§ Law in Context

PHIL HARRIS

An Introduction to Law

Seventh Edition

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An Introduction to Law

Since the publication of its first edition, this textbook has become the definitive student introduction to the subject. As with earlier editions, the seventh edition gives a clear understanding of fundamental legal concepts and their importance within society. In addition, this book addresses the ways in which rules and the structures of law respond to and impact upon changes in economic and political life. The title has been extensively updated and explores recent high profile developments such as the Civil Partnership Act 2005 and the Racial and Religious Hatred Bill. This introductory text covers a wide range of topics in a clear, sensible fashion giving full context to each. For this reason, *An Introduction to Law* is ideal for all students of law, be they undergraduate law students, those studying law as part of a mixed degree, or students on social sciences courses which offer law options.

PHIL HARRIS is Professor of Legal Education at Sheffield Hallam University.

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Preface

This book is written for students who are studying law on courses ranging from 'A' and 'AS' level and BTEC through to a wide range of undergraduate degree courses. Students studying for law degrees will find much material which introduces them to most of the foundation subjects, as well as familiarising them with legal concepts, legal method, and many aspects of the English legal system.

Apart from students enrolled on academic courses, it is hoped that this book will also be of interest to others who are fascinated by English law and the legal system. We live in a society in which everyday life is touched by legal regulation more than at any other period in history. Laws themselves are the result of intricate historical processes and of contemporary policies; those processes and policies are often controversial, and are themselves interesting and rewarding areas of study, helping us understand why our law takes the form that it does.

For if we are to have law at all (and every known social group has had codes approximating to what we would recognise as law) then it must be responsive to the needs of society. If the law, or any part of the legal system, fails to respond to those needs, then it clearly becomes open to criticism. I see neither use nor virtue in presenting or studying law as if it were merely a package of rules; or in a way which suggests that there is nothing wrong with it. And if criticisms of the law lead to criticisms of the society whose law it is, then so be it. If the critical comments in this book have the effect of stimulating further thought and discussion on the part of the reader, then one objective, at least, will have been achieved. This, indeed, is one of the approaches taken in this book, the other being that law cannot properly be understood, and certainly ought not to be studied, in a way which fails to take account of the social, economic and political contexts out of which the law arises and in which it operates.

Consequently, the reader will find that this book differs from most other law texts. I have tried to locate legal rules and institutions within the context of their historical background, taking into account the economic and political forces which have shaped – some might even say distorted – English law. To do this, I have incorporated, where appropriate, materials from disciplines other than that which is conventionally regarded as law. This approach, together with the inevitable constraints of space and time, has necessitated a considerable degree of selection as to

the topics covered. Within these constraints, I have concentrated on those areas of law – contract, tort, property, crime, the European Community, administration and aspects of the legal system – which are the main concerns of students taking the kind of courses indicated above.

It is worth repeating that this is an introductory text. The reader is warned that he or she will search in vain for the outcome of painstaking research, new theoretical formulations or even original insight. Rather, I have tried to draw together various strands of development, debate and controversy, and to present them within a framework of 'law in context'. Naturally, the contents have been updated throughout.

Once again, thanks are due to a large number of colleagues and friends who have helped in various ways in the preparation of this book. Among the contributors to this edition are Jim Hanlon, Nigel Johnson, Lesley Lomax, Cathy Morse, Andrea Nollent, Peter McGregor, Mark O'Brien, Andy Selman, Colleen Smith, Doug Smith, Rob Sykes and Adam Wilson. As always, special thanks go to Sue and Dominic, without whom this book would probably have been written, but it wouldn't have been half as much fun.

Although, like all authors, I wish I could blame someone else, errors which remain are of course my own responsibility.

Phil Harris
August 2006

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1

Law and society

One of the many ways in which human societies can be distinguished from animal groups is by reference to social *rules*. We eat and sleep at certain intervals; we work on certain days for certain periods; our behaviour towards others is controlled, directly and indirectly, through moral standards, religious doctrines, social traditions and legal rules. To take one specific example: we may be born with a 'mating instinct', but it is through social rules that the attempt is made to channel this 'instinct' into the most common socially-sanctioned form of relationship – heterosexual marriage.

Marriage is a good example of the way in which social rules govern our lives. Not only is the monogamous (one man/one woman) marriage supported by the predominant religion in British history – Christianity; it is also maintained through *moral* rules (hence the traditional idea of unmarried couples living together being 'wrong') and by the operation of rules of *law* which define and control the formalities of the marriage ceremony, lay down who can and who cannot legally marry, specify the circumstances whereby divorce may be obtained, define the rights to matrimonial property upon marital breakdown, and so on.

Marriage is only one example of social behaviour being governed through rules. Legal rules are especially significant in the world of business, with matters such as banking, money, credit and employment all regulated to some extent through law. Indeed, in a complex society like our own, it is hard to find any area of activity which is completely free from legal control. Driving, working, being a parent, handling property – all these are touched in some way by law. Even a basic activity like eating is indirectly affected by law, in that the food we eat is required by legal rules to meet rigorous standards of purity, hygiene and even description.

In this introductory chapter, attempts by various writers to analyse and explain law will be examined. We shall also consider some important social, economic and political developments over the past century or so which have profoundly affected the nature and extent of the regulation of social life by means of legal rules and procedures. In addition, some of the important themes running through this book will be introduced, such as the proposition that the law is never static; it is always changing, being reinterpreted or redefined, as legislators and judges strive, with varying degrees of success, to ensure that the law constantly reflects changes in society itself.

This, in turn, leads to a second important theme: that law can be properly understood only by examining the ways in which it actually operates in society, and by studying the often extremely complex relationship between a social group and its legal code.

Analysing law

Most of us, if asked to define law, would probably do so in terms of rules: for instance, we understand criminal law, forbidding certain activities, as a set of rules defining the types of behaviour which, if indulged in, result in some form of official 'retaliation' through police intervention, the courts, and some form of criminal *sanction* such as imprisonment, or a fine. Criminal law and the notion of legal sanctions will be examined in a later chapter. For the moment, the fundamental notion for us is that of a 'rule'.

In their work on the subject, Twining and Miers offer a wide definition of a rule as 'a general norm mandating or guiding conduct or action in a given type of situation'.[1] A rule prescribes what activity may, should or should not be carried out, or refers to activities which should be carried out in a specified way. Rules of law may forbid certain activity – murder and theft are prohibited through rules of criminal law – or they may impose certain conditions under which activity may be carried out (car drivers and television set users must, for example, have valid licences for those items before they can legally drive or use them). Again the law contains some rules which we might call 'power-conferring' rules: rules which enable certain activities to be carried out with some form of legal backing and protection, the best example of which is perhaps the law of contract, which provides rules which, among other things, guide us in the manner in which to act if we wish to make a valid contract.[2]

Because a rule guides us in what we may, ought or ought not to do, it is said to be *normative*. We can best grasp the meaning of this term if we contrast a normative statement, telling us what *ought* to happen, with a *factual* statement, which tells us what *does* happen. For instance, the statement 'cars must not be driven except on roads' is a normative, 'ought'-type statement, whereas 'cars are driven on roads' is a factual, 'is'-type statement. All rules, whether legal, moral or just customary, are normative, laying down standards of behaviour to which we *ought* to conform if the rule affects us.

