

**Lesson
One**

The Nature of Law

Aims

The aims of this lesson are to enable you to

- define what law is
- distinguish law from morality and justice, where appropriate
- indicate how and why law is divided up into separate areas of study

Context

The lessons which follow this one give more detail as to how our legal system has developed, and how laws are made within it. This lesson introduces these areas.

Note

It is important to emphasise here that this lesson, like all the lessons in the course, contains much detail and information which has been carefully selected, and which is necessary for your study.

It will be best, as you work through the course, and for revision purposes, if you could organize a system of notes for important definitions cases and other details. You might choose to use index cards (one set for cases, another for definitions, etc) cross-referenced to the sections of our course. (For further suggestions, see the Note at the beginning of Lesson Three). Above all, do not be put off by what may appear dauntingly complex and detailed material: persistent work will achieve all the results you could wish for.



1.1 Introduction

This lesson aims to give you a clear overall idea of the subject. It should give you an answer to the question 'What is the meaning and definition of law?' in the process introducing you to the following areas:

- the relationship of law to the closely related concepts of morality and justice and the necessity for a reliable system of law in a free society
- the various divisions and classifications of 'the law' into the following: Public Law (criminal, constitutional and administrative law) and Private Law (contract, tort and family law)
- An understanding of the legal differences between Civil Law and Criminal Law

1.2 The Nature of Law

'Law' is a term which is used in many different senses. All of these senses contain the common element of the law being a general rule of conduct. Thus there are the laws of science, the laws of morality, natural justice and the law of God, among others. To a lawyer, however, 'law' has a far narrower meaning. To him the term designates a rule or system of rules recognized by a country or community as regulating the actions of its members and enforced by the imposition of penalties. It consists of the rules recognised and acted on by the courts of justice. It can be differentiated from other types of rules in that:

- legal rules are **obligatory** : the citizen has no choice but to obey them
- legal rules are created by a **formal and usually somewhat complicated and solemn procedure**
- disputes concerning their applicability or their breach (breaking of the laws) are subject to **special procedures which might involve trials in the courts**
- there are mechanisms is a regular machinery which exists for the enforcement of the laws



Fact File. The Ancient Romans had a legal system called *Jurisprudence*. That is where the word *Jury* originates from.

1.3 Law and Morality

It is obvious that there is a close relationship and interaction between law and morality: it is probable that a legal system would not long survive if its rules did not substantially reflect the moral values of the community. Reciprocally, the law influences moral values.

For instance, until the Abortion Act 1967 abortion was illegal under any circumstances. Today it is legal but there are some groups like Life that feel it is morally wrong and illegal to take the life of the unborn child. There is the dilemma of what to do with the deep frozen embryos after five years in storage and in 1996 there was controversy over a woman who had a termination of one of the twins she was expecting when she felt she was unable to support both children. A highly contentious issue and one which deserves considerable thought for lay people and lawyers alike.

Although many rules feature in both law and morality, the nature of legal and moral rules may be distinguished as follows:

- In morality the rule itself is important, while any sanctions there may be for its breach tend to be unorganised. However, in law although the rules themselves are not always important, there is a regular and organised system for imposing sanctions.
- Rules of morality, unlike rules of law, are immune from deliberate change. This means that they will not be changed just for the sake of change itself. If society considers an act to be immoral, then society may never change its opinion, or if it does, it will be a slow process that develops over many years.
- Legal liability, unlike moral liability, may be independent of fault. This means that you may be held liable for your actions even if it was the result of an accident and not a deliberate act on your part. This is called “Strict Liability”.
- It is an important aim of law to provide certainty and therefore to draw firm lines — in consequence the emphasis is on a category of cases rather than the merits of the particular case. Morality, on the other hand, is more flexible, less clear cut. This is dependent on personal points of view and the understanding of values and ethics in society.
- Some laws are moral; others may be regarded as immoral whilst others are amoral.

