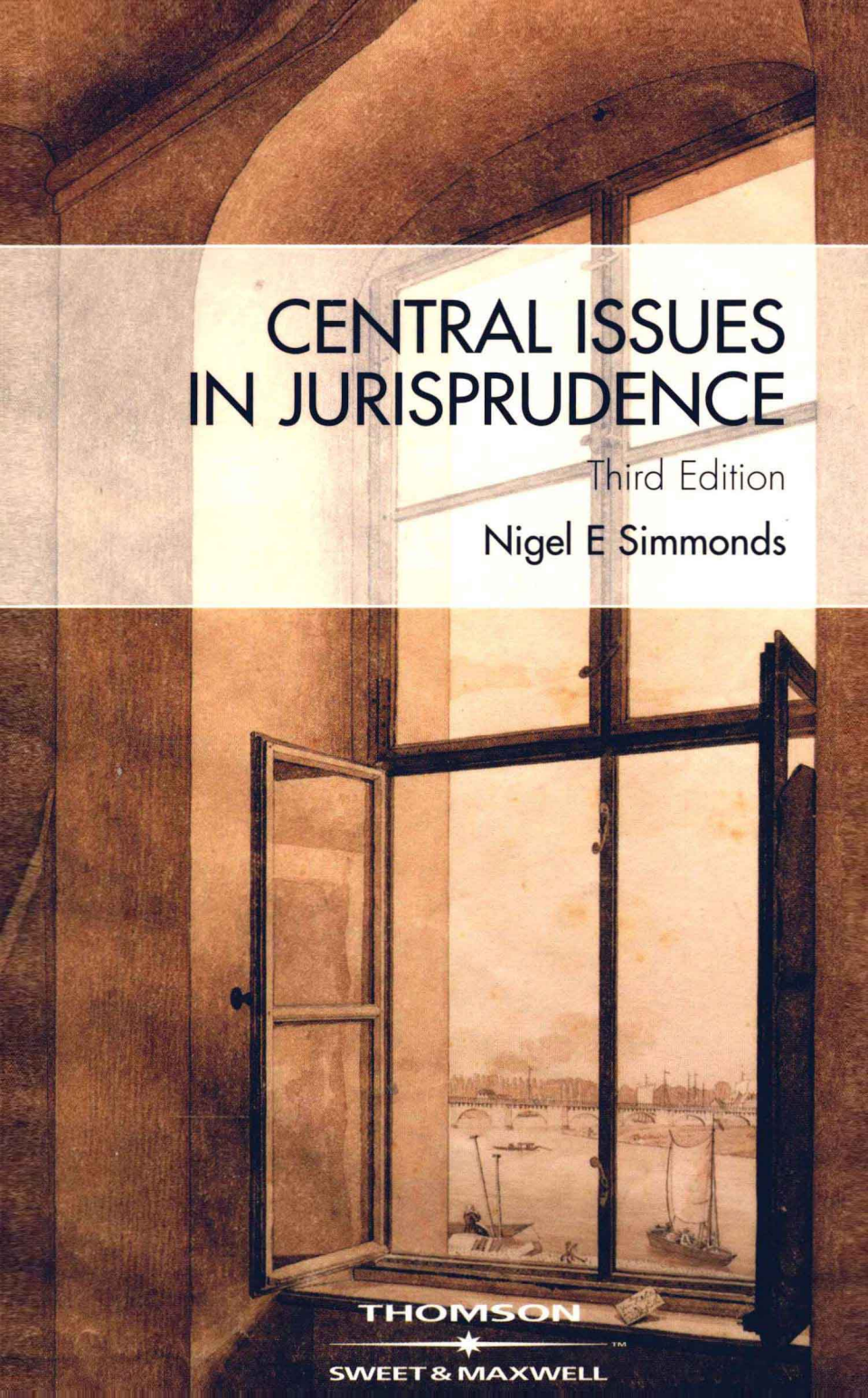
CENTRAL ISSUES
IN JURISPRUDENCE
Third Edition
Nigel E Simmonds
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CENTRAL ISSUES IN JURISPRUDENCE