Although the notion of a 'system of rules' probably corresponds closely to most people's idea of law, we can soon see that this is not sufficient by itself to be an accurate or adequate account of law, because there are, in any social group, various 'systems of rules' apart from law. How do we distinguish, for example, between a *legal* rule and a *moral* rule? In our society, though we consider it immoral to tell lies,

1 W. Twining and D. Miers, *How to Do Things with Rules* (4th edn., 1999, Butterworths), p 123.
2 See chapter 11.

it is not generally against the law to do so.[3] Of course, some moral rules are also embodied in the law, such as the legal rule prohibiting murder. This does not mean, however, as we shall see in chapter 2, that law and morality *always* correspond. It would take a very wide definition of 'morality', for instance, for the idea to be accepted that a driver who exceeds the speed limit by only two miles per hour (a criminal offence) would thereby be acting *immorally*!

Again, how do we distinguish between a legal rule and a rule of custom or etiquette? What is the difference between a judge's ordering a convicted person to pay a fine for breaking a criminal-law rule and a father's ordering his son to forfeit his pocket-money for disobeying him? Clearly, there *are* differences between these types of rule, and perhaps the only feature which they all have in common is their normativeness. But where do these differences lie?

The analysis of law, and the specification of the distinctions between law and other rules, have proved surprisingly difficult to articulate. Writers have, over the years, adopted various perspectives on legal analysis, sometimes concentrating on law as a system of rules of an official nature (as in the work of H L A Hart), sometimes focusing upon individual legal rules, their origin and their operation as part of an overall system (as can be seen in works within the sociology of law).[4] Some writers have analysed law as if it were a 'closed' system, operating within its own logical framework, and divorced in important ways from the wider social context. John Austin, writing in the nineteenth century, is an example of such writers.[5] Others have insisted that law and the legal system can only be analysed by considering them in relation to the other processes and institutions within the society in which they operate – as stated above, such is the perspective within this book.

Still other legal writers have provided accounts of law which take as their central issue the various *functions* which law is supposed to perform in a society. Two examples of this approach are worthy of note. First, the American writer Karl Llewellyn expounded his 'Law-Jobs Theory',[6] which is a general account of the functions of legal institutions in social groups of all kinds. Llewellyn argued that every social group has certain basic needs, which are catered for by the social institution of law by helping ensure that the group survives as such, and by providing for the prevention of disruptive disputes within the group. Should any disputes

3 There are various exceptions to this general statement, of which the best known are perhaps the offence of perjury (lying in the witness box), the making of a false statement in order to induce someone to buy something, which may fall foul of the Trade Descriptions Act 1968 (creating criminal offences for false or misleading trade descriptions, discussed in chapter 11), the law relating to misrepresentation, or lying on an official document (such as an income tax return or claim for income support benefit) which may lead to prosecution.

4 For a useful discussion of some important contributions in this area, see B. Roshier and H. Teff, *Law and Society in England* (1980, Tavistock), chapter 2; R. Cotterrell, *The Sociology of Law: An Introduction* (2nd edn., 1992, Oxford University Press).

5 See the discussion of the work of John Austin in R. Cotterrell, *The Politics of Jurisprudence* (2nd edn., 2003, LexisNexis Butterworths) chapter 3.

6 K. Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) *Yale LJ*; and see also K. Llewellyn and E. A. Hoebel, *The Cheyenne Way* (1941, University of Oklahoma Press).

arise between members, the law must provide the means of resolving them. The law must also provide the means whereby the authority structure of the group is constituted and recognised (such as a constitution) and, finally, the law must provide for the manner and procedures in which the above 'law-jobs' are carried out.

A second example of this approach is that of Robert Summers.[7] He identified five techniques of law, which may be used to implement social policies. These are, first, the use of law to remedy grievances among members of a society; second, the use of law as a penal instrument, with which to prohibit and prosecute forbidden behaviour; third, law as an instrument with which to promote certain defined activities; fourth, the use of law for managing various governmental public benefits, such as education and welfare policies; and fifth, the use of law to give effect to certain private arrangements between members of a society, such as the provisions of the law of contract in our own legal system.

We can contrast the analyses of Llewellyn and Summers with those of writers such as Austin, in that their accounts relate the law to its social context, whereas Austin treats rules, including legal rules, as though they were amenable to analysis 'in a vacuum', so to speak, or, put another way, in a manner divorced from social contexts or settings. For Austin, the hallmark of a legal rule (which he terms 'positive', or man-made, law) lies in the manner of its creation. He defined law as the *command of the sovereign body* in a society (which may be a person, such as a king or queen, or a body of elected officials, such as our own law-making body which we refer to formally as 'the Queen in Parliament'), and these commands were backed up by threats of sanctions, to be applied in the event of disobedience.

A major problem with Austin's analysis concerns his use of the idea of the 'command'. Although the rules of criminal law, mentioned above, may perhaps approximate to the idea of our being 'commanded' by the law-makers not to engage in prohibited conduct, on pain of some criminal sanction, there are very many rules of law which do not 'command' us to do things at all. The law concerning marriage, for example, never commands us to marry, but merely sets out the conditions under which people may marry, and the procedure which they must follow if their marriage is to be valid in law. Similarly, the law does not command us to make contracts, but rather lays down the conditions under which an agreement will have the force of a legally binding contract. This type of rule may be termed a '*power-giving*' rule, and may be contrasted with the *duty-imposing* rules which characterise criminal law. As Hart, among others, has pointed out, there are many other instances in law where the legal rule in question cannot sensibly be described as a form of 'command': 'Is it not misleading so to classify laws which confer powers on private individuals to make wills, contracts, or marriages, and laws which give powers to officials, eg to a judge, to try cases, to a minister to make rules, or a county council to make by-laws?'[8] The law, then, is far too complex, and contains far too great a

7 R. Summers, 'The Technique Element in Law' (1971) 59 *Calif LR*.
8 H. L. A. Hart, *The Concept of Law* (2nd edn., 1994, Oxford University Press), p 26.

variety of *kinds* of legal rules, for it to be reduced to the simple proposition that 'laws are commands'.