Law is made by the supreme authority in a state. It may be that the country has a Parliamentary democracy like we have in the UK. Equally the supreme authority may be a dictatorship as with the Nazi regime. When a law is made it is still law even though it may have dire consequences for sectors of the population. Nevertheless it is still good law no matter how abhorrent provided it has been made by the supreme law making body of that country.

When we say it is “good law”, we mean it has been implemented correctly, following the proper procedures. We do not necessarily mean it is a good law that is a benefit to the country and its people. Much of the law implemented under the Nazi regime was immoral, but still good law in the technical sense.

Morality tends to be accepted as being the general consensus of behaviour within a society. Sometimes moral behaviour and the law coincide and become the accepted rules of society. Thus ‘thou shalt not kill’ and ‘thou shalt not steal’ are rules which are generally accepted as being both moral and legal rules of society.

There are variants in people’s attitudes towards divorce and abortion. Not everyone feels the same way about these issues. In this context it may be argued that there may be elements of immorality. However divorce and abortion are both legal – subject to certain conditions.

Finally, some laws may be regarded as being amoral. These laws deal with offences that are purely statutory and a few years ago would not have been regarded as laws at all. An example is double yellow lines to prevent people parking cars in the road.

The whole debate about morals, religious beliefs and political issues will inevitably have an effect on people’s views and the law.

Activity 1

What do you think? There are no right and wrong answers to the following questions, but you might feel strongly about some of them – see what you think.

Is it right a person should steal food if they are penniless and not be prosecuted for stealing?

Should prostitution be made legal?

Should there be a right to euthanasia for people who want it?

Should the death penalty for murder be reintroduced?

The current government is considering making shop-lifting a non-criminal offence if the shop-lifter is prepared to pay the full price of the stolen goods and an ‘on the spot’ fine. Is this a useful way of dealing with shop-lifters (i.e. burglars people who steal from shops)?

1.4 Law and Justice

It is sometimes said that law exists to achieve justice either between man and man, or in human society. It is, therefore, of importance to establish the nature of justice, and how it is to be distinguished from law and from morality.

As regards the meaning of the term 'justice' it is necessary to distinguish between 'formal' and 'substantial' justice. As a formal requirement, justice seems to require that rules should be applied equally in all situations and to all persons to which they relate. It is easy to understand that a system of law should aim at achieving justice in this formal sense.

Substantial justice, on the other hand, is concerned with the content of the law, and a law will only be regarded as substantially just if it conforms to whatever criteria are to be applied in deciding what is just in the particular circumstances. Justice in this sense is little more than another word for the whole moral code operative in the particular community in question.

Thus, the word 'justice' can be used either as broadly corresponding to the meaning of morality in general, in which event it adds little to the discussion, or it can be used more usefully in the rather narrow formal sense. In this case it represents only one relatively limited feature of the moral code, though none the less one of considerable importance in the functioning of a legal system. If you are particularly interested in the theory and philosophy of law, there are lots of books available on the subject. They often are found under the subject name of "Jurisprudence" which was mentioned earlier.

1.5 The Need for Law

Bearing in mind that laws are not the only rules of social regulation, the question has often been posed as to whether there is any need for law at all. Indeed many prominent legal thinkers (jurists) have urged that laws are not only undesirable and unnecessary, but are a positive evil. Law, they have argued, by relying upon violence, perverts or corrupts man's true nature. Such opinions will generally be found to be based on a belief either in the intrinsic goodness of man or, at least, in his perfectibility by an appropriate type of education. Those who advocate this view see man in his natural condition as intrinsically peace-loving and disposed to live harmoniously with his neighbours. They assert that the evils of human society and its laws corrupt and divert man from his true nature.

By contrast, many other thinkers have considered that the life of man in his natural condition without the benefit of a social order

supported by law would be nothing but a state of perpetual warfare.

It would seem that both viewpoints represent extremes and that **in reality the regularity and predictability necessitated in an ordered society require some form of law.** In particular, it provides the members of society with the guarantees they require against the disruption of their social and economic activities.