JUSTICE, LAW AND RIGHTS

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PREFACE TO THE THIRD EDITION

Philosophical reflection upon the nature of law and justice is as old as philosophy itself, and that tradition of philosophical reflection has continued to the present day. This book aims to introduce readers to some of the major contemporary theories that make up the modern debate. The object is to put the reader, as quickly as possible, into a position where the most significant modern books on the subject can be read with comprehension, and with an awareness of the context of debate into which they fit.

A polity that is governed by law must ensure that decisions on the rights and duties of citizens can be justified in a principled manner. Consequently, a practice of articulate justification by appeal to general standards is at the heart of governance by law. Such a practice inevitably raises the question of what can count as an appropriate justification. Is "justification by reference to law" simply a matter of appealing to the commands of those who wield power? Or does law involve some necessary connection with justice and the common good? Questions such as these are inseparable from the form of political association that we call the rule of law. Jurisprudence therefore has a dual aspect: it is both a philosophical reflection upon the nature of law and an integral part of the phenomenon of governance by law.

It is for this reason amongst others that jurisprudence should form a central element in any legal education. In teaching jurisprudence to law students one undertakes an onerous responsibility, for one's task is not to impart a body of technical information but to introduce future lawyers and judges to one of the most important intellectual traditions of western civilization, and one that is fundamental to our conceptions of legality. There are different ways of tackling this task, none of them wholly satisfactory. The approach of this book is to focus upon a handful of important theories that at present help to shape the landscape of debate. The aim is to offer both exposition that will orientate the student who is embarking upon the principal texts, and critical analysis that will stimulate interest. I have not hesitated

to simplify matters where I think simplification will assist the student, and where any potential misconceptions will naturally be corrected by wider reading.

The principal changes to this edition are in Chs 2 and 7, which have been substantially rewritten; but small changes have been made elsewhere.

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INTRODUCTION

"Jurisprudence" is the term normally used in English-speaking countries to refer to general theoretical reflections upon law and justice. "Philosophy of law" is an equally good label. Lawyers are mostly down-to-earth types, and mention of "philosophy" is likely to send them rushing for the exit. To most people, philosophers seem to spend their time asking unanswerable questions, or doubting obvious common sense. Why then should a lawyer need to know anything at all about philosophy?

The principal reasons for studying jurisprudence are intellectual: the object of the enterprise is to achieve a clear understanding, not to improve one's professional skills. Since plenty of otherwise intelligent and fairly well-educated people are quite devoid of intellectual interests, one should perhaps not expect them to enjoy studying jurisprudence. Yet, even for them, jurisprudence should occupy a necessary place in their legal education. Even in its most mundane aspects, the lawyer's business is a matter of argument and reasoning. It may be true that one can learn to engage in this practice by immersion and experience, without much intellectual reflection: but one is then simply the conduit for assumptions and understandings that one has never subjected to serious scrutiny. As we shall see in a moment, the taken-for-granted perspectives of practical men and women are sometimes but the residue of yesterday's philosophy.

It is a mistake to ground the importance of jurisprudence upon a set of claims about its practical implications. Nevertheless, the subject can have practical implications, and may even be increasingly likely to assume great practical importance. In periods of settled legal development, lawyers can operate with the assumptions that they absorbed while studying the standard doctrinal subjects. Having been adopted in this non-reflective manner, the relevant framework of ideas may be invisible to those who daily invoke it: it is like the air that they breathe. Even the air may come to occupy one's conscious attention when its supply is disrupted or polluted, however.

When the legal order confronts new challenges in a period of

dramatic change, conventional assumptions may need to be identified, and their intellectual credentials examined. At such a time, the reflective detachment of jurisprudence makes a most vital contribution, as the most fundamental questions concerning law's nature and role must be addressed.

