they will also be responsible to the injured party in the civil law relating to the tort of negligence.

A crucial distinction between criminal and civil law is the level of proof required in the different types of cases. In the criminal case, the prosecution is required to prove that the defendant is guilty beyond reasonable doubt, whereas in a civil case, the degree

of proof is much lower and has only to be on the balance of probabilities. This difference in the level of proof raises the possibility of someone being able to succeed in a civil case, although there may not be sufficient evidence for a criminal prosecution. Indeed, this strategy has been used successfully in a number of cases against the police where the Crown Prosecution Service (CPS) has considered there to be insufficient evidence to support a criminal conviction for assault. A successful civil action may even put pressure on the CPS to reconsider its previous decision not to prosecute (see, further, below, 8.2, for an examination of the CPS). In June 2009 relatives of the victims of the Omagh bombing in Northern Ireland, which killed 29 people in 1998, won the right to take a civil case against members of the real IRA, following the failure of a criminal prosecution to secure any convictions. In approving the action the Judge in the case held that there was overwhelming evidence against four members of the terrorist group in relation to the atrocity.

It is essential not to confuse the standard of proof with the burden of proof. The latter refers to the need for the person making an allegation, be it the prosecution in a criminal case or the claimant in a civil case, to prove the facts of the case. In certain circumstances, once the prosecution/claimant has demonstrated certain facts, the burden of proof may shift to the defendant/respondent to provide evidence to prove their lack of culpability. The reverse burden of proof may be either *legal* or *evidential*, which in practice indicates the degree of evidence they have to provide in order to meet the burden they are under.

It should also be noted that the distinction between civil and criminal responsibility is further blurred in cases involving what may be described as hybrid offences. These are situations where a court awards a civil order against an individual, but with the attached sanction that any breach of the order will be subject to punishment as a criminal offence. As examples of this procedure may be cited the Protection from Harassment Act 1997 and the provision for the making of Anti-Social Behaviour Orders available under s 1(1) of the Crime and Disorder Act 1998. Both of these provisions are

	Criminal law:	**Civil law:**
Courts:	Magistrates' and Crown Court	County Court and High Court
Aims:	Enforce standards of behaviour, protect, punish and rehabilitate	Resolve disputes between individuals
Outcomes:	Sentences include imprisonment and community service	To compensate for loss or harm caused
Terminology:	Prosecute, guilt, etc	Action, liability, etc
Standard of proof:	Beyond reasonable doubt	On the balance of probability
Procedure:	Arrest and charge by police, prosecution by CPS	Decision to bring an action made by claimant

FIGURE 1.2 *Differences between Criminal and Civil law.*

of considerable interest and deserve some attention in their own right. The Protection from Harassment Act was introduced as a measure to deal with 'stalking', the harassment of individuals by people continuously following them, and allowed the victim of harassment to get a court order to prevent the stalking. Whereas stalking may have been the high-profile source of the Act, it is possible, however, that its most useful provision, if it is used appropriately, may actually lie in providing more protection for women who are subject to assault and harassment from their partners than is available under alternative criminal or civil law procedures. In March 2001, a black clerk in a City of London police station used the Act successfully against *The Sun* newspaper in an action. The newspaper had published three articles about the woman after she had reported four police officers in her station for making racist comments about a Somali asylum seeker and as a consequence had received hate mail. The paper admitted that the articles were 'strident, aggressive and inflammatory' and the judge held that they were also racist. In his view, the Protection from Harassment Act gave the claimant 'a right to protection from harassment by all the world including the press'. The Court of Appeal subsequently refused an application by the newspaper to strike out the action (*Thomas v News Group Newspapers* (2001)) and consequently it can be concluded that the Act potentially offers significant protection to the ordinary members of the public who have been the object of what many see as press harassment. Such protection is, of course, additional to any other protection provided under the Human Rights Act 1998.