Law provides the basis of a stable society. It ensures in large measure, survival, freedom and the possibility of building and maintaining that type of civilisation in which those who are equal are treated equally in the legal process, and in which 'natural justice' prevails.

Law tends to trail behind public opinion. The reason is that the legislators take time to react to public opinion. This was true of the Abortion Act 1967. By contrast in recent surveys the majority of people in the country are in favour of the death penalty, but Parliament steadfastly refuses to reintroduce the death penalty. There are pros and cons to every argument.

It is **essential** you are able to argue both sides of the case.

Activity 2

What do you think? There are no right and wrong answers to the following questions, but you might feel strongly about some of them – see what you think.

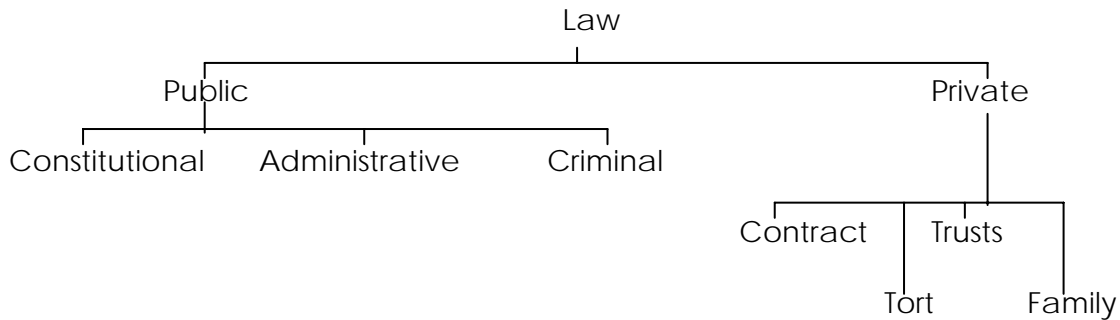
Do you think a society without any laws would work, or would people try and enforce their own laws?

Are the people who believe in a law free society correct in believing in the intrinsic good in everybody?

What sort of laws do you think a society could do without?

1.6 Classification of Law

Here is one way of classifying law:



Law may be classified in various ways, but the most significant division is between Public and Private.

Public Law

Public Law is concerned with matters that affect the state as a community. It comprises:

Constitutional Law

This is concerned with determining the principal functions of the main organs of government, and regulating their inter-relationships.

Administrative Law

This is defined as that body of legal principles which concerns the rights and duties arising from the impact on the individual of the actual functioning of the executive instruments of government.

Criminal Law

This is the part of the law which characterizes certain kind of wrong doings as offences against the State and punishable by the State. They need not be offences which violate any private right, although they may well do, but the State seeks to redress the balance.

Private Law

Private Law is concerned with matters that affect the rights and duties of individuals among themselves. It includes:

Law of Contract

This deals with that branch of the law which determines whether a promise is legally enforceable and what are its legal consequences.

Law of Tort

This is concerned with determination of the circumstances in which one person is liable to compensate another for an injury he has caused that other. The injury need not have caused physical harm, torts include negligence and nuisance and the 'injury' caused may be inconvenience or financial injury.

Law of Trust

This is that part of the law which determines the devolution (passing on) of property.

Family Law

This is concerned with marriage, co-habitation and divorce and also with the rights and duties of parents and children.

1.7 English Law and its Characteristics

'English Law' means the law of England. England for these purposes includes Wales. English Law, as such, has certain distinguishing characteristics:

Antiquity and Continuity

English law shows continuous growth from the earliest period of our national independence. There has been no violent or revolutionary break in its history since the Anglo-Saxon laws of Ethelbert, King of Kent in A.D.560. However, the Anglo-Saxon detail is so scarce that the Norman Conquest affords the best starting point!