Lawyers with little interest in jurisprudence sometimes imagine that its exponents are claiming that the practice and application of law (in adjudication, for example) should be guided by philosophical theories. There are indeed theorists who take that view, but an acceptance of the importance of jurisprudence does not commit one to any such claim. Indeed, one of the central questions for jurisprudence is precisely the issue of how far law is a self-contained body of reasoning with its own autonomy or integrity, and how far the interpretation and application of law requires one to address open-ended questions concerning justice and morality: questions which cannot be resolved simply by reference to settled legal rules, and which traditionally fall within the province of philosophy. Some theorists believe that deep moral and political issues are unavoidably raised in legal argument and judicial decision; but there are others who deny this. Law is viewed by many as basically an exercise in rule-application, where reference has to be made to considerations other than the settled legal rules only in a small minority of situations. To decide whether adjudication needs to be guided by philosophy, we need to decide between these rival visions of law; and, in trying to decide between those rival visions, we are already engaged in philosophy.

Someone who denies the relevance of philosophical reflection to law is therefore entering the jurisprudential debate rather than rejecting it as irrelevant. The lawyer who argues that law has no place for broad philosophical theories is already adopting a certain philosophical understanding of the nature of law and of justice. To fully defend that position, such a lawyer would need to defend a series of general philosophical claims about the nature of law, the nature of rules, and the kinds of reasoning involved in the application of rules. Our supposedly "anti-philosophical" lawyer would soon find that he or she was engaged in philosophical discussion. To claim that, at bottom, legal practice is not a philosophical business is therefore not to oppose philosophy, but to adopt a philosophical position.

DOCTRINE AND THEORY

We usually think of law as requiring systematic study. We assume that law is not merely a long list of separate rules, or a jumble of unrelated decided cases, but an ordered body of standards exhibiting some degree of structure and system. Textbooks divide the law up into separate chunks that have a broad intellectual significance: thus, a book on contract might be divided into categories such as "formation", "vitiating factors", "discharge" and "remedies". Within each of these general categories, certain principles will be set forth, and the more specific rules will so far as possible be subsumed under general principles. The general principles will be invoked as a basis for interpreting and developing the more specific rules.

This way of thinking about law is so familiar to us that we tend to take it for granted. Yet it was not always so. Medieval legal writing did not take the form of a systematic treatise divided up into orderly categories and structured by principles. Right up until the eighteenth century, the main forms of legal writing (glosses, formularies and abridgements) were disorderly assemblages of legal information relatively untouched by any assumption that the law contained its own organising categories and principles. This prompts for us the question of why we make the assumptions that we do. Why do we assume that law will be structured by general principles, rather than simply being a long list of rules, enacted for enormously varied and unsystematic reasons?

Historically the assumed systematic character of law has been strongly influenced by the tradition of natural law theory, which argued for the existence of objective moral values binding upon the whole of humanity. It has been said that modern legal textbook writers are the heirs to the natural law tradition in so far as they seek to expound the detailed rules of law in relation to underlying principles and values. Certainly we can find legal writers of the seventeenth and eighteenth centuries invoking theories of natural law as a justification for their attempt to expound the law in ordered principles. Generally speaking, natural law theories in this period held that men have certain natural rights and duties, the enforcement of which makes organised social life possible. Courts and legal systems were viewed as defining and then enforcing these natural rights and duties. The law was capable of systematic study and exposition in so far as it was based on principles of reason and justice, since

the various established rules could be related to underlying principles that they expressed, or rights that they protected.

Many of the modern debates in jurisprudence find their most immediate origin in the attack that was mounted on natural law theories, at the end of the eighteenth century, by Jeremy Bentham. Bentham argued that talk of natural law and of natural rights can settle nothing: there is no way of demonstrating what such laws and rights might be, and so the theory of natural law offers no determinate guidance on moral and political issues. The only proper basis for determining how we should live, what laws we should have, and so forth, is the principle of utility. This principle holds that one should always act so as to maximise the greatest happiness of the greatest number. The only good reason for a law is its tendency to maximise happiness: all talk of law as enforcing pre-existing natural rights is not only wasted breath but also positively harmful, as diverting men's attention from the real issue of the consequences for welfare of having this or that law.