While there certainly is potential for the Protection from Harassment Act to be used positively, many have claimed that in practice it has been used in a repressive way to prevent otherwise legitimate demonstrations. Perhaps significantly, the definition of harassment was extended by s 125 of the Serious Organised Crime and Police Act (SOCPA) 2005, to include 'a course of conduct . . . which involves harassment of two or more persons'. And as conduct is defined as including speech, this means that a person need only address someone once to be considered to be harassing them, as long as they have also addressed someone else in the same manner. Another such allegedly antidemocratic provision is contained in s 132 of SOCPA. While not actually forbidding demonstrations within the designated area – one square kilometre around parliament – s 132 requires any person who intends to organise a demonstration in that area to apply to the police for authorisation to do so. It permits the police to impose conditions on the holding of a demonstration. Any breach of the provisions constitutes a criminal offence.

Following the implementation of the Act, so called 'democracy campaigners' defied it by holding weekly picnics in Parliament Square, with the consequent arrest of a number of protestors. However, and ironically, the wording of SOCPA did not cover the situation of the person at whom the Act was specifically aimed, one Brian Haw. Haw had been conducting a demonstration in Parliament Square since June 2001. He lived on the pavement in the square and displayed a large number of placards, originally protesting against the government's policies in relation to, and later its war with, Iraq.

In *R (on the application of Haw) v Secretary of State for the Home Department* (2006), the question arose as to whether or not the Act applied only to new demonstrations, or whether it covered Haw's continuing protest, which had started before the Act came into force. There can be no doubt that the Act was designed to deal with Haw, but unfortunately, for the government at least, the Divisional Court held by a majority of 2

to 1 that its wording was prospective and did not cover Haw's ongoing protest. Consequently, the Commencement Order for the Act, which purported to make it apply to demonstrations that began before the Act came into force, amounted to an alteration of the substance of the Act and to that effect was *ultra vires* and invalid. In May 2006, the Court of Appeal reversed the decision of the High Court holding that SOCPA did apply to *Haw*. The *Haw* case raises a number of related issues as regards legislation and statutory interpretation, which will be considered further, below, at 3.3 and 3.4.

In its 2009 Constitutional Reform and Governance Bill, the previous Government revealed its intention to repeal ss 132 to 138 of SOCPA 2005, leaving the regulation of demonstrations in the vicinity of parliament to rules made under the Public Order Act 1986, the same statutory framework that applies to other parts of the country. However, no such measures were included in the actual Constitutional Reform and Governance Act when it was passed into law in April 2010, just before the General Election of that year. One of the first commitments of the incoming Conservative/Liberal Democrat coalition government was to repeal the offending sections of SOCPA and to that end the Demonstrations in the Vicinity of Parliament (Removal of Authorisation Requirements) Bill was introduced in the House of Lords in October 2010. Another contentious piece of legislation introduced by the previous administration that the coalition committed to repeal was the Identity Cards Act 2006. That Act was to be amended to remove the requirement for UK citizens to register for identity documents in a subsequent Identity Documents Act.

The preceding changes to the law reflected the coalition government's wider perception that the previous Labour government had been insufficiently attentive to individual liberties, not to say too authoritarian.

In July, the new coalition home secretary, Theresa May, announced a full review of anti-terrorism laws and procedures to be conducted by former director of public prosecutions Lord Macdonald. On announcing the review the Home Secretary claimed that review would focus on which powers could be scaled back in order to restore the balance between civil liberties and security (this will be considered further at 2.5 below). This proposal was in no little way a result of the decision in January 2010, of the European Court of Human Rights in *Gillan & Quinton v UK*, in which the court ruled that police powers, under section 44 of the Terrorism Act 2000, to arbitrarily stop and search people without the need for any grounds for suspicion, were contrary to the European Convention on Human Rights. The court held that the powers themselves, and the way they were authorised, were 'neither sufficiently circumscribed, nor subject to adequate legal safeguards against abuse'.

The problems with the section 44 powers were further compounded in June 2010 when it was revealed that even such authorisation procedures as there were, had not been complied with, either because the authorisation given had exceeded the maximum 28-day limit or had not been properly approved by ministers within 48 hours.