Uncodified

English law, unlike the law of Continental countries, is not codified (organized into a set of rules and set in an Act of Parliament – a Statute). Certain topics in English law, have been codified (e.g. Sale of Goods, Company Law) but in general the law is uncodified and is, therefore, flexible.

Judicial Character

A corollary of the uncodified nature of our law is its judicial character. This factor is particularly significant and the role played by the judiciary in the development of our legal system will become evident as your studies progress. Occasionally, this results in some decisions being made that are not the best decisions; this may lead to an Act of Parliament being passed to rectify that, so then an area of law that was uncodified becomes codified.

Influence of Procedure

The influence of procedure on the development of our law is still evidenced today in the nature of our substantive law. Litigation in the royal courts used to have to be commenced by one of a limited number of writs. The sum total of the law was thus to be found at any given time in the sum total of authorised writs (or forms of action). Where there was a writ there was a right. Conversely, no writ, no right! Although the forms of action were finally abolished by the Common Law Procedure Act 1852 (and indeed they were not entirely dead until the Judicature Act 1873-5) our substantive law still reflects them, for in the four corners of the writs were to be found the body of common law rights.

Feudal Survivals

English law still contains some feudal elements. These were especially prevalent in the area of land law where, despite the reforms of 1925, a few are still to be found (e.g. the theory that the Monarch is the ultimate lord of all land in England).

No Reception of Roman Law

Despite the use of a lot of Latin words, there has been no reception of Roman Law as such, although some areas of English law do evidence Roman influence, e.g. contracts and administration and, indirectly, wills and family law.

Independence of the Judiciary

Based on the Act of Settlement 1701 this independence is reinforced by tradition, convention and practice. When we talk about independence, we mean that the courts should not be subjected to improper influence from other branches of the government or from private interests. Closely associated with this is the independence of the legal profession and the private nature of law reporting.

English Law is Common Law

Finally, English Law is Common Law – one law throughout the country.

Stare decisis, ratio decidendi and obiter dicta

Quite a few Latin phrases have become part of the language of English Law. These are three of the more common ones that you will need to remember.

'*Stare decisis*' means 'stand by things decided'. This means the legal principle of determining points in litigation according to **precedent** (i.e. previous rulings).

'*Ratio decidendi*' means the **reason** for the decision, that is to say the very fundamental point of law that was considered by the judge(s) and as a result of which the decision was given. In English Law, there should always be a reason!

'*Obiter dicta*' refers to remarks made by the judge(s) 'by the way' and which were not basic and essential to the decision.

We will look at these principles in more detail in later lessons.

1.8 Revision Quiz

1. What is law?
2. What factors differentiate legal rules from other forms of rules?
3. What is the relationship between Law and Justice?
4. What is the relationship between Law and Morality?
5. What is English Law? What are its main characteristics?
6. How may law be classified?
7. What do you understand by the terms Public and Private Law?
8. What is the difference between Civil and Criminal Law?
9. What is a tort?
10. How does tortious liability differ from contractual liability?
11. Is criminal law public or private?
12. What is the law of trusts concerned with?
13. What is codified law?
14. Which branch of law relates to the rights and duties between parents and children?
15. What does *stare decisis* mean?

