

1. What is the difference between a kingdom and a band of robbers?

1 LAW CANNOT BE DEFINED WITHOUT REFERENCE TO JUSTICE

Law cannot be defined without reference to justice. Law cannot be understood apart from justice. This is a central thesis of natural law theory and also of Ronald Dworkin's legal interpretivism. Legal positivism denies that there is a necessary connection between law and justice.

Augustine of Hippo's thought, and the ways in which it was interpreted, are of considerable importance to Western history. Augustine was one of the key transmitters of natural law theory from ancient Greece and Israel to the West. Augustine has been claimed as the inspiration for the authority of the medieval Catholic Church, the Reformation and the idea of a secular society. In the past generation, Augustine has inspired the political theologies offered by British theologians John Milbank (*Theology & Social Theory*) and Oliver O'Donovan (*The Desire of the Nations* and *The Ways of Judgment*) and has been seen as an intriguing dialogue partner for postmodern thinkers (Schuld, *Foucault and Augustine*; Caputo and Scanlon, *Augustine and Postmodernism*).

Although Augustine continues to be regularly referenced by legal philosophers (Hart, Finnis, Alexy) and a collection of essays on *Augustine and Modern Law* was recently published, there has not been a sustained formulation of a theory of law inspired by Augustine that stands in the same relationship to Augustine as Finnis's *Natural Law and Natural Rights* stands in relationship to Aquinas. Augustine was a major interlocutor for Thomas Aquinas, who is usually seen as the natural law theorist par excellence. Augustine's approach was, however, more provocative and critical than Aquinas's. Injustice was a major feature of his magnum opus *The City of God* and of his correspondence.

Augustine posed two questions that go to the heart of the nature of law and that have continued to fascinate legal philosophers in the centuries since he raised them. Augustine asked: (i) what is the difference between a kingdom and a band of robbers? (ii) is an unjust law a law at all? These two questions force us to consider whether law is simply a means of social control, distin-

guished from a band of robbers only by its size, or whether law is a social institution justified by its orientation towards justice.

This book takes its inspiration from Augustine's questions to develop a legal theory that is realistic but not cynical about law's relationship to justice and to violence, that can diagnose ways in which law becomes deformed and pathological, and that indicates that law is a necessary but insufficient instrument for the pursuit of justice.

Legal positivism is right to identify that the relationship between law and justice is problematic but wrong to conclude that it is both possible and helpful to analyse law in isolation from justice. Augustine begins *The City of God* Book XIX, which contains his central discussion of justice, by discussing the supreme good. He says:

the end of our good is that for the sake of which other things are to be desired ... Thus, by the *end of good*, we at present mean, not that by which good is destroyed, so that it no longer exists, but that by which it is finished, so that it becomes complete.

Justice is the end of law. Justice is the ultimate purpose of law; it is the goal (*telos*) towards which law aims. I will argue in this book that law is best understood as *differing to* justice: i.e., as referring to, deferring to and differing from justice. Laws necessarily refer to justice: their authority depends on their pretended orientation towards justice. Laws necessarily defer to justice: there is an implicit acknowledgement that laws can only achieve an approximation of justice. Laws necessarily differ from justice because the constraint of governing through general or generalizable rules makes it impossible for laws to do justice in all individual cases. Only by recognizing these connections between law and morality can law be understood as a social institution.

Defenders of the rule of law as an ideal, such as Fuller and Finnis, argue that the rule of law secures important values. Raz responded that law is simply an instrument that can be used just as easily for evil purposes as for good. Marx affirmed that the rule of law secured important values but stressed that, as chief among those values was the protection of the property of those controlling the means of production, communism required the abandonment, or at least the rethinking, of the rule of law.

This book seeks to explore the claim of justice: to consider whether and to what extent it underpins the rule of law as an ideal, as well as the dangers that arise if the claim is inflated or if it is disregarded.