Anti-social behaviour orders

Anti-social behaviour orders (ASBOs) were introduced under the Crime and Disorder Act 1998 and have been extended in the Police Reform Act (PRA) 2002 and the Anti-social Behaviour Act 2003. ASBOs are available against individuals aged 10 or over. Their purpose is to control and minimise persistent problematic behaviour that seriously inconveniences other individuals or communities.

What amounts to anti-social behaviour is not defined in specific terms, but the sort of behaviour that is subject to this form of control includes, although it is not limited to:

- harassment of residents or passers-by;
- verbal abuse;
- criminal damage;
- vandalism;
- noise nuisance;
- writing graffiti;
- engaging in threatening behaviour in large groups;
- racial or homophobic abuse;
- smoking or drinking alcohol while under age;
- drug or alcohol abuse;
- begging;
- prostitution;
- kerb-crawling;
- throwing missiles;
- assault;
- vehicle crime.

An application for an ASBO is not made by individuals who are subjected to the anti-social behaviour, for the obvious reason that they might be subjected to further victimisation. It is the function of local authorities, police forces, including the British Transport Police, and registered social landlords to collect the evidence and put it to the magistrates' court. Initially the ASBO was a purely civil action distinct from, and an alternative to, criminal actions. However, the PRA 2002 introduced the possibility of such orders being made on conviction in criminal proceedings, in addition to, but separate from, any sentence imposed. The Serious Crime Act 2007, introduced the possibility of courts awarding Serious Crime Prevention Orders (SCPO). These civil behaviour orders were designed to be used against those involved in serious crime with the stated purpose of protecting the public by preventing, restricting or disrupting involvement in serious crime. Such orders could be made on application to the High Court, or the Crown Court upon conviction for a serious offence, and breach of the order is a criminal offence.

Subsequently, the Criminal Justice and Immigration Act (CJIA) 2008, amongst many changes (e.g. s 79 abolished the common law offences of blasphemy and blasphemous libel in England and Wales), introduced new control orders and powers in relation to anti-social behaviour. Thus Part 7 of the Act, ss 98 to 117, introduced the concept of the violent offender orders (VOO). As the name indicates these orders, similar in effect to ASBOs and SCPOs, are imposed where it is '*necessary for the purpose of protecting the public from the risk of serious violent harm caused by the offender*' in

addition to sentencing in the case of conviction for specific violent offences. The person to be made subject to such an order must be at least 18, have been convicted of a 'specified offence' and have received a sentence of at least one year in prison or a psychiatric hospital.

The 'specified offences' are manslaughter, attempted murder, conspiracy to murder and other violent offences under the Offences against the Person Act 1861.

Section 118 of the CJIA inserted a new Part 1A into the Anti-social Behaviour Act 2003, which made provision for closure orders in respect of premises associated with persistent disorder or nuisance. The provisions are similar to those in Part 1 of that Act, which relate to closure orders in respect of premises where Class A drugs are used unlawfully and permits police and local authorities to apply for a court order to close, for a period of three months, business or residential premises associated with anti-social behaviour in terms of 'significant and persistent disorder or persistent serious nuisance to members of the public'. It is an offence to remain in or re-enter the premises for the duration of the order.

R (on the application of McCann) v Manchester Crown Court

The exact legal categorisation of these orders and their consequences was considered by the House of Lords in two conjoined cases: *R (on the application of McCann) v Manchester Crown Court; Clingham v Kensington and Chelsea RLBC* (2002). The *McCann* case raised three related issues: the first related to the exact legal nature of the orders, whether they were civil in nature, as contended by the State, or criminal, as lawyers for the appellants argued. The answers to two further related questions depended upon the answer to that primary question. The first of these related to the difference in the way in which the rules of hearsay evidence operated in civil and criminal cases, with the former being less stringent than in criminal cases. The second related to the issue of what the appropriate standard of proof required to support the issuing of the order was: was it the civil law standard, on the balance of probabilities, or the criminal standard of beyond all reasonable doubt?