What other formulations and classifications of law may be offered by legal writers? One significant attempt in recent years has been Hart's own theory, contained in his book *The Concept of Law*, in which he sets out, first, the basic legal requirements, as he sees them, of any social group which is to be more than a 'suicide club'. Every such social group, Hart suggests, must have certain rules which impose duties upon the members of the group concerning standards of behaviour. These 'primary' rules, which might contain rules approximating to basic criminal-law rules but which might also impose what we would call civil-law duties (akin to duties contained in the law of tort – see chapter 9), could conceivably comprise the *only* rules within a social group; but, Hart argues, in a developed and complex society, these 'primary' rules will give rise to certain problems which will have to be dealt with by means of additional, 'secondary' rules. The first problem with such a simple code is that there will be no settled procedure for resolving doubts as to the nature and authority of an apparently 'legal' rule. To remedy this, the introduction of 'rules of recognition' is needed: these rules will constitute the hallmark of what is truly a *law*, and may do so by reference to a set of other rules or institutions, such as a constitution, a monarch or a representative body, such as Parliament.

A second problem will be that the primary rules will be static: there will be no means of changing the rules in accordance with changes in the circumstances of the social group. The remedy for this defect, says Hart, is a set of 'rules of change', enabling specified bodies to introduce new rules or to alter existing ones. Third, the primary rules will be inefficiently administered, because their enforcement will be through diffuse social pressures within the group. The remedy for this, says Hart, is the introduction of 'rules of adjudication', which provide for officials (judges) to decide disputes authoritatively. It will be appreciated that these secondary rules are really 'rules about rules', and Hart argues that the characteristic feature of a modern legal system is this *union* of primary and secondary rules.

Interesting though this approach is, it has suffered at the hands of critics. To begin with, some commentators have argued that Hart's reduction of all duty-imposing rules to a category which he calls 'primary' rules is far too great a simplification. Can this category really usefully embrace areas of law, all of which impose duties of various kinds and with various consequences, as diverse in content and objectives as contract law, private property law, family law, criminal law, tort law and labour relations law? It may be argued that a much more complex classificatory scheme is required in order for such differences adequately to be analysed and understood.

Another criticism is that Hart's treatment of a legal system as a 'system of rules' fails to take into account the various other normative prescriptions contained within a legal system which affect the course, development and application of the law, but which are not 'rules'. In particular, Dworkin has argued[9] that Hart fails to take

9 R. M. Dworkin, *Taking Rights Seriously* (1977, Duckworth), chapter 2.

account of the role of *principles* in the operation of the law. Principles, he maintains, differ from rules in that whilst the latter are applicable in an all-or-nothing manner, the former are guidelines, stating 'a reason that argues in one direction, but [does] not necessitate a particular decision'.[10] Thus, suppose that a man murders his father in order to benefit from the father's will which, as he knows, provides that all the father's property will come to him upon the father's death. Irrespective of the liability of the man for murder, the question will fall to be considered whether he will ultimately acquire that property. Normally, the law attempts to give effect to the wishes of the maker of a will, but here the outcome may well be affected by the *principle* that 'no man should profit by his own wrong' and the result may well be that, through the operation of this principle, and *despite the existence of legal rules* which would otherwise have operated in the son's favour, the murderer does not receive the inheritance.[11] Whether or not this type of principle is *part* of the fabric of legal rules, as Dworkin argues, is a difficult question: all parts of the law contain principles as well as 'hard rules' – an example might be principles of public policy which affect judicial deliberations concerning the law of negligence, which we shall consider in chapter 9 – but for the moment, it can be appreciated from the above discussion that there is much more to law than merely legal rules.

A more general point which must be made here is that, although the 'law as rules' approach has, through the work of writers such as Austin and Hart, greatly influenced patterns of legal thought in this country and elsewhere, it is by no means the only approach which may be taken in legal study. Already we have mentioned the approach which looks at law in terms of its functions within society. Other writers have taken the view that law is best understood by examining the actual *operation* of the legal system in practice, and by comparing the 'letter of the law' with the way it actually operates. Such an approach is taken by those writers whose work is usually categorised as 'Legal Realism' – principally, Karl Llewellyn, Jerome Frank and Oliver Wendell Holmes. Other writers, at various times, have analysed law in terms of a society's cultural and/or historical background, whilst still others, adopting an anthropological approach, have argued that the idea of a legal system may be illuminated by considering and comparing modern legal systems with the systems of small, technologically less developed, societies.

Authority and obedience to law

Another important aspect of rules in general, and legal rules in particular, is the phenomenon of obedience to those rules, and the acceptance that those rules are both legitimate and authoritative. Again, there are many analyses of these issues, one or two of which may be briefly considered here.

10 Ibid., p 26.

11 These were the facts in the American case of *Riggs v Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), discussed by Dworkin, ibid., at pp 23–24. For Hart's response to Dworkin's criticisms, see *The Concept of Law* (op. cit.), esp. pp 259–268.

For example, Austin's idea of why we obey law is found in his notion of the 'habit of obedience' to the sovereign body in a society, which, together with the ever-present threat of sanctions, explains obedience to law. Few, however, would accept this idea as an adequate explanation. It is a questionable assumption that we obey law out of habit or for fear of official reprisals. Do we really go through our daily law-abiding lives with such things kept in mind? Surely not. Rather, as Hart[12] argues, most of us conform to law because of more complex social and psychological processes. Hart's own explanation of obedience to law lies in the idea of some inner psychological inclination whereby we accept the *legitimacy* or *authority* of the source of the law; we obey because we consider it 'right and proper' to do so. Hart calls this acceptance the 'internal' aspect of obedience to law, and argues that people usually obey because of such acceptance.

Of course, as Hart acknowledges, there are exceptions. Some might obey out of a genuine worry about the consequences of disobedience; others might disagree with the entirety of the legal and social arrangements in our society, but obey the law out of sheer convenience. Everything depends, of course, upon the kind of society and legal system in question, for an extreme and oppressive regime might deliberately obtain obedience to its dictates by instilling terror into the population. In our own society, however, few of us would seriously dispute the idea that most people accept the legitimacy of existing legal, social and political authority, as defined through constitutional doctrines and principles, and our everyday 'common-sense' notions of legal authority.

This question of the idea of authority in society is worthy of closer attention, however. One sociologist who wrote extensively about law, Max Weber, identified three *types of authority* in social groups.[13] First, he argued, the authority of a leader or ruler may be the result of the personal, individual characteristics of that leader – his or her *charisma* – which sets that person apart from the rest. Examples might be Jesus, Napoleon, or Hitler in Nazi Germany, Eva Peron in Argentina, or Winston Churchill in Britain, all of whom, it might be said, to some extent and to varying degrees, rose to their exalted positions and maintained those positions as leaders through their extraordinarily strong personalities.