1.9 Self-Assessment Test: Lesson 1

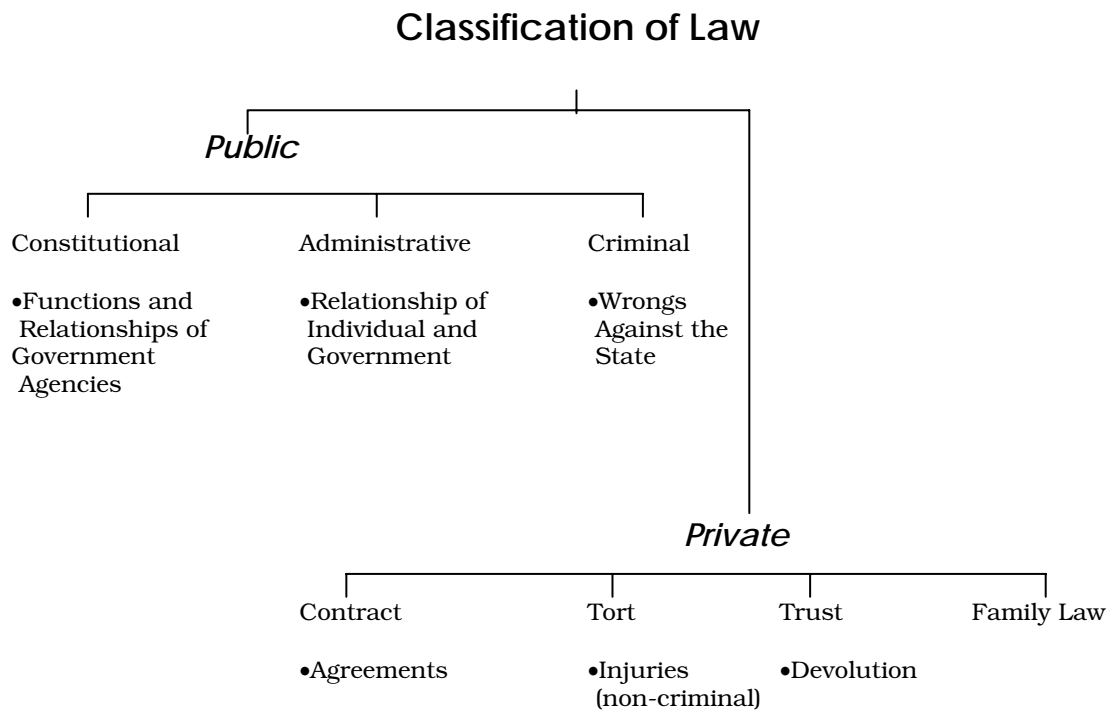
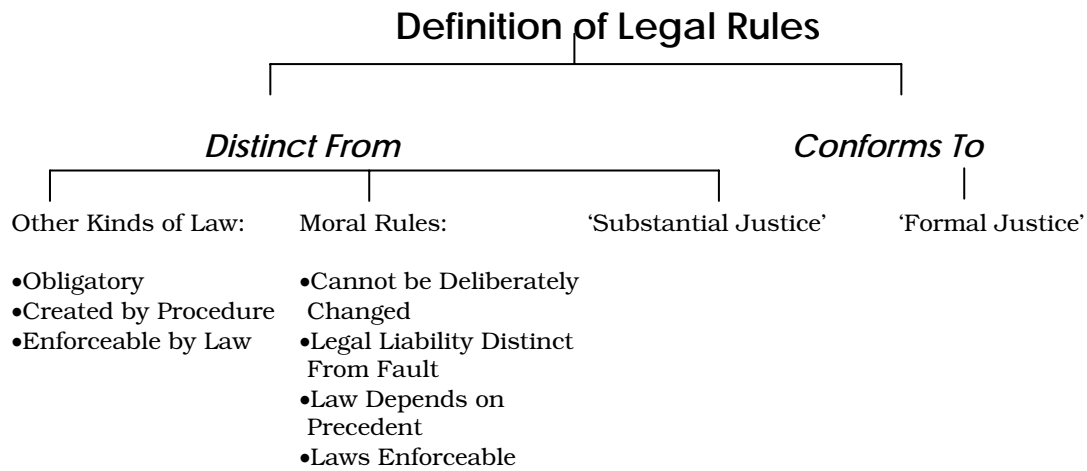
You may need to read the lesson more than once before you are satisfied that you understand the material contained in it. Then you should answer the following questions, and then check your answer against those given at the end of the course. Set yourself a time limit and try and stick to it – this is good practice for the exam. If you are stuck with a certain question, move on to the next one, you may have time to go back to it at the end. Please do **NOT** send your answers to your tutor.