2 IDEALIST AND CYNICAL RULERS AND IDEALIST AND CYNICAL SUBJECTS

Legal systems contain two different kinds of people: rulers and subjects. Rulers make the laws, administer the laws, decide whether or not the laws have been broken and enforce the laws. Today, we have different types of rulers – legislators, bureaucrats, judges and police officers – who carry out those different roles. Subjects obey the laws.

Some of the rulers may believe that the laws are just. Let's call them the idealists. Other rulers may believe that the laws are unjust, but they enjoy having power and so they want to see the laws followed nonetheless. Let's call them the cynics. Some of the subjects may believe that the laws are just. In the same way that the idealist rulers promote the laws sincerely, the idealist subjects obey the laws voluntarily because of their belief that the laws are just. Other subjects may believe that the laws are unjust. Like the cynical rulers, they think that the laws are merely tools of oppression and social control. They will try to avoid following the laws if at all possible and will only obey them when the price of not doing so is too great.

So, there are already four perspectives on the law: the perspectives of idealist rulers and cynical rulers, idealist subjects and cynical subjects. Now imagine a visitor to the legal system, someone who is not a subject or a ruler within the system but an outsider. If such a visitor wants to understand the legal system, which perspective should he or she adopt?

Perhaps the visitor should adopt the perspective of the idealist ruler. That way the visitor will see the legal system at its best and will understand how the legal system tries to achieve justice for its subjects. Or the visitor could adopt the perspective of the cynical ruler. From this perspective the visitor will be able to expose the ugly realities of power, control and oppression that lie behind the claims that the law achieves justice.

If the visitor looks at things from the perspective of the idealist subject, he or she will be able to understand how the laws are understood and obeyed in practice, how the letters on the page shape the lives of those law-abiding subjects who live under them. The visitor would see things differently again if he or she looks at the legal system from the point of view of the cynical subject, who only obeys the law when they are forced to.

Different scholars suggest that the visitor should adopt any one of those different points of view. Ronald Dworkin approaches law from the perspective of the idealist ruler and Niccolo Machiavelli and Karl Marx from the perspective of the cynical ruler. Sociologists of law often want to examine how law works in practice from the perspective of the idealist subject. Oliver Wendell Holmes

famously thought that law was best understood from the perspective of the bad man, the cynical subject.¹

As any legal system may well contain both rulers and subjects who are idealists and cynics, each of these four perspective needs to be considered and weighed in order to understand what the overall picture of what law is in that system and how it relates to justice. As we go through this book, try to keep each of our four characters – the idealist ruler, the cynical ruler, the idealist subject and the cynical subject – in mind.

The four characters are archetypes. In reality, a ruler does not have to believe that their legal system is perfect in order to be an idealist. The ruler may think that the system is the best legal system that is realistically achievable and that it has the best means available for changing the laws so that they become more just. For example, a ruler who was a sincere believer in liberal democracy might well think like this.

A ruler who is a cynic may not need to be thoroughly cynical. Such a ruler may be content that some of the rules in the legal system are just so long as his power is protected. Indeed, a cynical ruler might well come to the conclusion that a good way to preserve his power is if many of the rules in the system appear to be just. What's more, for reasons we will explore in Chapter 5, the cynical ruler will probably work out that the best way to preserve his power would be if even the unjust rules in the system were presented as if they were just.

Thus the idealist ruler and the cynical ruler will have something in common: both of them will present the rules of the legal system as just. The idealist ruler will present them as just because she sincerely believes them to be just; the cynical ruler will present them as just because he thinks that will be the best way to preserve his power.

The idealist subject seems the most unlikely of the four archetypal characters. Whereas the idealist ruler may be self-deluded, if we met a subject who believed that all the laws of their legal system were perfectly just we would think they had been brainwashed. A subject who believed that the laws of their system were just whatever those laws happened to be is someone we would regard as dangerous.

The cynical subject approaches each and every law with a question: is it in my interests to obey this law? If the answer to that question is that it is in the cynical subject's interests to obey the law, the question of force does not come into it. The cynical subject is happy to volunteer her obedience because of what she gets out of it. If the cynical subject concludes that obeying this particular law is not in her best interests, then she has to go on to consider how likely it

¹ O. Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

is that her disobedience will be punished and how severe the punishment will be if it is imposed. There is therefore a further step in her calculation of her own self-interest that she has to make before deciding whether to obey or to disobey.