A second type of authority, according to Weber, is *traditional* authority, where obedience to the leader or regime is sustained because it is traditional: 'it has always been so.' Third, Weber identifies in modern Western societies a form of authority which he calls *rational-legal* or *bureaucratic*, where the authority of the regime is legitimised not through personal charismatic leadership, nor through pure tradition, but through rules and procedures. Although such a type may correspond roughly to authority in our own society, where the system of government and law-making depends upon a constitution providing formal procedures for law-creation and the business of government by Parliament, Weber's three types of authority

12 H. L. A. Hart, *The Concept of Law*, op. cit.

13 M. Weber, *Law in Economy and Society*, ed. M. Rheinstein (1969, Harvard University Press), esp. chapter 12.

have rarely, if ever, existed in reality in their *pure* form. Most societies have elements of more than one type. Our own society has elements of all three – the traditional (as seen in the ceremonies surrounding, say, the formal opening of Parliament), the charismatic (such as the leadership of Churchill during the Second World War) and the rational-legal (as in bureaucratic political and legal institutions such as the civil service). The issues raised by notions such as 'obedience to law' and 'sources of authority', then, are clearly much more complex than Austin's simple idea of a 'sovereign' might suggest.

Law and society

We have seen that there is no one way of undertaking legal study: whilst all the various approaches may well have something useful to offer, none has yet managed to produce an analysis of law and legal systems which answers all the many and varied questions which students and researchers might want to ask about this complicated and fascinating subject. The perspective taken in this present book is that an understanding of law cannot be acquired unless the subject matter is examined in close relationship to the social, economic and political contexts in which it is created, maintained and implemented. To equip us for the task of understanding something of the *society* in which the law operates, as well the law itself, we must turn our attention to some analyses which take law as but a part (albeit an important part) of the wider social arrangements.

When a lawyer uses terms such as 'society', the picture often conjured up is of a rather loose collection of people, institutions and other social phenomena in the midst of which law occupies a central place, holding these social arrangements together in an orderly fashion. But if law were suddenly relaxed, would society immediately plunge into chaos and disorder? Most of us doubt that this would happen. One reason why it would not happen is that society is not just a loose group of independent units, but rather exhibits certain regular patterns of behaviour, relationships and beliefs. What gives a particular society its uniqueness is the way in which these patterns interrelate at any given time in history. Law, far from being a kind of social glue holding us all inside a boundary of legality and punishing those who try to extricate themselves, is but one component of the overall *social structure*, having links and dependencies with other social elements and forces. We can identify various social phenomena which constitute parts of the overall structure of a society, including, in addition to law, political institutions (Parliament, political parties), economic and commercial institutions (trade unions, manufacturers' associations, patterns of production and trade, and so on), religious institutions, institutions concerned with the teaching of social rules and standards (such as schools and the family) and cultural institutions (such as literature and the arts, the press, television and radio). We shall, at various points in our examination of the place of law in society, refer to these other facets of the social structure.

If we imagine a society as a complex network of the kinds of institutions and social forces mentioned above, we could map out the ways in which they relate to each other without too much difficulty. But some institutions and social groups are more important than others; some groups have more political power, or more economic influence, than others. Some groups may enjoy considerable prestige, whereas others may be thought of as less worthy. Within a society, therefore, groups and individuals may be differentiated, or *ranked*, by their place on a 'ladder of influence', with some ranking higher in terms of power, prestige, wealth, or some other criterion, than others. Sociologists use the term *social stratification* to express this idea, and there are many ways in which social stratification may be analysed. If we are interested in prestige groups in India, for instance, we may look at the stratification of groups in terms of the caste system, in which some groups, or 'castes', are regarded as higher in status than others. In a simple tribal society, stratification may occur through a ranking system descending from king, or chief, at the top, through, perhaps, village elders and religious officials, down to the ordinary family unit, which may itself be stratified in terms of power (male elders frequently being the heads of households). Or, taking our own society, we may classify people in terms of social class – a very important aspect of our society, particularly when we come to consider political and economic power and position.[14]

Some sociologists would go on to analyse social institutions and processes in terms of their *function* in society; we noted above how such an approach might be applied to an analysis of law. Put simply, the 'function' of a social institution or process is the contribution it makes to the overall social structure and its maintenance. We may say, for example, that the function of the family unit in our society is to ensure continued procreation, to ensure socialisation, and to bolster the economic base of the society through its activities as a consumer unit.

Armed with these concepts of social structure, social stratification and social function (none of which, for reasons of space, we are able to explore further here), we can begin to examine some approaches to law in society taken by sociologists. One of the most influential writers in this field was the French sociologist Emile Durkheim, whose major works appeared at the end of the nineteenth century. One of Durkheim's main concerns was the problem of social cohesion: what is it that keeps a society together? We noted above the fact that societies exhibit regularities, and patterns of behaviour and attitudes. What provides this cohesion?

Durkheim, in trying to resolve this problem, presented two contrasting 'types' of society[15] – an analytical device frequently used by social scientists to enable us to draw contrasts. The first type discussed by Durkheim is a relatively simple, technologically undeveloped, society; the other type being 'advanced' in terms of

14 Students might follow up discussion of these concepts in any textbook on sociology: for example A. Giddens, *Sociology* (4th edn., 2001, Polity Press); T. Bilton et al, *Introductory Sociology* (4th edn., 2002, Palgrave); M. Haralambos and M. Holborn, *Sociology: Themes and Perspectives* (6th edn., 2004, Collins).

15 E. Durkheim, *The Division of Labour in Society* (1964, Free Press, New York; Macmillan, London).

technology and social structure. He argued that the primary characteristic of the first type will be that the whole group exists and acts collectively towards common aims, the moral and legal code (the 'collective conscience') being acknowledged and accepted by the whole group and keeping the group together. This is called 'mechanical solidarity'. In the event of any deviance from these collectively held norms of the group, sanctions are brought to bear on the offender through *repressive* (criminal, or penal) law, which expresses the community's anger and avenges the offence against the collective moral sentiments of the group. Not only does this repressive law serve to identify and punish the deviant, however; it also fulfils the function of maintaining the boundaries between acceptable and unacceptable behaviour, thus helping maintain the collective conscience, and hence the cohesion of the group. Central to Durkheim's thesis is the proposition that the interests of any one individual in such a group are identical to those of the group as a whole; there is no room for the expression of individual creativity or dissent from group norms.

As the social group becomes more complex (larger, with increasing economic and other ties between social units and with other social groups) there occurs, argues Durkheim, increasing *occupational specialisation*, or *division of labour*, where no single individual occupies a self-sufficient position as both producer and consumer of his or her everyday needs. Instead, tasks become divided among members of the society. The making of bread, for example, becomes no longer a task undertaken by each family for its own needs, but is rather a series of tasks, divided between farmer, flour mills and bakeries. Each, therefore, is occupationally specialised. But more than this: in the complete bread-production process, the bakery is dependent on obtaining supplies of flour from the mill, and the mill is in turn dependent upon the farmer for the supply of corn. The farmer is dependent on the flour mill for payment for the corn; and the flour mill is similarly dependent upon income from sales of flour. Each of these units, then, is not only occupationally specialised, but *economically dependent* upon the others involved in the process.

It is precisely this interdependence, argues Durkheim, that is the keynote of social solidarity in advanced industrial society. There is a radical change in the nature and range of the collective conscience, in that the individual takes on a new social importance in his or her own right, rather than occupying a social position simply as one member of a collective. The individual, encouraged socially to develop and realise talents, skills and potentialities, is elevated to quite a different status.

