Chapter 1
Law

Introduction

Legal method refers to the collection of methods or techniques for working with law. The next chapter explains the term legal method. As a prelude to this, Chapter 1 explains in broad terms the scope and nature of the term 'law'.

Part A. Nature of Law

Law has both a wide and a narrow scope depending on how one wants to look at it. The narrow scope is law as a set of rules, while the broad scope is law as it enmeshes with social science, which in brief form is law as a social science.[1] Sometimes scholars also refer to it as sociological jurisprudence. A useful way to explain and illustrate this is with the following diagram:

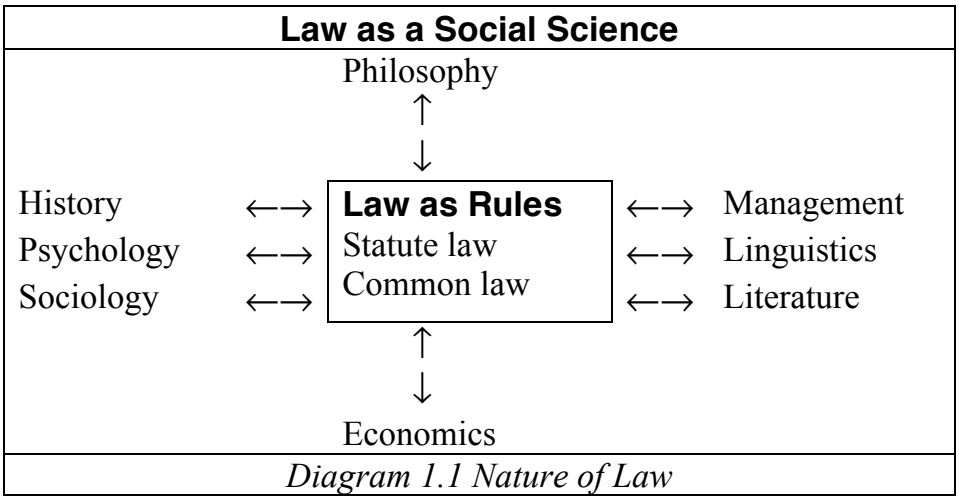

Diagram 1.1 Nature of Law

1. An illustration is Enright (2015) *Legal Reasoning*. In order to explain legal reasoning it is necessary to make frequent excursions into the social sciences.

This diagram illustrates the narrow scope of law in the centre box that bears the label 'Law as Rules'. It displays the wider scope of law by various social sciences that cluster around the box containing Law as Rule. In this context these eight disciplines are representatives of all the social sciences. The basic proposition is that any social science potentially casts some light on the wider application of law. There are two-way arrows between these disciplines and Law as Rules. These represent the relationship and interaction between the two.

Part B. Law as Rules

A common major focus of lawyers, and law students in law schools, is to conceive law as a set of rules that they need to know and understand. These rules are of two kinds, common law made by courts in the process of deciding a case and statutes enacted by a legislature. Law in this form is sometimes called black letter law. It is also sometimes called positivist law. This description comes along a path that history laid down. Positivism is a theory about law that was a reaction to another theory labelled natural law. In simple terms, natural law theory said that the only valid law was a law that conformed to a permanent and comprehensive set of values that pervaded human life. Positivism as a legal philosophy denied that there was such a set of values and said, in simple terms, that law is any command or prescription that issues from or is 'posited' by a body that claims to possess law-making authority. (As is obvious, the label 'positivism' derives from the notion that law is 'posited' by law makers.)

The study of law as a set of rules is largely a matter of English comprehension. To a considerable extent this is how law is conceived as a profession that people practise. Know the rules and use them to help your clients. It is also the view of law that is dominant in the syllabus of most law schools. However, in studying these rules or using them in the practice of law it is impossible to insulate them entirely from their wider role as social phenomena. For example, it is almost inevitable that some unstated value or unformulated premise of human behaviour underlies how law is used, especially in litigation.

There is a traditional classification of law, or sources of law as is the common phrase, as primary, secondary and tertiary sources:

1. Primary Sources. Primary sources consist of law itself in its raw state. There are two major types – statutes (also called statute law) and common law:

 1.1 Statutes. Statutes include delegated legislation and instruments made under authority that a statute has conferred on some official. Legislatures, such as a parliament or congress, make or enact statute law.