The House of Lords answered the questions as follows:

> Proceedings for an anti-social behaviour order were civil under domestic law. In support of this conclusion the court relied on a number of factors. Firstly, the Crown Prosecution Service was not involved in applications for the making of such an order as they were in criminal proceedings. Secondly, there was no need to show *mens rea*, or the guilty mind required to establish criminal liability. Thirdly, the issuing of the ASBO was not a penalty as such, as would be the outcome of a criminal case.

As the House found no contrary cases in the European Court of Human Rights it concluded that ASBO procedures could not be seen to be criminal for the purposes of Art 6 of the Human Rights Act 1998.

Following on from the first determination, that the proceedings were civil in nature, the Civil Evidence Act 1995 and the Magistrates' Courts (Hearsay Evidence

in Civil Proceedings) Rules 1999 permitted the introduction of hearsay evidence. However, as regards the weight given to such evidence that depended on the facts of each case, but its cumulative effect could be sufficient to support the issuing of the order.

As regards the issue of the standard of proof, however, the House held that the criminal standard should be applied. For the purposes of s 1(1)(a) of the Crime and Disorder Act, it would suffice for the magistrates '*to be sure*' that the defendant had acted in an anti-social manner. In the words of Lord Steyn '[the magistrates] must in all cases under section 1 apply the criminal standard . . . it will be sufficient for the magistrates, when applying section 1(1)(a) to be sure that the defendant has acted in an anti-social manner, that is to say in a manner which caused or was likely to cause harassment, alarm, or distress to one or more persons not of the same household as himself.'

Lord Steyn went on the point out that when considering whether, for the purposes of s1(1)(b) of the Act, an order was necessary to protect persons from further anti-social acts, the magistrates needed only to exercise their judgment and no standard of proof was involved: 'it [was] an exercise of judgement or evaluation.'

Whereas these Acts may seem initially to offer a welcome additional protection to the innocent individual, it has to be recognised that such advantage is achieved in effect by criminalising what was, and remains, in other circumstances non-criminal behaviour, and deciding its applicability on the basis of the lower civil law burden of proof.

For a more information on ASBOs and the related 'Acceptable Behaviour Contracts' reference can be made to the Home Office document 'A Guide to Antisocial Behaviour Orders and Acceptable Behaviour Contracts available at www.crime reduction.home office.gov.uk/asbos/asbos9.pdf.

Anti-social behaviour orders have been subject to much criticism for the way they have been used in an attempt to define wider social problems as problems merely relating to social order. Of particular concern is the way that they and related orders are used to deal with political protestors, those suffering from mental health problems and young people generally.

As one commentator has put it:

> The reality is that ASBOs are being used far beyond their initial remit of dealing with vandals and nuisance neighbours. Behaviour that is overtly non-criminal is being criminalised and society's vulnerable groups are being targeted. Increasingly it is behaviour that is different rather than 'antisocial' that is being penalised. The form such punishment takes is perhaps of even greater concern because ASBOs effectively bypass criminal law and operate within their own shadow legal system. In effect, we no longer need to break the law to go to jail. In this sense they typify a growing abandonment of the rule of law. [Max Rowlands, ECLN Essays no 9: 'The state of ASBO Britain – the rise of intolerance']

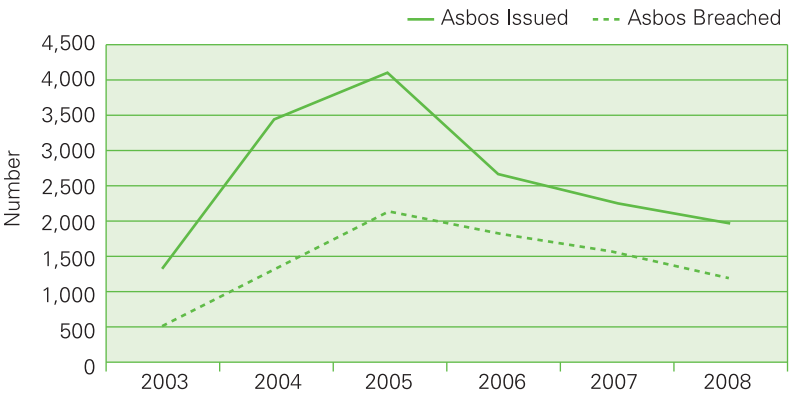

FIGURE 1.3 *Asbos issued and breached in England and Wales 2003–2008.*
SOURCE: *Home Office*