The natural law theory of Augustine and Aquinas does not start from the perspective of any of the four archetypal characters we have met so far. Augustine and Aquinas adopt the perspective of the conscientious subject. For them, a central function of law is to create a moral obligation to obey the law. The conscientious subject wants to know whether or not a law is just. If the law is just, then the conscientious subject will obey the law. If the law is unjust, then the conscientious subject has reasons not to obey the law.

The idealist subject regards the laws of their legal system as just. The conscientious subject measures the law of their legal system against an independent standard of justice.

In those cases where the laws of their legal system are unjust, the conscientious subject may think that it is nonetheless worth obeying the laws in order to maintain the stability of the system as a whole. However, the conscientious subject whose ideal of justice is an independent standard may come to the conclusion that a particular law is so unjust that he should disobey it. Such a conscientious subject is a critical subject, who may defend or criticize the legal system to which he is subject, depending on his assessment of how its rules measure up to the independent standard of justice to which he holds.

Just as both the idealist ruler and cynical ruler present the rules as just (though for different reasons), so the idealist subject and the cynical subject obey the rules (though for different reasons). The cynical subject's obedience is contingent on her calculation of her own self-interest. The conscientious subject's obedience is contingent on his calculation of whether the rules approximate sufficiently the standard of justice against which they are to be measured.

Let's return to the perspective of the rulers. The idealist ruler wants her subjects to obey the laws because she believes that the laws are just and therefore thinks that obeying the laws will be good for her subjects. The cynical ruler wants his subjects to obey the laws because this will preserve his power. Both these types of ruler know that their subjects may be idealists, cynics or conscientious. By proclaiming that their laws are just, the rulers will give their idealist and conscientious subjects reasons to obey the laws. Such proclamations may also encourage their subjects to become idealists by leading them to believe that the laws of their system are just. By adopting rules that their subjects can see are in the interests of those subjects, the rulers will give their cynical subjects reasons to obey the laws. It is only where the appeals to both justice and self-interest fail that the rulers will have to use force in order to secure the obedience of their subjects. The use of force is expensive and

inefficient, and therefore prudent rulers, whether they are idealists or cynics, will limit the number of situations in which the laws are obviously unjust and obviously not in the interests of their subjects.

3 THE CLAIM OF JUSTICE

Thinking about how law looks through the ideas of our five characters has uncovered three important features of law: (i) that rulers present laws as just; (ii) that rulers do this in order to persuade their subjects to obey the rules voluntarily; and (iii) that when this persuasion fails, rulers use force to secure the obedience of their subjects.

Each of these three features of law will be explored in this book, though it is the first one which is primary. It is the presentation of laws as just which rulers use to induce voluntary obedience and to justify the use of force when obedience is not volunteered. Voluntary obedience (what some legal theorists call a habit of obedience) is obviously a key feature of what makes a system of rules a legal system. A legal system where no one ever obeyed the rules would hardly count as a legal system at all. It would be totally ineffective.

As for force, we find it hard to imagine how a legal system could be effective if there were no sanctions imposed for disobedience. If laws are to be effective they need to be backed up by at least the threat of the use of force. Yet a system in which the subjects only obeyed the rules because they were forced to do so would not really seem like a legal system either: it would be much more like a prison camp.

But what, if any, attention should we pay to the claim of justice? Should we disregard it entirely because we know it can be made by the cynical ruler as well as by the idealist ruler? Should we ignore it because we know that it is made both by rulers who came to power by peaceful means and by rulers who came to power by violent means? To answer these questions we need to think a little about the history of the claim of justice and how it has been challenged.