 1.2 Common Law. Common law is found in cases. Courts make common law. Courts also interpret both statute law and common law. These interpretations add to, and become part of, statute law and common law.

2. Secondary Sources. Secondary sources of law refer to the description and analysis of law in legal texts. Examples are textbooks, encyclopedias, journal articles and services.

3. Tertiary Sources. Tertiary sources refer to two types of materials – published material that is related to law and documents that lawyers create when they work with law.

Law in the pure sense, which is the concern of legal method, consists of primary sources. However, the discussion here also covers secondary and tertiary sources. It is necessary for law students to understand all three sources as they embark on their study, in order to see the big picture. Moreover, apart from their use in making law accessible, secondary sources might be used as a source of arguments for interpreting law.

Primary Sources

Primary sources consist of the law itself. There are two basic types – statute law (or just statutes) and common law.

Statute Law

Statute law possesses four components:
1. Statutes. Statutes are made directly by a legislature.
2. Delegated Legislation. Delegated legislation consists of law made by some person or body exercising powers conferred by a statute.
3. Executive Instruments. These are instruments that have been made by some person or body exercising powers conferred by the statute.
4. Judicial Decisions. These are judicial decisions made by courts that interpret statutes, delegated legislation and executive instruments.

Statutes

Statutes are also known as Acts, or Acts of Parliament, and the two terms, statute and Act, are now synonymous. It is common practice to spell Act with a capital 'A,' although there is a trend to use just a lower case 'a'. Enactment is another term for Act or statute. It is less frequently used than the other two and it can also include delegated legislation. A fourth term, legislation, is a generic word also covering both statutes and delegated legislation.

Statute law is the major and superior type of law in that it can override common law. In fact, statute law now increasingly displaces common law. Statute law is also wide ranging because, within constitutional limits, a legislature can make any statute that it likes. Thus statute law is a means of spontaneous intervention by the state in the citizen's life; for economic activities is a complement to, a substitute for, or a stricture on, the operation of the market. Given that statute law is such a powerful weapon there is scrutiny on its making and operation to detect deficiencies, and pressure that it be properly made. In response to this there has been study of legislative technique to understand better how statute law might operate. There have also been attempts to

make statute law clear, simple, and uniform,[2] and to formulate standards for legislation.[3]

To illustrate what a statute looks like the text will set out a selection of sections from the United States *Sherman Antitrust Act* (1890). This statute seeks to prevent anticompetitive action by business firms by imposing penalties on those who engage in this behaviour. It is part of the economic constitution of the Untied States because its aim is to enhance and preserve the market as a major method of economic regulation.

However, before proceeding to the *Sherman Act* it is necessary to say something about the layout of a statute, which the extract from the *Sherman Act* below will illustrate. It is common practice among the various jurisdictions for the drafter of the statute to insert two things before the text of the section. These are:
1. Number. They insert a number to identify the section.
2. Heading. They insert a heading that contains a summary of the content and effect of the section.
Sections 1 and 2 of this Act will now illustrate the text of a statute. These provide as follows:

Section 1. Trusts, etc., in restraint of trade illegal; penalty
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2. Monopolizing trade a felony; penalty
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

It is common for a statute to define some of the terms or expressions that it uses. Section 7 of the *Sherman Act* does this. It defines ‘person’ and ‘persons’ in the following way:

2. Mann (1983)
3. Commentary 2.1

Section 7. 'Person' or 'persons' defined

The word 'person', or 'persons', wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

As is explained in later discussion, a secondary source is a good tool for understanding cases and statutes. One of the simplest and most effective means for a secondary source to explain a legal rule is to organise the legal rule by dividing it into its elements and consequences.[4] The table below indicates how a lawyer could divide s1 into its elements and consequences when read with the definitions in s7. This illustration is useful in this context. It is also a warm up for later discussion of organising law[5]. Here is the table:

Element 1 Person
There is a person. There are two meanings: 1. Natural Meaning. In its natural and most obvious sense the word 'person' includes a human person. 2. Statutory Definition. Because of the definition of 'person' in s7 it includes corporations and associations existing under or authorized by the laws of any of the following – (a) the United States, (b) any of the Territories, (c) any State, or (d) any foreign country.[6]
Element 2 Contract, Combination or Conspiracy
The person does one of the following actions: 2.1 They make a contract. 2.2 They engage in a combination. 2.3 They engage in a conspiracy.
Element 3 Illegality
The contract, combination or conspiracy is illegal. A contract, combination (whether in the form of trust or otherwise), or conspiracy is illegal when it satisfies both of these requirements: 3.1 It is in restraint of trade or commerce. 3.2 This trade or commerce is either (a) among the several States, or (b) with foreign nations.
Consequences
1. The person is guilty of a felony.
2. The person shall be punished in either or both of two ways at the discretion of the court: 2.1 Fine.(a) If the person is a corporation the court can punish them by a fine not exceeding $10,000,000. (b) If they are any other person the court can punish them

4. Chapter 4 Organising Law: Micro Analysis
5. Chapters 3-6
6. *Sherman Antitrust Act* (1890) s7

by a fine not exceeding $350,000. 2.2 Imprisonment. The court can punish them by imprisonment not exceeding three years.
Diagram 1.2 Elements of Sherman Antitrust Act (1890) Section 1

Elements and consequences are put in a table here to emphasise how they provide a framework for organising law that tends to simplify law. Generally law texts do not set out information in tabular form as has just been done. Nevertheless, the analysis conveyed by this table must be at the core of a text if it is to convey the law clearly and accurately. Moreover, a text could usefully convey this basic information in a table at the outset as a prelude to more detailed treatment. The advantage of doing so is that the key propositions, which are constituted by the elements and consequences, are not lost in the detail.

Delegated Legislation

Nature

Delegated legislation is law made by a person or body to whom a legislature has, by statute, delegated law-making authority. Sometimes the statute simply authorises delegated legislation. Sometimes, though, the statutes may authorise a further level or levels of delegated legislation – it authorises delegated legislation and this delegated legislation is authorised to make further delegated legislation.

Delegated legislation is thus made by a legislature only indirectly, unlike statute law, which is a direct creation. Nevertheless, apart from its subordinate status, delegated legislation is in many respects similar to statute law. And, at least in a functional sense, it is part of the statute that authorises it.

Terminology

Delegated legislation is also known as subordinate legislation, secondary legislation or subsidiary legislation. These are generic terms referring to delegated legislation as a whole.

However, in each jurisdiction typically there is a variety of names used to describe pieces of delegated legislation. For example one piece of delegated legislation may be labelled as regulations, for example the 'Rail Transport Regulations 1999' while another might be labelled as rules, for example 'Supreme Court Rules 2002'. A list of common labels for delegated legislation includes regulations, by-laws, rules, ordinances, statutory rules and statutory instruments. There is, however, no inherent significance in these names, which are normally conferred by the enabling or delegating Act itself. With delegated legislation what counts is the extent of the power delegated, and the use made of it. The various labels are mere means of references. Thus if delegated legislation says that an applicant for a benefit must use Form X it does not matter that the delegated legislation is a rule, a regulation, a by-law and so on. What counts is that it legally requires an applicant to use Form X.

Executive Instruments

A statute or delegated legislation may authorise some body or official to make an executive instrument. This is an instrument that typically performs a one-off task. For example, many appointments to statutory offices are made by executive instrument. An executive instrument made under a statute or delegated legislation is part of the statute or delegated legislation, and therefore part of a primary source of law.[7]

Judicial Decisions

Statute law includes judicial decisions that have interpreted statutes, delegated legislation or executive instruments. But since these decisions are judicial creations they can also be conceived as part of common law. They therefore have a dual identity.

Common Law

Introduction

Common law is the older source of law. Common law originated in England, although there is also a Scottish common law.[8] It is convenient to distinguish three forms of common law:

1. Pure Form. In pure form, common law consists of rules of law made by judges in deciding a case. For this reason this form of common law is also called judge-made law or case law.
2. Hybrid Form. There is a hybrid form of common law called statutory common law, which consists of common law made under statutory authority.
3. Interpreting Statute Law. The label common law can also be applied to judicial interpretation of statutes (although this can also be characterised as statute law).