1. Answer each part of this question in a single word or short sentence.
 - (a) What is law?
 - (b) What do you understand by morality?
 - (c) What is formal justice?
 - (d) What is public law?
 - (e) What are the constituents of public law?
 - (f) What is the law of succession concerned with?
 - (g) What is English law?
 - (h) Is English Law codified?
 - (i) How did litigation originally commence in the Royal Courts?
 - (j) What Act of Parliament is the basis of judicial independence?

 2. Answer each part of this question in a few words.
 - (a) In what way do legal rules differ from other rules as regards their breach?
 - (b) What is the relationship between law and morality?
 - (c) Why does an ordered society require some form of law?
 - (d) How does public law differ from private law?
 - (e) What is the law of tort?

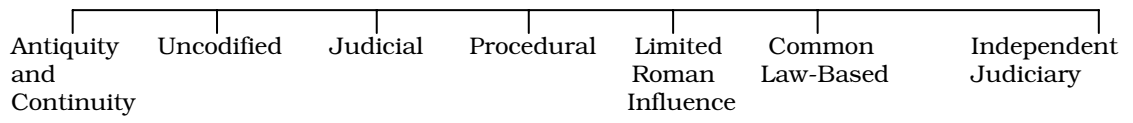
 3. Answer each part of this question in short phrases or sentences.
 - (a) List three ways in which law can be distinguished from morality.
 - (b) List three ways in which law can be distinguished from justice.
 - (c) List five characteristics of English Law.
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1.10 Summary: The Nature of Law



English Law

Distinguishing Characteristics



1.11 Suggested Answers to Revision Quiz

1. Law is a body of rules or principles recognised and applied by the state in the administration of justice.
2. Legal rules are obligatory and created either by the consensus of the people - Common Law - or by an elaborate and solemn set of procedures. There is enforcement machinery for dealing with disputes. Compare these with moral rules which are generally less clear-cut, unenforceable and independent of fault.
3. Laws are the principles or rules which must be upheld for the benefit of society. Justice is how the rules are upheld but justice on its own may not lead to a freer and more equitable state.
4. It is possible for laws to be passed which are immoral, against the public interest and against human rights e.g. the Nazi Regime of the Third Reich.
5. The jurisdiction of the English Law covers the areas of England and Wales and is based upon
 - common law principles
 - case law, *stare decisis* and *ratio decidendi*
 - statute Law (codified law)
6. Public law (and, most importantly, criminal law) is one area and private/civil law (in the common law sense) is the other. The areas of civil law are Contract, Tort, Family and Trusts.
7. Public law is concerned with the state in various forms. Criminal Law, Administrative Law (issuing of licences), Constitutional Law; you may also include Acts of Parliament.

Private Law concerns the law of contract, tort and trusts. The reason is that these facets of the law are governed by individuals and their decisions as to what they wish to do.
8. Civil law is concerned with the rights and duties of the individual and between individuals; contract, law tort and trusts. If there is a breach of these rules then damages may be sought which are payable by the perpetrator of the injury.

Public law or criminal law is concerned with wrongs committed by a person(s) or in some cases a corporate body. Criminal law is punishable by the state.
9. A tort is a civil wrong where a person is liable to be compensated for the wrong done to him; e.g. trespass to the person, goods, land; negligence; nuisance.
10. Contractual liability is where one person is in breach of an agreement made between the parties. A tort is where there has been an unlawful interference with another's person, property or land.

11. Criminal law is public law; it applies to every person in the land.
12. The Law of Trusts is concerned with the devolution (passing on) of property.
13. Codified law is law that has been written down as a set of rules.
14. Family law relates to the rights and duties between parents and children.
15. *Stare decisis* means 'Stand by things decided'.

How did you get on?

If you are happy with your result, move on to Lesson Two. If there are areas you did not understand, read them again and remember to keep testing yourself.

There may seem a lot to learn – there is a lot to learn! But it will all start to make sense as long as you work through the material carefully and methodically. If there are any words you don't understand, like the Latin words, don't worry, they will start to make more sense the more that you use them.