Alexander the Great conquered a vast empire. In *The City of God*, Book IV, chapter 4, Augustine retells the story of when Alexander the Great met a pirate. The pirate suggested to Alexander the Great that they were just the same, that both of them were robbers, and that the only difference between them was one of scale.² There have been many like Alexander the Great who have conquered new lands: Julius Caesar, William the Conqueror, Babur and Napoleon are just a few of the examples of the men who have led armies, fought wars and sought to impose their rule on those whom they defeated. These conquerors typically

² Augustine's source for this story was either Nonius Marcellus's *De Compensiosa doctrina libros* or Cicero, *De Republica*, iii.

confiscated land and possessions and then gave them to their followers. The basis for this activity is violence. It is might that prevails. Augustine was very clear-sighted about this: 'to make war on your neighbours, and thence to proceed to others, and through mere lust of dominion to crush and subdue people who do you no harm, what else is this to be called than great robbery?'³

However, although it was might that secured the conquest, the victorious conqueror often (but by no means always) appeals to something else in order to maintain their rule. The crushing power of might is transformed into the claim of right. The new rulers begin to claim that their rule and their rules are just. The making of such a claim is a necessary, though as we shall see in Chapter 3 not a sufficient, condition for the existence of a legal system.

In ancient civilizations such as Egypt, Assyria and Babylon, rulers claimed that their rule was just in the most direct way possible: they claimed that they were gods, or the sons of the gods. Because of their divine authority, the rules they made must be just. In ancient Greece, Thucydides presents the rulers of Athens as claiming that 'right makes might', i.e., that the power of the Athenian state justified it in behaving exactly as it wished. In 416 BC, Athens demanded that the island of Melos become a subject state; when the Melians responded that they were a neutral state and that Athens' threats were unjust, the Athenians answered, 'the strong do what they can and the weak suffer what they must'.⁴ Athens' stance denied the existence of any standard of justice higher than the decisions of its rulers. The ancient world therefore contains examples of idealist rulers (Egypt, Assyria and Babylon) and cynical rulers (Athens). What they have in common is the denial of the existence of any standard of justice other than their rule.

But in Athens, the claim that the rulers could not act unjustly was challenged. Socrates asserted that there was an independent standard of justice. Shortly after 404 BC, he refused to cooperate with an order to arrest Leon of Salamis, whose proposed execution he regarded as unjust. Plato and Aristotle developed further Socrates' idea that there was a standard of justice that was different from whatever the laws might be. They argued that the standard for justice was to be found in nature. This standard for justice is the natural law. Laws and actions by rulers that contradicted the natural law were unjust.⁵

Elsewhere in the Mediterranean, Israel-Judah developed a tradition that also challenged rulers' claims that their rule was just. But unlike Greece, this tradition arose from within its religion. The religion of Israel-Judah claimed that

³ Augustine, *The City of God*, H. Bettenson tr. (Penguin 1955) IV.6.

⁴ Thucydides, *The History of the Peloponnesian War*, 5.84–116.

⁵ C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart 2002) 37–44.

its God YHWH was the creator of the whole world. It claimed that this God had directly revealed to Moses the Ten Commandments that formed the centre-piece of Israel-Judah's laws. Israel-Judah's laws as recorded in the Pentateuch were, *ex hypothesi*, just. It might have been expected that these beliefs would have resulted, as elsewhere in the ancient world, in an authoritarian society in which the king, as YHWH's anointed ruler, was the infallible mouthpiece of divine justice. Not so; instead, like the idea of natural law in Greece, the Pentateuch became the focus to challenge rulers' claims to be ruling justly. Priests and kings appealed to divinely authorized rule and claimed to be dispensing divine justice. Prophets responded by appealing to the Pentateuch against the king. The king was authorized by YHWH to uphold YHWH's law. When the king's actions contradicted YHWH's law they were *ultra vires*, outlawed. Even Israel-Judah's greatest kings, Saul, David and Solomon, were denounced by prophets when they acted unjustly.⁶

Israel-Judah occupied a tiny portion of land between the empires of Egypt to the South and first Assyria and then Babylon to the East. It was invaded by first one and then another of these empires and its independence was finally destroyed by Babylon. The later prophets declared the loss of political independence to be YHWH's judgment on the gross injustices and violations of the Pentateuch by the kings of Israel-Judah. They also insisted that YHWH's standards of justice applied to the new rulers, be they Egyptian, Babylonian, Medo-Persian, Seleucid or Roman. In this way, basic standards of YHWH's justice were declared to be universally applicable – to be, in effect, natural law with a divine origin.