The 9,247 breaches of ASBOs in the period 1 June 2000 to 31 December 2008 resulted in the following sentences being handed down:

- 53 per cent, a total of 4,944, were given an immediate custodial sentence with an average length of 5.2 months.
- 26 per cent were given a community sentence.
- the remaining 21 per cent received lesser sentences such as fines or disqualification from driving.

(Home Office 28 July 2010 Statistical Notice: Anti-Social Behaviour Order (ASBO) Statistics England and Wales 2008, http://rds.homeoffice.gov.uk/rds/pdfs10/asbo2008snr.pdf)

As with many of the previous government's initiatives, the ASBO and its related orders did not find favour with the newly elected coalition government and in July 2010 the Home Secretary, Theresa May, announced her wish to see ASBOs replaced by simpler sanctions that would be easier to obtain and to enforce and that, where possible, 'should be rehabilitating and restorative, rather than criminalising and coercive'.

In February 2011 the Home Office announced its proposals, which included:

- The Criminal Behaviour Order, a civil order available on conviction for any offence, that it could be given to anyone over the age of criminal responsibility and would replace the CRASBO. The Criminal Behaviour Order would be additional to the court's sentence for the offence, not a substitute for it.
- The Crime Prevention Injunction a civil court order that agencies can secure quickly to stop an individual's anti-social behaviour. It could include both prohibitions on

behaviour and positive requirements to address underlying issues, and would replace a range of current orders.

As with the reformulation of Control Orders (see 2.5.2) some critics claimed that the proposals were purely changes in name rather than content. In support of this can be cited the Home Office's previous implementation of a new 'gang injunction' at the end of January 2011. Similar to previous ASBOs, the new injunction is designed to deal with gang culture. Meaures that might be included in such an injunction include barring peiople from:

- entering a certain geographical area
- being in public with a particular species of animal, for example a dog which had previously been used as a weapon
- wearing certain 'gang colours' in public.

A further example of the relationship between criminal law and civil law may be seen in the courts' power to make an order for the confiscation of a person's property under the Proceeds of Crime Act 2002 (see below, at 2.5.1.1).

Private prosecutions

It should not be forgotten that although prosecution of criminal offences is usually the prerogative of the State, it remains open to the private individual to initiate a private prosecution in relation to a criminal offence. It has to be remembered, however, that even in the private prosecution, the test of the burden of proof remains the criminal one requiring the facts to be proved beyond reasonable doubt. An example of the problems inherent in such private actions can be seen in the case of Stephen Lawrence, the young black man who was gratuitously stabbed to death by a gang of white racists whilst standing at a bus stop in London. Although there was strong suspicion, and indeed evidence, against particular individuals, the CPS declined to press charges against them on the basis of insufficiency of evidence. When the lawyers of the Lawrence family mounted a private prosecution against the suspects, the action failed for want of sufficient evidence to convict. As a consequence of the failure of the private prosecution, the rule against double jeopardy meant that the accused could not be retried for the same offence at any time in the future, even if the police subsequently acquired sufficient new evidence to support a conviction. The report of the Macpherson Inquiry into the manner in which the Metropolitan Police dealt with the Stephen Lawrence case gained much publicity for its finding of 'institutional racism' within the service, but it also made a clear recommendation that the removal of the rule against double jeopardy be considered. Subsequently, a Law Commission report recommended the removal of the double jeopardy rule and provision to remove it, under particular circumstances and subject to strict regulation, was contained in ss 75–79 of the Criminal Justice Act 2003.

