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IAN McLEOD

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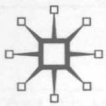

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Preface

The second edition of this book continues with the same intention as its predecessor, namely to combine an explanation of the main topics commonly encountered in courses on Legal Theory or Jurisprudence, with, wherever possible, practical illustrations drawn from substantive law.

The emphasis on practical application stems from my experience of teaching the subject within a semesterized system. More particularly, when law is taught in units of eleven or twelve weeks (or thereabouts), students never have the luxury of that leisurely reflection which might enable at least some of them to make the connections between legal theory and substantive law for themselves; and it is my experience that law students relate better to legal theory when they can see the point of it all in terms of substantive law. Similarly, I hope that students who encounter legal theory in the context of the study of disciplines such as philosophy and politics may find their perceptions of the subject enhanced by seeing how it relates to the practical aspects of law.

Turning to the happy task of acknowledgment, many people have helped, sometimes unwittingly, in the writing of this book. It would be impossible to name them all, and invidious to name only some. By way of exception, however, I must record a significant and enduring debt to Hamish Armour, who made many perceptive and helpful comments on the manuscript of the first edition, although, of course, I must again absolve him from responsibility for any errors, omissions, confusions or infelicities which remain.

My principal acknowledgment must, as always, be to my wife Jacqui, who continues to be unbelievably patient and supportive. She understands fully what the Roman poet Juvenal meant when he replied to the question 'Is writing an art or a craft?', with 'Neither: it is a disease'. Having helped me to deliver, within less than twelve months, the fourth edition of *Legal Method* (also published by Palgrave), as well as this edition of this book, she continues to look forward to the day when I may be cured.

IAN McLEOD
November 2002

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1 The Nature of Legal Theory: From Laws to Law

1.1 Introduction

This chapter begins with a discussion of the relationship between *law* and *legal theory*, and continues by clarifying some basic problems of terminology and methodology. It then considers the importance of context in legal theory, the dangers inherent in classifying legal theories and the extent (if any) to which we can have knowledge of moral matters, before concluding with an explanation of why it is useful to study legal theory, both from the perspective of legal practice and within the wider context of the academic study of law.

1.2 Law and Legal Theory

Most courses of study within the field of law involve an analysis of the content of a specific part of the whole legal system. Provided you know the basic terminology of the legal system you are studying, the title of a typical course gives a reasonably accurate indication of the scope of the subject matter involved. Thus English lawyers will know what aspects of legal doctrine they can expect from a course on *tort*, while Scots lawyers will know what they can expect from a course on *delict*; and comparative lawyers will know that, broadly speaking, the two subjects are the same.

It is not surprising, therefore, that law students develop an expectation that the scope of both the courses they study, and the textbooks which support those courses, will be defined by reference to specific areas of law. Of course, the treatment of the legal content may vary. Some courses will be taught and studied contextually, with the legal doctrines being examined within the social and economic context of the real world; others will proceed on the so-called *black letter* basis, which means that the cases and statutes containing the legal doctrines will be subjected to purely textual analysis, with little or no reference to the practical context within which those doctrines function.

Other variations are possible. For example, the packaging and labelling of courses may change from time to time. What was once commonly known as *constitutional and administrative law* may become known as *public law*. Similarly, the established textbook unities of *contract* and *tort* may be merged and expanded by the addition of *restitution* to form the new subject of *obligations*, while at the same time being enlivened and made more realistic by the addition of a dash of *equity*. Nevertheless, irrespective of the ways in which courses are labelled, taught and studied, the general proposition remains that practically the whole of the law curriculum is presented in terms of areas of law which are, or are at least perceived to be, doctrinally coherent.

Legal theory is different. One immediately apparent difference is that legal theory is painted on a larger canvas; or, to change the metaphor into a more appropriately verbal one, it asks bigger questions. So, for example, criminal lawyers will ask questions such as *what is the definition of theft?* Legal theorists, on the other hand, will ask questions such as *what is it that makes the prohibition on theft (along with a great many other prohibitions) into a matter of law, whereas many other forms of dishonesty are left solely in the realm of morality?*

In a nutshell, therefore, legal theory involves a progression from the study of *laws* to the study of *law*.

1.3 A Question of Terminology: *Jurisprudence*, *Legal Philosophy*, or *Legal Theory*?

Although this book is called *Legal Theory*, you will find that some other books (and the courses for which they are used) bear other titles, such as *Jurisprudence*, *Legal Philosophy* or *the Philosophy of Law*. Closer examination of the contents of both books and courses, however, will generally show that the choice of title often reflects nothing more substantial than the personal preference of the person making the choice. All that need be said here is that this book uses the expression *legal theory* in a relatively broad sense to include discussion of not only the nature of *law*, but also the nature of *rights* and *justice*, and the use of *law* to *enforce morality*.

If justification for this use of *legal theory* is required, it may be provided on two bases.

First, all these topics discussed are clearly theoretical in nature, and those which do not directly address the nature of law itself are so closely involved with the nature of law that it would be both unrealistic and unhelpful to consign them to separate consideration elsewhere.

Secondly, it is a peculiarly Anglo-American idea to treat *legal theory* as being more or less synonymous with *jurisprudence*. In French, for example,

the word *jurisprudence* means the body of law developed through the decisions of the courts. This explains the use of the phrase *Strasbourg jurisprudence* to identify the *law* contained in the European Convention on Human Rights as developed by the European Court of Human Rights at Strasbourg. The phrase *théorie générale du droit*, on the other hand, reflects the theoretical nature of that kind of material which, in Anglo-American usage, is called *jurisprudence*.

1.4 The Sources of Legal Theory

It is, of course, trite to say that the primary sources of English law are cases and statutes, together with any relevant sources of European Community law. Admittedly, as we shall see more or less throughout this book, one of the central concerns of legal theory is whether *law* may properly be limited to formal texts of any kind, or whether it also incorporates elements drawn from other sources. However, for the present purposes, the essential point is that judicial and legislative texts are, in practical terms, the primary sources of legal doctrine, with scholarly works being no more than aids to understanding those sources.

For the student of legal theory, on the other hand, the primary sources are frequently not cases and legislative enactments, but the works of legal theorists. Furthermore, legal theorists are not necessarily lawyers, because the subject matter is inextricably linked with both philosophy and political theory. As W. Friedmann puts it:

> 'all legal theory must contain elements of philosophy – man's reflections on his position in the universe – and gain its colour and specific content from political theory – the ideas entertained on the best form of society.' (*Legal Theory*, 5th edn, 1967, p. 4.)

More particularly:

> 'Before the nineteenth century... the great legal theorists were primarily philosophers, churchmen and politicians'

and

> 'the new era of legal philosophy arises mainly from the confrontation of the professional lawyer, in his legal work, with problems of social justice.
>
> 'It is, therefore, inevitable that an analysis of earlier legal theories must lean more heavily on general philosophical and political theory, while modern legal theories can be more adequately discussed in the lawyer's