So, in the ancient world two views of law's relationship to justice competed with one another. There was the official propaganda of the rulers, which claimed that the laws were just because they represented the will of the gods or because 'might makes right'. Standing against that were the Greek philosophers who claimed that there was an independent standard of justice to be found in nature, and the prophets of Israel-Judah claiming that there was a God-given standard of justice against which all human laws should be measured.

The Roman Empire brought new levels of sophistication to its laws and its propaganda. The emperors justified their conquests as bringing the *Pax Romana* (the Roman peace) and the justice of Roman law to the barbarians. The Empire proclaimed that its rule and its rules delivered divinely authorized peace and justice. The strength of its legions ensured peace and the wisdom of its laws enacted justice for all. The pagan emperors claimed that they were

⁶ 2 Samuel 12; 1 Kings 11:4.

gods, or would become gods on their death. The imperial cult was the focus for this propaganda of divine rule.

Yet, as the Empire extended itself, a sect from Israel-Judah began to win converts across the Roman world. This sect worshipped not the emperor but one crucified as a rebel. The death of the sect's founder, Jesus of Nazareth, following trials by both Jewish and Roman rulers was, for its members, definitive proof that laws could be unjust, that might did not make right, and that God did not automatically approve of every action taken by rulers.

Then, in the fourth century after the death of Jesus, Constantine became Emperor and started the move towards the adoption of Christianity as the official religion of the Empire. This was a key moment in history, and not just in legal history. The Roman propaganda about divine emperors was repackaged for a Christian audience. Eusebius presented Constantine as God's (and Jesus's) representative on Earth. Once again, the rulers were attempting to claim that their laws and their rules had to be just because they were authorized by God.

However, within a hundred years, two key things had happened. First, in 390 AD, an army commander was killed in a riot in Thessalonica. In response, the Roman Emperor Theodosius ordered the massacre of 7,000 people. Ambrose, Bishop of Milan, was outraged. He banned Theodosius from attending church until Theodosius had performed several months of public penance. It was a dramatic demonstration that, in Ambrose's view, the emperor could have, and had, broken God's law.

The second event was even more remarkable. In 410 AD, an army of Visigoths invaded the city of Rome. It was an event of greater symbolism than 9/11. It was a shock from which the Western Roman Empire never recovered. On the other side of the Mediterranean, in North Africa, Augustine of Hippo attempted to make sense of it. He wrote a long book called *The City of God*, whose major theme was that apparent success or failure in life has nothing to do with whether God is pleased or displeased with you. What is more, Augustine denied that the word 'justice' could properly be used to describe the *Pax Romana*. The Roman Empire and its laws were never just. Human rule, even in the form of the almost universal Roman law, had never delivered justice. Justice was divine and was manifested only in Jesus of Nazareth and in the Heavenly city.

Augustine has been interpreted in different ways, explored further in Chapter 8. In the Middle Ages he was usually treated as an idealist, who believed that the problem with the Roman Empire was that its Christianity had never been more than a veneer and so its laws had never truly been reformed to accord with divine justice. More recently, he is regarded as having been cynical about human laws, as someone who thought that human laws are always, inevitably unjust. A consideration of Augustine's thought as a whole shows him to be

concerned about the relative justice of human power structures while always asserting that they are provisional and fall short of the standard of true justice. Augustine was neither an idealist nor a cynic; he was a critic.

4 LAW'S REFERENCE TO JUSTICE: THE THREE DIMENSIONS OF THE JUSTIFICATION OF LAW

Law is a technical object;⁷ it is something designed and used by human beings for a purpose. 'Every technical object is characterized by the particular end it has been conceived to serve.'⁸ Legal systems and the laws within them are designed to achieve the purposes of guiding behaviour and stabilizing expectations, subjecting violence to discipline and resolving disputes. They do this not by issuing bare commands but by issuing intelligible rules, for which reasons are either expressly or impliedly given – reasons that justify the rules adopted in terms of the conceptions of deep justice to which they refer. It is the giving of reasons that transforms the rules issued by the rulers from mere commands into laws and that gives rise to the expectation of systemic coherence.