These changes are accompanied by a corresponding change in the type of law present in the society. Whereas law in the 'simple' type of society is, according to Durkheim, repressive, or penal, law in the 'advanced' type of society takes on the form of *compensatory* rules, where the object is not to punish, but to solve grievances by trying to restore the aggrieved person to the position he or she was in prior to the dispute. The disputes dealt with through the law in such a situation are not those between, so to speak, the group and the individual deviant, but rather those which occur between individuals or between groups, within the society.

Durkheim's analysis has been very influential; nevertheless many have found

problems with his work. He greatly overestimated the extent to which repressive law would decline and give way to compensatory law in an industrialised society. He himself explained the continued existence of repressive, criminal-type rules in modern society as being due to the incomplete, defective or 'pathological' forms of the division of labour to be found in existing industrial societies, and put forward suggestions as to how these 'pathological' forms of the division of labour might be remedied to facilitate the development of a pure or 'spontaneous' form of division of labour where repressive law would decline much further. Yet today we have as many criminal-law rules as ever.

Also, it is clear from later research that Durkheim underestimated the degree to which compensatory, or *civil*, law already exists in 'simple' societies. Many tribal groups, for instance, have firm relationships within and between families and other groups, giving rise to patterns of mutual dependency ties having the force of legal obligation; many have clearly discernible political and legal structures, and property relationships involving obligations and rights similar to those existing in our own law. Whilst there may well be certain differences in the manner in which disputes are solved (we shall come to this issue later), it is clear that Durkheim's twofold classification of types of society, though containing useful insights, will not do the analytical job for which he fashioned it.

The researches of social anthropologists, studying simple societies, have also provided us with useful information concerning law in society, although we must always be careful not to assume that what may hold for a technologically undeveloped group will necessarily be applicable to a complex and advanced society. We referred above to the American writer Llewellyn: with an anthropologist, Hoebel, Llewellyn studied American Indian groups and based his ideas as to the social functions of law on their researches. It is interesting that similar conclusions as to the functions of law have been reached by Hart (a lawyer and philosopher), by Talcott Parsons (a sociologist)[16] and by Hoebel in his own work *The Law of Primitive Man*.[17] As Schur points out:

> However their terminology may differ, anthropologists, legal philosophers, and sociologists are in general agreement that a legal order must, at the very least, provide for the authorisation and recognition of legitimate authority, provide means of resolving disputes, and provide mechanisms for facilitating interpersonal relationships, including adaptation to change.[18]

To what extent, then, can such functions be identified in our own society?

Law plays an important part in the definition and regulation of all kinds of social relationships, between individuals and between groups. Thus, for example, the basic social unit in our society, the family, is defined and protected through legal rules and institutions. The marriage bond is created partly through deference to

16 See in particular T. Parsons, 'Law and Social Control' in W. M. Evan (ed.), *Law and Sociology* (1962, Free Press).
17 E. A. Hoebel, *The Law of Primitive Man* (1954, Harvard University Press).
18 E. Schur, *Law and Society* (1968, Random House), pp 79–80.

religion, partly through the necessity for legal formalities. Divorce, too, can only be obtained through legal channels, and of course the law prohibits multiple (polygamous) marital relationships through the law on bigamy. The rights and obligations of members of the family, as spouses and parents, are defined through law, and there is provision, through the Children Act 1989, for removing children from unsuitable homes with their natural parents and placing them in the care of local authorities or with foster parents. In the business world, too, the law regulates the activities of the limited company, the partnership and the trade union. Financial deals between people in business are subject, normally, to the law of contract, at least in theory,[19] and there are many obligations contained in Acts of Parliament such as the Companies Acts, with whose regulations all companies must comply.

Regarding the identification and allocation of official authority, it is through legal rules that specific powers are vested in Parliament to enact new laws, and in the courts to administer the law and to mete out sanctions and remedies in criminal and civil cases. This body of law, known as *public law*, deals with constitutional rules, the authority of elected representatives such as councillors, or members of Parliament, and the powers of bodies such as the civil service, the courts, tribunals, the police, local authorities and bodies such as the Post Office and the National Health Service. We shall examine various aspects of all these matters later, and we shall look in particular at the relationship between law and public administration in chapter 12.

It is by means of such constitutional rules that social changes may become reflected in, or in some cases encouraged by, changes in the law. One of the most important facets of law, as we noted earlier, is its *dynamic* character; social conditions, and hence law, change all the time. Some changes are little more than passing fads, and make little impact upon the legal structure. But others bring with them permanent and far-reaching effects, and such developments usually result, sooner or later, in changes in the fabric of legal rules. The development and increased use of the motor car in the twentieth century is a good example. Given the proliferation of cheaper, faster and more reliable cars, it is not altogether surprising that the legal code responded by the enactment of numerous rules designed to protect both car-drivers and others, through the regulation of car safety, speed and driving skills – a far cry from the somewhat crude device of having someone carrying a red flag walk in front of the slow-moving early mechanical vehicles! This example illustrates not only the reflection in the law of these developments, but also the way law may be, at least partially, used as an *educative* instrument. Road safety and motor-vehicle law may be viewed as a means of inculcating public awareness of the dangers of modern road conditions, thus encouraging the development of attitudes of safety-consciousness. Other similar instances are the use of law in race relations and equal opportunities (currently through the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995) not only to

19 See chapter 11.

outlaw discrimination on the grounds of race, sex or disability in the workplace, in the provision of goods and services, and elsewhere, but also to play a part in changing people's attitudes and, arguably, to help to create a social environment in which prejudice diminishes and, hopefully, disappears.

The changing nature of law is seen in all aspects of the legal system, not least in those areas concerned with one more 'function' of law: dispute-settlement. Now, whilst most studies of law in various types of society have revealed the existence of more or less formal mechanisms of dispute-settlement, it is possible to see, as Chambliss and Seidman argue, certain differences between advanced and undeveloped societies in the way that the legal system goes about this task: 'The dispute-settlement systems of simple societies tend toward compromise, or "give-a-little, get-a-little"; the official dispute-settlement systems of most complex societies tend toward "winner-takes-all".'[20] This distinction, say Chambliss and Seidman, is connected with certain factors about the types of society in question. Simple societies, as we noted above when discussing Durkheim's work, tend to be community-based, relatively self-sufficient, and with low degrees of technology and division of labour. It is this type of society which some writers have called *Gemeinschaft*, or 'community', as distinct from *Gesellschaft*, referring to a more complex, differentiated society.[21] In societies approximating to the community-type (these terms referring, like Durkheim's types, to hypothetical models, or 'ideal types' which never actually occur in reality in their 'pure' form), social relations tend to be fairly permanent; indeed the continued existence of the community group depends upon the continued existence of social ties, and consequently in such groups the type of dispute-settlement is often *compromise*.