Bentham's rejection of natural law and his adoption of the principle of utility led him to further controversial conclusions. As we have already noted, some of the great legal writers of the period tended to expound the law in terms of an underlying natural law theory. Thus Blackstone's *Commentaries on the Laws of England* presented the major features of English law as an embodiment and protection of certain basic natural rights. Bentham objected to this approach because, he held, it confused the existence of a law with its merit or demerit. Whether or not a certain rule was an existing rule of English law depended upon whether that rule had been laid down. But whether or not it was a good law was an altogether separate issue, depending on the tendency of the law to maximise happiness. An approach that treated positive law expressly laid down in established rules as a manifestation of natural law was objectionable in that it confused what the law is with what the law morally ought to be. The theory of law that Bentham constructed admitted as part of the existing law only those rules that had been deliberately laid down by persons in authority (such as judges or legislators). All doctrinal arguments that were not concerned with the application of such rules were treated by Bentham as arguments about what the law should be, but not about what it is.

Bentham's critique of natural law theory gave rise to a number of problems that have continued to occupy the centre of the stage in modern jurisprudential debates. First and foremost is the

question of the separation of the law as it is and as it ought to be. When we state that such and such a rule represents the law, are we making a kind of moral judgment about the justice or fairness or reasonableness of the rule? Or could we set on one side all such questions of justice and reasonableness, while nevertheless justifying our statement by reference to observable facts concerning the issuing of certain orders by persons in authority or the acceptance of certain standards by people more generally? In describing the law as imposing a duty, are we committed to saying that the law is morally right or morally binding? Those who wish to emphasise the separability of law from morality are generally called "legal positivists". Legal positivists do not wish to argue that morality does not influence the law, or that law is not subject to moral scrutiny and criticism; nor would they necessarily deny that we may have a moral obligation to obey the law. What they do wish to claim is that the mere fact that something is the law does not make it right. The concept of law, for positivists, is a concept with no intrinsic moral import. Whether a rule is morally good, and whether it ought to be obeyed, are questions quite separate from the question of whether that rule is part of the existing law.

Second is the question of how we are to conceive of the nature of legal standards. Does law consist entirely of rules that can be identified by their source of enactment (having been laid down in a statute or a specific case)? Or can the law be said to include principles that have never been expressly formulated, but which are believed to form part of the conception of justice on which the black letter rules are based?

Third is the principle of utility itself. We will see in Part I of this book that the principle of utility as an account of morality faces serious difficulty. It can be argued that adherence to the principle would lead to morally abhorrent action in certain circumstances. It can also be argued that general adherence to the principle would make social co-ordination impossible, since such co-ordination requires a framework of rules that are treated as binding, irrespective of the requirements of utility. It can be suggested that utility is strangely irrelevant to the problem of justice, since the principle of utility is indifferent to questions of distribution which are central to the concept of justice, and because justice is concerned with largely backward-looking considerations, not with the future consequences taken account of by utility. Later in Part I, we will consider some rival attempts to develop theories of justice. The theoretical problems of justice

are important for the lawyer not only in themselves but also, as we shall see, for the bearing that they may have on the concept of law itself.

THE CENTRALITY OF JURISPRUDENCE

In his great work *The Philosophy of Right*, Hegel tells us that "the right of subjective freedom" is "the pivot and centre of the difference between antiquity and modern times." Drawing upon this idea, we will find that it is possible to characterise modern political thinking in a way that makes jurisprudence seem central to the intellectual problems of a modern community.