The justification of law is threefold. There is the claim of authority: the law is determined (whether this is understood in terms of deciding, that is, making, or discerning, that is, finding) by those within a community who have the right to do so. There is the claim of substantive justice: that the law determined is substantively just. There is the claim of allegiance: that the rules are of benefit to those who are subject to them because they can be followed and will be followed by all those to whom they apply.

These three claims might be expressed as follows. The claim of authority says 'do this because I said so'; the claim that the law is substantively just says 'do this because it is the right thing to do'; the claim of allegiance says 'do this because everybody else will be doing it'.

Let's examine those claims in more detail.

4.1 The claim of authority: That the law is determined by those who have the right to do so

The first claim, the claim to have the right to determine the law, is, at root, a political claim.⁹ This is the claim that is made by all those organs within

⁷ A. Supiot, *Homo Juridicus: On the Anthropological Function of the Law*, S. Brown tr. (Verso 2007), 46–7, 115; K.M. Ehrenberg, 'Law as Plan and Artifact' (2016) 7 *Jurisprudence* 325–40.

⁸ Supiot, *Homo Juridicus*, 115.

⁹ To the obvious objection raised by N. MacCormick in 'Why Law Makes No Claims' in G. Pavlakos ed., *Law, Rights and Discourse* (Hart 2007) at 59 that, being

a system that claim to be sources of law. This claim may be made in strong or weak forms. Among its strongest forms are the assertions that the ruler is given by God or that she perfectly embodies the will of the people. In England, questions of political right are forestalled by the motto emblazoned on the Royal Coat of Arms: *Dieu et mon droit*. The Queen's position is both given to her by God and established by 'her right'. In its weakest form, the claim may simply be that the judge was appointed in accordance with those procedures governing the appointment of judges at the time in question. Even here, however, there is not only an appeal to procedural justice but also an assertion that those procedures were morally permissible.

The claim that the law is determined by those who have the right to do so helps law to achieve its goals because it establishes recognized sources of law. Subjects know who will be issuing the general and generalizable rules that they and others are supposed to follow. Subjects know who is claiming the authority to determine which uses of force are permitted and which are not. Subjects know which organs have been given authority to resolve disputes.

The claim of authority is also the claim on which a legal system relies when its claim of substantive justice is falsified. Rulers insist that those subject to those rules do not have to and are not permitted to reconsider the substantive justice of the rules for themselves, but must act in accordance with the rules. Legal systems insist, in the name of right order, that even if the law is unjust, it is right that its sanctions be applied.¹⁰ The claim of authority is that reforming an unjust law is a matter for those who are the rightful authorities.

The claim of authority guides behaviour and stabilizes expectations by identifying those who will make the rules. The claim of authority disciplines violence by identifying those who have responsibility for enforcing the rules. The claim of authority identifies those who are tasked with resolving disputes.

4.2 The claim of substantive justice: that the law that has been determined is substantively right

Legal systems do not, however, rely on the claim of authority alone. Legal systems claim that their rules are made by those who have the right to do so

merely a system or a state of affairs, 'Law claims nothing', R. Alexy responds in 'The Dual Nature of Law' (2010) 23 *Ratio Juris* 167, 168 that 'Law can and does raise a claim to [moral] correctness, for the claim is made by its representatives'. In a legislative Act, the legislature speaks as a corporate entity with a single voice declaring this law is morally in order.

¹⁰ P. Soper, 'Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law' (1988) 22 *Creighton Law Review* 67, 84.

and that their rules are morally justified.¹¹ The politicians who legislate for us, the government that executes those laws and the judges who decide cases not only claim to have the formal right to do so, but also claim that their judgments are 'right'. It is the reference to justice that makes a command a law rather than a bald assertion of power.