In a modern, differentiated society, on the other hand, there are many disputes involving no desire or need by the parties to continue their relationship; the example given by Chambliss and Seidman is a typical personal injury claim: 'When a person gets injured in an automobile accident, usually he had no prior relationship with the other party and anticipates no future relationship. In such cases, the parties typically expect in the end that if necessary they will settle their dispute in court on a "winner-takes-all" basis.'[22] Nevertheless, in such situations negotiations and compromise may well take place. As we shall see in a later chapter, bargaining and negotiations through insurance companies, and between the parties' lawyers, will more often than not result in the settlement of disputes outside courts of law. But, as Chambliss and Seidman point out, such negotiation is mainly to save time, trouble and, in particular, expense: 'They bargain, not in an effort to make possible a future relationship, but in light of their estimates of the probabilities of a favourable outcome of the potential "winner-takes-all" litigation.'[23] Only in cases where the parties *do* anticipate future relations is there any genuine attempt to 'give a little, take a little'. Such cases would include those discussed by

20 W. Chambliss and R. Seidman, *Law, Order and Power* (2nd edn., 1982, Addison-Wesley), p 38.
21 See, esp., F. Tönnies, *Community and Association* (1887).
22 Chambliss and Seidman, op. cit., p 40. 23 Ibid.

Macaulay,[24] where business firms negotiate with a view to *avoiding* disputes, or, where disputes arise, to *compromise* rather than take the dispute to court, because good business relations are essential if a business is to continue to flourish.

From the foregoing discussion, certain additional features of law, particularly that of modern Western societies, may be identified. Whereas, for instance, law may be used to provide an institutional setting for the resolution of disputes between private individuals, as discussed in the last paragraph, the use of law to achieve certain *positive objectives of social or economic policy* may be, by contrast, a somewhat different function for the law to perform. State intervention in the sphere of motor-vehicle use, or in the field of race relations, expresses such general policies, which are of clear benefit to the community. Other examples of state intervention brought about through the use of law would include the development of the welfare state, the post-Second World War nationalisation of various industries, such as the railways and coal-mining; the health service, and the provisions and regulations constituting town and country planning.

Such intervention by the state, usually presented by governments and by politicians as being 'in the interests of the community as a whole', is often the expression and attempted realisation of the political convictions of those governments and politicians. In Britain in the years following the Second World War, a number of industries and activities (such as coal-mining and the provision of health care services) were nationalised (that is, owned and run by the state) and were for many years part of a range of nationalised industries that included most energy and public utility organisations. In the 1980s and early 1990s, however, the Conservative government pursued policies of placing many nationalised industries into the hands of private organisations. Thus we saw the privatisation of the telecommunications, water, rail transport, electricity and gas industries in line with the government's commitment to a return to a national economy based substantially upon free private enterprise. Since the election of the first New Labour government in 1997, there has been a continuation of such policies, such as a proposal to extend privatisation to the air traffic control service. It is not altogether surprising that state intervention along these lines is often highly controversial. Since the twentieth century there has, none the less, been continuing interventionist regulation, often expressed through legal rules and procedures. Such regulation, affecting many of the areas discussed in this book, raises important questions about the relationship between the state and private individuals and groups, and about the appropriateness or otherwise of using *legal* mechanisms for the realisation of political policies and objectives. It is vital, therefore, to appreciate the historical,

24 S. Macaulay, 'Non-Contractual Relations in Business' in V. Aubert (ed.), *Sociology of Law* (1972, Penguin). See also H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (1987, Clarendon); M. Palmer and S. Roberts, *Dispute Processes: ADR and the Primary Forms of Decision-making,* (1998, *Law in Context* series, Butterworths); C. Menkel-Meadow, 'Lawyer Negotiations: Theories and Realities – What we Learn from Mediation' (1993) 56 *MLR* 361. And see below, chapters 6 and 11.

social and political context of these developments – a context which requires examination of the far-reaching changes which were subsequent upon rapid industrial advances taking place within an economy based upon capitalism. Some aspects of these developments – affecting, for instance, the world of commerce – are discussed in later chapters. For the moment, it is useful to examine briefly the ways in which developing industrialisation brought changes in employment relationships, and in more general *social* relationships within the developing economy.

Industrialisation and the role of law

Although the eighteenth and nineteenth centuries are usually regarded as the most important period for the growth of industry and commerce, the period does not mark the *origin* of industrial or commercial development: Britain's economy had long been tied to trading at home and abroad. What the period does signify is a change in the *scale* and *nature* of industry and trade – the emergence and consolidation of *capitalism* as the basis for the economic system. By 'capitalism' we refer to the mode of production which is geared to the making of private profit, and it is no accident that this mode of production flourished in Britain during the period of the eighteenth and nineteenth centuries.

Many factors contributed to the expansion of manufacturing industries, among them the availability of natural resources (notably coal) and the suitability of certain areas for the use of water- and steam-powered machines. More important, the acquisition by Britain of overseas colonies not only yielded an abundance of raw materials but also provided a market for goods manufactured in Britain.[25]

Another supremely important factor was the existence of a *free market in labour*. This refers to a situation in which workers 'sell' their labour in exchange for wages, as opposed to being 'tied' to farms, estates and small, family-run manufacturing concerns. Prior to the industrial revolution, when the economy was primarily, though not exclusively, dependent upon agriculture, the dominant mode of production was feudalism. This gave rise to social relations in which agricultural labourers or peasants were tied to, and economically dependent on, the landowning gentry and nobility (their lords and masters); for upon the feudal relationship between lord and servants depended the latter's livelihoods and homes. From the mid-1700s, however, the enclosure movement, whereby land – including land previously regarded as 'common' land – was parcelled up and acquired by landlords, had the effect of forcing many farm labourers, many of whom had depended for their survival upon the old traditional rights to the common land, out of their agricultural settings and, for many, into the expanding new towns to become workers in the developing factory industries.

These factories were owned and run by those 'captains of industry' who had invested their capital in the new machines, many powered by the recently invented

25 For an excellent discussion on this, see E. J. Hobsbawm, *Industry and Empire* (1969, Penguin).

steam-engine (another factor contributing to the rapid industrial development of the period), which required industrial workers to operate them. The factory system thus helped crystallise the new formations of social class. No longer could the population be divided only into agricultural peasants and powerful landowners, with a sprinkling of tradesmen and artisans, for now the industrial revolution had brought two new classes: the industrial working class and the industrialists who employed them, paid their wages and frequently provided them with housing. Together with the commercial entrepreneurs who traded in the manufactured goods and brought raw materials to be worked in the factories, these constituted the rising new 'middle classes', the 'bourgeoisie', a social class distinct from the landowners who had traditionally possessed the wealth and political power and who had until then been the sole 'ruling class' in England.