In considering the relationship between civil law and criminal law, it is sometimes thought that criminal law is the more important in maintaining social order, but it is at least arguable that, in reality, the reverse is the case. For the most part, people come into

contact with the criminal law infrequently, whereas everyone is continuously involved with civil law, even if it is only the use of contract law to make some purchase. The criminal law of theft, for example, may be seen as simply the cutting edge of the wider and more fundamental rights established by general property law. In any case, there remains the fact that civil and criminal law each has its own distinct legal system. The nature of these systems will be considered in detail in later chapters. The structure of the civil courts is considered in Chapter 4 and that of the criminal courts in Chapter 6.

1.4 APPROACHES TO LAW AND LEGAL STUDY

There are a number of possible approaches to the study of law, each of which has its own implications for how law is understood, located and studied.

1.4.1 BLACK LETTER LAW

The first is the traditional/formalistic approach. This 'black letter' approach to law, as it is commonly referred to, is posited on the existence of a discrete legal universe as the object of study. It is concerned with establishing a knowledge of the specific legal rules that regulate social activity. The essential point in relation to this approach is that study tends to be restricted to the sphere of the legal without reference to the social activity to which the legal rules are applied.

However, as well as learning the law in the foregoing sense as simply a body of rules and principles and techniques to be mastered, it is important to learn something *about* law. The reason for this and the justification for this course is that law is considerably more than just the trade of lawyers.

1.4.2 CONTEXTUALISM

The second approach to the study of law is the contextualist approach. This is by far the most common approach to law in modern academic institutions, and the intention behind it is to recognise that law is a *social* phenomenon and operates within a social context. Society requires particular tasks to be undertaken, be it the maintenance of order or the regulation of economic activity, and it is the function of *law* to perform those tasks.

The move from the black letter approach to the contextualist one involves an important shift in emphasis. No longer is law seen as simply a matter to be explained and justified in its own terms. It no longer constitutes its own discrete universe, but is analysed and perhaps more importantly it can actually be assessed within its socioeconomic context and its performance can be evaluated in relation to the supposed purposes within that socioeconomic context.

1.4.3 CRITICAL LEGAL THEORY

The contextualist approach may therefore be seen as an advance on the sterile legalism of the black letter approach to the extent that it takes cognisance of, and seeks to accommodate human behaviour within, the real world. I would suggest, however, that there is still one major shortcoming in its approach. True, it seeks to place law in its context, but what exactly is the context into which law is to be fitted? In our particular society the context is, and without any pejorative overtones, advanced capitalism. The difficulty with the contextualist approach is that it tends to take that particular context for granted; as a given, the assumed, unproblematic, and to that extent unquestioned, background in relation to which law has to operate. To that extent the concern of the contextualist is still the *legal* regulation of particular behaviour, without any great detailed consideration of the actual behaviour to which the legal rules are addressed.

It is only a third type of approach to the study of law that attempts to remedy that shortcoming in the contextualist approach; that third type of approach, and the one espoused by this particular text, is the critical/theoretical approach to law. From this latter perspective, not only is law in context an object of study, but equally, if not more essentially, the context within which law functions is itself an object of study. Neither law nor its social context is taken for granted, and the actual social relations and activity to which law is applied are examined in order to try to account for the existence of law in the first place.

In our society, as has been stated previously, law appears to, and does, play an important part in the creation and maintenance of social order, its centrality being typified in the very phrase 'law and order', with its underlying suggestion that the two go together with the latter, order, depending on the existence of the former, law. We must be aware, however, that law, as we know it, is not the only means of creating order. [Even in our society order is not solely dependent on law, and we are not continuously having recourse to the courts in order to solve our problems.]