Law claims legitimate moral authority for itself; legal systems claim both that their organs have the right to make normative decisions and that those normative decisions are right. Law refers to justice because legal systems necessarily claim that their rules are just. Imagine you were reading the constitution of the Republic of Ruritania and you discovered that it declared that the Republic of Ruritania was an unjust republic, governed according to law. Wouldn't you think that was a contradiction in terms?¹² A legal system that does not claim to be just is no legal system at all.

A legal system seeks to guide behaviour and stabilize expectations by purporting to provide its subjects with decisive reasons for acting in accordance with its rules. This claim is most successful when the moral reasons that have led to the adoption of the particular law are identified and persuasive.

The claim that the law is substantively right may be made in strong or weak forms. At its strongest, it is the claim that the law was given directly by God or that it perfectly reproduces immutable, eternal principles of true justice. Among its weakest forms is the claim that this law represented the best available political compromise that could be reached in all the circumstances. Nonetheless, there is a claim in all cases that the law is morally in order; that it would be morally right to obey this law.

Whether presented in its strongest or its weakest forms, however, there is always an excess over the mere claim that the rules have been formulated according to the right procedures. Governments, legislatures, judges and bureaucrats do not merely assert that they have the right to make or apply the rules; they also invariably assert that they are making the right rules or applying the rules in the right way. Governing according to law always involves the claim to be doing right through the enactment and enforcement of law. Law necessarily claims to possess legitimate moral authority.¹³

¹¹ J.L. Coleman, 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence' (2007) 27 *Oxford Journal of Legal Studies* 581.

¹² R. Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, B.L. Paulson and S.L. Paulson tr. (Oxford University Press 2002), 36.

¹³ J. Raz, *Ethics in the Public Domain* (Clarendon 1994) 199.

The moral authority of law is claimed by reference to a conception of deep justice (explored in Chapter 2). Alain Supiot has argued that:

Whereas conceptions of justice differ from epoch to epoch and from country to country, the need for a shared representation of justice in a particular country and at a particular time does not. The legal system is where this representation takes shape and ... gives shared meaning and a common orientation to people's actions.¹⁴

Gustav Radbruch wrote, in a similar vein: 'One cannot define law, also positive law, in any other way than as an order or statute that is by its very sense determined to serve justice.'¹⁵ Law is therefore not separable from deep justice. Legal systems refer to deep justice and law gives form to deep justice. Law makes a conception of deep justice effective, though there is always an excess in the conception that cannot be given form in law.

The first issue of the *Modern Law Review* in 1937 carried an article by Richard O'Sullivan entitled 'A Scale of Values in the Common Law', in which he sought to trace the ideas of deep justice that underlay the English common law and to show that they were arranged in a 'hierarchy of values', 'a certain scale of objective values', the use of which 'furnishes a reasonable rule'.

A legal system's claim that the rules are substantively just helps to resolve disputes because it seeks to persuade all its subjects to adopt the common conception of deep justice that the rules are intended to reflect. A legal system's claim that its rules are substantively just helps to discipline violence by persuading its subjects that their desires, suitably guided and stabilized, are capable of fulfilment by abiding by the framework of its rules. Thus the claim that the law is substantively just is essential to enable a legal system to fulfil its aims. As we will see in Chapter 5, however, the concept of deep justice to which a legal system refers may be seriously flawed.

4.3 The claim of allegiance: that the rules are of benefit to those who are subject to them because they can be followed and will be followed by all those to whom they apply

The third dimension of law's justification is the claim that the rules are of benefit to those who are subject to them because they can and will be followed by all those to whom they apply. This claim distinguishes a legal system both from a tyranny and from a managerial system.

¹⁴ Supiot, *Homo Juridicus*, xx.

¹⁵ G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', in *Rechtsphilosophie* (7th ed., Koehler 1946) 353.