One tradition of political philosophy, drawing its inspiration from Aristotle's *Politics*, begins by asking a series of questions about "the good". That is to say, it regards as fundamental the question of what counts as an excellent, valuable life for a human being. Having arrived at such a conception of excellence, a philosopher within this tradition will then describe the social and political institutions capable of fostering such excellent lives. The family, the forms of economic production, and the forms of governance will all be viewed from this perspective. Law is likely to play an important part in this type of political vision, for law can inculcate good habits of conduct, protect good citizens from the predatory conduct of others, and can help to sustain other valuable institutions such as the family and the market. Being centred upon the attempt to foster a conception of excellence, this tradition of thought tends to assume that an adequate political community will have a high degree of consensus upon values; those values will, of course, inform and guide legal judgment.

Political philosophies stemming from this tradition have continued to thrive in the modern world, on both the left and the right; but they have been opposed by a rival tradition giving greater centrality to what Hegel calls "the right of subjective freedom". These theories emphasise the importance of each individual deciding for him or herself upon what counts as a good or excellent life. The role of the state is not thought to be the fostering of this or that conception of excellence, but the provision of a framework within which each individual has an opportunity to choose and pursue his or her own conception of the good.

Within the Aristotelian type of theory, law occupies an

important but not necessarily pre-eminent place. By contrast, law assumes absolute centrality within the later type of theory that emphasises the "right of subjective freedom". For individuals can be provided with the opportunity of pursuing their own conception of a good life only if they possess clearly demarcated domains of liberty within which they are free from interference: and it is the law that must demarcate such domains of liberty. In this way, political debate in such a community comes to be dominated by essentially juridical notions such as "rights", "justice" and "equality" (rather than by non-juridical notions such as "well-being", or "the common good").

If law becomes central in this way, it also becomes problematic. A political community that does not seek to foster a shared conception of excellence, but facilitates diverse individual choices, must contemplate a high degree of pluralism and diversity in the values espoused by its citizens and officials. How then is a shared set of rules going to be possible? Such a shared set of rules is *necessary* for the demarcation of domains of liberty, and it must be capable of being supported, understood and applied by people whose broader values are otherwise very diverse: but is this possible?

Jurisprudence has exhibited an intense concern with the nature of law partly in response to this problem. Can laws be identified with certain written texts (statutes and cases) established by authority? One problem here is that shared texts may not give us shared rules if we read the texts in quite different ways; and people with diverse values and cultural understandings may well reach diverse conclusions about the meanings of the texts. In any case, when judges apply the law they claim to discern its *true* meaning; and their conclusions frequently seem to be informed by the belief that the true meaning is that which renders the law most just. Can one really separate the meaning of the law from one's understanding of justice? Can one separate an understanding of justice from one's conception of "the good"?

In Pt 1 of this book we will examine various theories of justice. Questions of justice must be addressed when we are making legislative decisions about the laws that should be enacted, and when we subject existing laws to criticism. Such questions may also arise in the context of interpreting and applying the law to specific cases. Is it possible for questions of justice to be addressed without reliance upon conceptions of excellence and well-being? Will not every proposed account of justice (and

therefore every proposed body of laws) favour some conceptions of excellence at the expense of others? Or is it possible to develop theories of justice that are, in some sense, "neutral" between "conceptions of the good"?

In Pt 2 we will turn to the question of the nature of law. What is the relationship between law and justice? Is genuine law necessarily just? Must it at least *claim* to be just? Must the interpretation of law always be guided by considerations of justice? Do we need to invoke theories of justice in order to identify the content of the law?

Finally, in Pt 3, we will turn to the question of rights. The notion of a right might be considered central to the conception of politics as facilitating individual choices, or individual interests. Yet the concept of a right is very poorly understood. What exactly is entailed by the possession of a right? Are rights essentially concerned to protect choice? Or are they essentially concerned to protect our well-being, even independently of our choices? We will find that the various possible answers to questions of this sort are closely bound up with the issues of law and justice addressed earlier in the book.