Such class formations brought tensions. Not only did the middle classes make demands for a greater political voice in Parliament (something they felt was their due, given their developing key role in the country's economic affairs),[26] bringing them at times into conflict with the established landowning class, but also many of the working classes, conscious of the iniquities of the factory system (low wages, appalling working conditions, long hours, bad housing and the systematic exploitation of women and children), were beginning to make demands for improvements in their working conditions, and for a political voice. Hence, we see many cases of attempts by workers to form themselves into associations – what we would now recognise as trade unions – in order to press collectively for better pay and conditions. And there were movements, such as Chartism in the 1840s (a working-class campaign for more political involvement), which involved demands for universal male suffrage, removal of the property qualification for members of Parliament and the holding of annual general elections.

It is easy to see in these latter developments the basis of what we would today call industrial relations problems, but the period was not, in fact, the beginning of such potential or actual conflicts. Legal controls of employment relations date back to periods long before the industrial revolution, and one or two brief instances reveal the repressive attitude of law-makers and judges to any attempt by working people to improve their lot by collective action. In 1563, the Statute of Artificers gave power to justices of the peace to fix wages; in 1698 a body of journeymen were successfully prosecuted for having 'combined' to negotiate with their employers over wages; the Master and Servant laws of 1823 provided for the imprisonment of any workers who 'broke their contracts of employment' by going on strike; and various statutes outlawed 'combinations of workers' – the forerunners of trade unions – throughout the eighteenth century.[27]

26 See chapter 5.

27 K. W. Wedderburn, *The Worker and the Law* (3rd edn., 1986, Penguin), p 76; and see generally S. Deakin and G. S. Morris, *Labour Law* (4th edn., 2005, Hart Publishing); H. Pelling, *A History of British Trade Unionism* (1973, Penguin); A. Harding, *A Social History of English Law* (1966, Penguin); E. P. Thompson, *The Making of the English Working Class* (1975, Penguin).

These early laws regulating wages and prohibiting 'combinations' are, of course, examples of direct state intervention which, though no doubt legitimated as being in the interests of the national economy, nevertheless clearly operated to the advantage of employers and to the detriment of employees. The effect of these restrictions was, moreover, to enhance the conflicts inherent in the employment relationship – conflicts which become clearer when we examine the relative positions of *power* between them.

Then, as now, recurrent unemployment was a problem for many, and if people wished to work for an employer, they had little choice but to accept employment on the terms dictated by that employer. Workers were in no position to argue or negotiate, for they had little or no bargaining power. The strike (that is, *collective* withdrawal of labour) was one of the few means of bringing any kind of pressure to bear on employers for improvements in pay and conditions, and it is not altogether surprising that the law was one of the principal weapons used to try to prevent any such disruptions which might damage employers' business, and perhaps ultimately the whole fabric of trade and industry upon which the national economy had come to depend. Even when these Combination Acts were repealed, the judges were still able to interpret strikes as 'conspiracies to injure' the employers' interests. The turbulent events of the French Revolution at the end of the eighteenth century caused many members of the English ruling classes to fear lest similar troubles should occur on this side of the Channel; indeed, the period saw frequent uprisings by ordinary working people: food riots, and of course the machine-breaking riots and the Luddite movement in the early nineteenth century, directed against the use of machines which threatened the jobs of skilled workers in some parts of the country.[28] These were reasons why every sign of workers' resistance to the existing and developing economic and political order was severely repressed. It was not until well into the second half of the nineteenth century that the beginnings of trade union activity, especially free collective bargaining over terms and conditions of employment between workers and employers, began on a legal, organised basis. Even then (some would argue, even now) the attitude of the judges, when disputed cases came before them, was typically one of conservatism and anti-trade unionism. The landmark cases are recounted in all the major works on labour law,[29] especially those cases dating from the turn of the last century to the present day, in which the judges have consistently interpreted the law in a manner against the interests and activities of the unions.

The relationship between employer and employee is, in law, one of *contract*; that is, a legally binding agreement made by two parties, containing the agreed rights and obligations of each party, any breach of which entitles the aggrieved party to a legal remedy for *breach of contract*. This idea of the contract, discussed here in the context of the employment contract, applies to many other situations, notably, as

28 See in particular, Thompson, op. cit.
29 For example, Deakin and Morris, op. cit; Wedderburn, op. cit.

we shall see in chapter 11, to the buying and selling of goods and services. Ideas of social relations based on the contract were particularly prevalent during the nineteenth century, when the dominant social and economic philosophies were those of 'freedom of contract' and *laisser-faire* individualism. By this was meant that each individual in society should be left free to regulate his[30] own affairs with as little interference as possible by the state. Relationships between people in business and employment were regarded as best left to the parties concerned, to drive as good a bargain as they could get for their goods or services. Consequently, in line with this dominant ideology, there was relatively little state intervention through legal controls over, or restrictions upon, business, industry or employment, although piecemeal legislation in the nineteenth century did begin to lay down minimum standards of working conditions; for example, by means of the Factory Acts.

Laisser-faire involved the assumption, then, that all members of society were free and able to regulate and arrange their affairs with others (including their employers), and that all were equal in terms of their bargaining positions. If people were to be left free and equal then, according to dominant social and economic philosophies, competitive trade and industry would flourish, and the nation would thrive. In fact, as we have noted, there was, and still is, a fundamental *in*equality in terms of wealth, social position and bargaining power between people of different positions within the social structure. Two business representatives, negotiating over, say, the sale of goods, might have been in more or less equal bargaining positions; but the same was certainly not true of the relationship between most employers and employees. Nevertheless, the employment contract (supposedly freely made between employer and employee) was deemed to be made between people of equal standing, and even today the expressions 'freedom' and 'equality of contract' remain the basis for many areas of law involving contractual agreement. Given the predominance of these ideas about freedom and equality of contract, what particular problems confronted the parties to an employment contract in the nineteenth century, and to what extent has subsequent state intervention successfully tackled them through legislation?

To begin with, the fact that the terms of an employment contract might be oral, coupled with the frequently vague and complex nature of the terms of such a contract, led to the law being called upon to settle the many and varied disputes arising from employment situations. For example, an employee who was injured at work might claim compensation (see chapter 9); or an employee who was dismissed might bring a claim against the ex-employer alleging that the dismissal was unlawful. The difficulty is that many legal rules and remedies are only applicable if there is a proper 'employment contract' as opposed to other situations where one person

30 The omission of the feminine adjective is deliberate: the position of women in nineteenth-century society was such that they were thought not to have any affairs to regulate; the struggle for equality for women has continued throughout the twentieth century. Today, we have legislation dealing with equal pay and sex discrimination, but apart from legal enactments, the social and economic struggle for women's rights continues.

does work for another: if I call a taxi which carries me to my destination, the driver may be said to be doing work for me, but is hardly to be called my 'employee'.