The twelfth-century writer John of Salisbury argued that ‘Between a tyrant and a prince there is this single or chief difference, that the latter obeys the law and rules the people by its dictates, accounting himself as but their servant’.¹⁶ The difference between the prince and the tyrant is that the prince counts himself as *bound* by the law. In the twentieth century this idea was picked up by sociologist Georg Simmel,¹⁷ and was reintroduced to legal philosophy by Fuller as the idea that

There is a kind of reciprocity between government and citizen with respect to the observance of rules. Government says to the citizen in effect, ‘These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.’ When this bond of reciprocity is finally and completely ruptured, nothing is left on which to ground the citizen’s duty to observe the rules.¹⁸

Fuller suggested three differences between a managerial system and a legal system. First, in a managerial system only the subjects are bound by the rules, whereas in a legal system the ruler is also bound. Second, the directives issued by a manager are followed by those subject to them in order to fulfil the manager’s purposes, whereas laws are given that they may be followed by subjects in pursuit of their own ends. Third, whereas a manager’s prime concern is with his subjects’ relations towards him and only secondarily with the interrelationship between his subjects, the lawgiver’s focus is the reverse. As a result, whereas a lawgiver will issue general or generalizable rules, a manager will only have reason to issue general rather than specific directives if to do so is, in the particular case, more expedient. Moreover, there is no strong reason why the manager should himself act in accordance with general rules. Therefore:

the subordinate has no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order. This means, in turn, that in managerial relation there is no room for a formal principle demanding that the actions of the superior conform to the rules he has himself announced; in this context the principle of ‘congruence between official action and declared rule’ loses its relevance.¹⁹

¹⁶ John of Salisbury, *Policraticus*, Cary Nederman tr. and ed. (Cambridge University Press 1991).

¹⁷ G. Simmel, *The Sociology of Georg Simmel*, Kurt H. Wolff tr. (Free Press 1950) 186.

¹⁸ L.L. Fuller, *The Morality of Law* (revd ed., Yale University Press 1964) 39–40.

¹⁹ Fuller, *The Morality of Law*, 208–9.

Compliance by the ruler with the declared rules therefore constitutes the key distinction between a legal system and a regime of managerial direction.

The importance of this dimension of law's justification for law's aims in guiding behaviour, stabilizing expectations and subjecting violence to discipline should now be apparent. It is only if it is possible to follow the rules that the law can guide behaviour. It is only if others can, and are likely to, follow the rules that law can stabilize expectations. It is only if the authors of the rules will follow them, and there will be protection from violence in circumstances not permitted by the rules, that law can discipline violence. It is only if legal redress is available if the rules are not followed that the law can resolve disputes.

4.4 The interdependence of the three dimensions of law's reference to justice

Law is not merely a practice of issuing rules backed by force; it is a practice of issuing rules that carry with them reasoning explaining their justification. Law is a practice of issuing rules that claim to be just. Paradigmatically, law is a practice of subjecting rulers to the requirement to exercise their power through issuing justified rules and adhering to those justified rules. When this is done in a given society, then that society is subject to the rule of law.

Although the claims of authority and of allegiance can be examined as involving more than the mere claim that the law is substantively just, they are not severable from that claim. As we will explore in Chapter 3 on violence, a legal regime that is governing according to the rule of law does not say 'follow these rules because I said so', irrespective of their substantive justice, but rather 'follow these rules because you ought to accept my judgment that these rules are substantively just'. The claim of authority includes within itself an assertion of the substantive justice of the rules of the legal system. Similarly, the claim of allegiance does not assert that you should follow these rules because everybody else will be doing so and you should do what everybody else is doing, whether it is just or unjust. Rather, the claim of allegiance is that you should follow these rules because everybody else will be doing so, and doing what they are doing is the right thing to do, because the rules that they are following are substantively just.

5 THE WAY FORWARD

The next chapter explores the definitions of law and justice being used in this book. Chapters 3 and 4 look at the alternative approaches to law: law viewed as violence, law analysed without reference to justice and law seen as pursuing

the goal of freedom. I will argue that while features of law do distance it from justice, law as a social institution depends on its reference to justice and is necessarily connected to an account of the common good.