Critical legal study is concerned with seeking a general explanation of the form of order, but more particularly it is concerned with a search for the explanation of why our society has developed its particular form of *legal* order. In stressing the contribution that law makes to determining what we accept as order in our society, we are implicitly asserting the point that there can be no single universal idea of order, but rather that there are different versions of order. The version operating in our society, an order essentially shaped by law, is but one specific type of order; it is both culturally and historically specific to our present society.

Whichever approach one adopts to legal study – and each is valid within its own terms – will depend not just upon the individual student's approach and the ideological framework they operate within, but also the area of law that student wishes to research. Some projects may be open to a merely expository analysis, while others, by the very nature of the subject, will demand a more critical analysis and explanation.

1.5 SKILLS

At the centre of any law student's course will be the law library, although, increasingly, paper-based resources are being supported by internet and other electronic sources. As well as general academic skills, law students need to develop particular skills relating to the finding and reading of legal texts. They are also required to develop the specific skills of writing legal essays and answering problem questions. The online Legal Skills Guide website that supports this text encourages the development of such skills, see at www.routledge.com/textbooks/9780415566957.

CHAPTER SUMMARY: LAW AND LEGAL STUDY

THE STUDY OF LAW

The study of law is not just a matter of learning rules. It is a general misconception that learning the law is about learning a mass of legal rules. Critical, analytical thought should inform the work of the good student.

THE NATURE OF LAW

Legal systems are particular ways of establishing and maintaining social order. Law is a formal mechanism of social control. Studying the English legal system involves considering a fundamental institution in our society.

CATEGORIES OF LAW

Law may be categorised in a number of ways, although the various categories are not mutually exclusive.

Common law and civil law relate to distinct legal systems. The English legal system is a common law one as opposed to continental systems, which are based on civil law.

Common law and equity distinguish the two historical sources and systems of English law. Common law emerged in the process of establishing a single legal system throughout the country. Equity was developed later to soften the formal rigour of the common law. The two systems are now united, but in the final analysis, equity should prevail.

Common law and statute relate to the source of law. Common law is judge made; statute law is produced by parliament.

Private law and public law relate to whom the law is addressed. Private law relates to individual citizens, whereas public law relates to institutions of government.

Civil law and criminal law distinguish between law, the purpose of which is to facilitate the interaction of individuals and law that is aimed at enforcing particular standards of behaviour.

APPROACHES TO LEGAL STUDY

Students of law can adopt a number of distinct approaches to legal study. Prominent among these are the traditional 'black letter', approach, the more evaluative 'contextualist' approach, or the more radical 'critical legal studies' approach.

SKILLS

This textbook is supported by a Legal Skills Guide that can be found at www.routledge.com/textbooks/9780415566957 skills where you can improve the skills you'll need to be a successful law student, and ultimately a successful lawyer.

FURTHER READING

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LEGAL LANGUAGE

Friedman, L, 'On interpretation of laws' (1988) 11(3) Ratio Juris 252
Goodrich, P, *Reading the Law*, 1986, Oxford: Basil Blackwell
Jackson, B, *Making Sense in Law*, 1995, London: Deborah Charles

USEFUL WEBSITES

The constant impingement of legal issues on all aspects of social and individual life should be tracked and explored at:

www.bbc.co.uk
www.guardian.co.uk
www.timesonline.co.uk
www.independent.co.uk
www.ft.com
www.intute.ac.uk/socialsciences/law

A free online service that helps you to find the best web resources for your studies and research.

www.ukcle.ac.uk/index.html

The website for the UK Centre for Legal Education.

www.justice.gov.uk

The official website of the Ministry of Justice.

COMPANION WEBSITE

Now visit the companion website to:

- listen to Gary Slapper's audio introduction to the English legal system;
- test your understanding of the key terms using our Flashcard Glossary;
- revise and consolidate your knowledge of 'Law and legal study' using our Multiple Choice Question testbank;
- view all of the links to the Useful Websites above;
- access legal news from *Times Online* – including Gary Slapper's regular column, 'Weird Cases' – and from around the world via a feed from the lawdit reading room;
- access the supporting Legal Skills Guide, which discusses eight key skills.

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