The old legal test for ascertaining whether an employment relationship existed was the 'control' test, expounded in the case of *Yewens v Noakes*[31] in 1880, and formulated in terms of the extent to which the employer exercised effective control over the workers. However, the growth of specialised and highly skilled occupations led to many cases where the employer could not sensibly be said to be 'in control' of the activities of the employee, and this test has been discarded. Unfortunately, no acceptable substitute test has yet found full favour with the judges. In *Short v Henderson*[32] in 1946, one judge referred to the need to take into account a multiplicity of factors in deciding the issue, and in 1953 Denning LJ observed that 'the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation.'[33]

This 'organisation' test, like all other tests resting upon single factors, has been found unworkable in practice. The modern approach to the problem has been to consider many factors, notably the power to appoint and dismiss, the mode of payment and the making of deductions for National Insurance and income tax, the organisation of the workplace, and the issue of who provides the tools for the job.[34] This is the 'multiple' or 'mixed' test – still of practical importance since in English law the status of the worker is still the basis of most employment protection rights.[35]

It is noteworthy, however, that today many employers are using labour much more flexibly than in the past: more use is being made, for example, of part-time workers and short-term contract workers, and the European Union is seeking to protect the rights of such workers. Interestingly, although the British government is attempting to resist such moves, recent legislation has tended to blur the old distinction between a contract of employment and other types of working relationships. The Wages Act 1986, s 8,[36] for example, extended employment rights somewhat by providing a rather broader definition of 'worker' than simply one who is in a contract of employment.

Of course, once the relationship has been established as one of employment, there will remain the substantive issue of the case, which may be over a dismissal, a redundancy or some alleged breach of the contract by either employer or employee. The infinite variability of terms of employment contracts, coupled with the fact that in many cases employees suffered the double disadvantage of inability

31 (1880) 6 QBD 530. 32 (1946) 115 LJPC 41.

33 *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at p 295.

34 See *Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433; I. T. Smith and G. Thomas, *Smith and Wood's Industrial Law* (8th edn., 2003, Butterworths); H. Collins, K. Ewing and A. McColgan, *Labour Law: Text and Materials* (2nd edn., 2005, Hart); M. Sargeant and D. Lewis, *Employment Law* (3rd edn., 2005, Pearson).

35 See *O'Kelly v Trusthouse Forte* [1984] QB 90; *Hall v Lorimer* [1994] 1 All ER 250.

36 Now consolidated into the Employment Rights Act 1996 (Pt II) which is the statute containing individual employment rights.

both to negotiate those terms and readily to ascertain the terms as dictated by the employer, has led, over the years, to a large number of instances of state intervention, through a series of statutes, in the field of employment. Changed philosophies about 'state interference', the reforming zeal of individual politicians and campaigners and, most important of all, the gradual absorption of working-class interests into the political process – through the widening of the franchise, the emergence of the trade union movement as a vociferous pressure-group, and the development and electoral success of the Labour Party – have all played their part, at different times, in furthering such legislative intervention. Work conditions, the existence of hazards, hidden and apparent, and insecurity of employment have long been regarded as worthy of legal intervention. A number of separate Acts of Parliament have provided, for example, for the physical protection of workers. Today the Health and Safety at Work etc Act 1974 lays legal duties upon employers, employees, sub-contractors, manufacturers and others to observe due care in installing, using and maintaining equipment and premises; the Act provides various administrative sanctions for the enforcement of its provisions, and contains a legal framework for worker-participation in safety at work.

With regard to terms and conditions of employment, the Employment Rights Act 1996, now substantially amended by the Employment Relations Act 1999, provides that the employee must be given notice of the main terms of the contract of employment. The law also provides for increased protection for employees in most industries by providing for redundancy payments (paid out when there is no longer any work for an employee to do, and first introduced in 1965); and for unfair dismissal (first introduced in 1971), whereby an employee who successfully alleges, before an Employment Tribunal, that he or she was unfairly dismissed may be offered reinstatement (the same job with the same employer), re-engagement (a different job with the same employer) or compensation (the remedy which is most frequently sought). The Employment Relations Act 1999 also extended maternity rights and introduced a new right to three months' paternity leave; and a new 'national minimum wage' was introduced the previous year by the National Minimum Wage Act 1998.

Protective legislation affecting work and working conditions is only one important area in which state intervention has taken place – often on the grounds of benefit to the community. The nineteenth century saw the beginnings of local government services, in fields such as public health, urban amenities and improvement, and, later, slum-clearance programmes which would, in time, sweep away the foul and inadequate housing stock which had characterised many industrial towns. These beginnings prefaced the acceleration of central and local government intervention in areas of social life which had previously been private, not public, domains; and the twentieth-century 'welfare state ethic' of state intervention (ostensibly) for the benefit of the community stands in direct contrast to the nineteenth-century individualist *laisser-faire* ideal of leaving people alone to manage their own affairs as best they could, without state help or 'interference'.

During the twentieth century, the state has played a significant role in all aspects of everyday life, especially in the context of various schemes which we associate with the term 'welfare state' – income support, job-seekers allowance, incapacity benefits, old-age pensions, social services and so on. Other aspects of the welfare state are the state-run education system, the health service, and local authority services ranging from refuse disposal to the provision of housing, and from street lighting to the maintenance of highways. These examples are clear cases where the state has accepted a large measure of social responsibility for providing for the *whole* community in key areas.

It should not be assumed from this, however, that interventionist policies are invariably seen as operating for the benefit of all, or that 'welfare statism' has met with support from all government administrations. The Conservative administrations under Margaret Thatcher during the 1980s, and the ideas of 'Thatcherism', were highly critical of what became derided as the 'nanny state', with a large measure of approval of old ideas of self-determinism for the individual. And apart from the fact, noted above, that party-politically inspired measures will attract party-political opposition both inside and outside Parliament, there are other levels at which doubts, fears or anger may result from policies introduced by particular governments, which may be seen as operating *against* the interests of certain sections of the community. Private landlords, for example, may oppose the legal protection of tenants against eviction; property developers may resist the introduction of legal requirements for satisfying conditions imposed by planning or building regulations; employers may oppose legislation which they see as tending, directly or indirectly, to impose new financial burdens upon them (such as the introduction of the minimum wage); and so on.

In assessing the strengths and weaknesses of arguments for or against such measures, and indeed any legal rule, procedure or institution, we need, at a more general level, to be able to make analytical and theoretical connections between law and the various aspects and components of modern social structure. By what means can such an analysis be carried out?

Law and society: consensus or conflict?

> Law may be regarded as a benign facilitating mechanism, making transactions possible between men and solving awkward problems as they arise; it may, alternatively, be seen as a mechanism of social control, regulating activities and interests in the name of either the community, a ruling class or the state. The state itself may be defined as either 'neutral arbiter' or 'interested party' in the solution of disputes and the balancing of interests. Again, law may be seen as an institution for the furtherance and protection of the welfare of everyone, or it may be seen, crudely, as an instrument of repression wielded by the dominant groups in society.[37]

37 P. J. Harris and J. D. Buckle, 'Philosophies of Law and the Law Teacher' (1976) *The Law Teacher*, p 6.