In early times common law was the major source of law, as indicated by the fact that basic areas of law – constitutional law, contract, tort, crime and property – are common law creations. However, in varying degrees in the many jurisdictions where common law operates, statutory provisions have now displaced or modified a swathe of common law rules.[9]

Common Law Rules

Nature

As a source of law, common law dates back to the centralisation of judicial administration that took place in England under King Henry II (1154-1189). Before common law came into being, English law included a few statutes on special topics, but the major law was local customary law (also called custom). Being local, customary law varied from place to place. The local feudal lord administered the law by holding court when necessary. One of the changes that Henry II made to the administration of justice was to send his royal judges on circuit. They started to hear

7. *R v Walker* [1875] LR 10 QB 355
8. Jamieson (1980)
9. Holmes (1881), Beaten (1997), Milsom (1980-82), Calabresi (1982).

cases that might otherwise have been heard by the feudal lord. In the process, these judges started to compare the various customary laws that they encountered and talk about these rules among themselves. What then happened was that when the judges heard a case in a particular place, there would be times when they would not apply the customary rule from that place but the rule from some other place. They did this because this other rule provided a better legal solution to the problem than did the local rule. Bit by bit over time this process supplanted the various local laws with one uniform set of rules on the basis that the judges collectively regarded these as the best solution to the particular problem. In some ways it amounted to a judicial codification of customary law. This law came to be called common law because the law was common throughout the realm – there was one uniform set of rules (although pockets of customary law still survived).[10]

As this account shows, common law consists of rules or principles of law formulated by judges in cases when deciding disputes in areas where there were no applicable statutes. In the absence of a relevant statute, courts themselves formulated rules of law.

Illustration
A good illustration of the making of common law comes from the case of *Donoghue v Stevenson* in 1932. There the House of Lords created the tort of negligence for English common law.[11]

The facts of this case involved the following:
1. A bottle of ginger beer.
2. A Mr Stevenson who manufactured this ginger beer.
3. A Mister Minchella who owned a café that sold Stevenson's ginger beer.
4. A Mrs Donoghue who drank from a bottle of this ginger beer in Mr Minchella's café.
5. A snail that somehow found its way into Mrs Donoghue's bottle of ginger beer.

Here now are the facts in narrative form. Mrs Donogue went to the café in Paisley run by Mr Minchella. Mrs Donoghue was accompanied by a friend. Mrs Donoghue sat down at one of the tables. Her friend purchased a bottle of ginger beer from Mr Minchella. Stevenson had manufactured this ginger beer. The bottle was made of dark opaque glass. Minchella poured some of the ginger beer out into a tumbler. Her friend then brought the tumbler of ginger beer and the bottle with the remaining ginger beer to the table where Mrs Donoghue was sitting. Mrs Donoghue drank some of the contents of the tumbler. Her friend then poured the remainder of the contents of the bottle into the tumbler. As the friend did this, a snail, which was in a state of decomposition, floated out of the bottle and into the tumbler. In consequence Mrs Donoghue suffered from shock because of seeing the decomposed snail and severe

10 Commentary 2.2
11. *Donoghue v Stevenson* [1932] AC 562

gastro-enteritis because of drinking the contaminated ginger beer. Consequently she sued the manufacturer of the ginger beer, Stevenson.

The issue before the court was whether the plaintiff Donoghue had an action against the defendant (or the defender as they are called in Scotland). Each of the five judges in the House of Lords (called law lords) hearing the case wrote separate judgments endeavouring to answer this question. These consume 62 pages of the law report. However, the key part of the decision was a finding of three judges (a majority) that there existed a tort of negligence that had fairly general application. This changed the law of negligence because prior to this case there were only specific actions for negligence for defined circumstances.

By wide agreement a passage from the judgment of Lord Atkin reasonably accurately describes the tort of negligence as propounded by the case. (It is also one of the most famous passages in English law since it turned the presence of a small mollusc into a tort that has been lucrative for lawyers in a large way). Here is the passage: 'At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'[12]

Judgments

Since courts make common law, it is found in 'the judgments of judges entrusted with its administration'.[13] Cases are published. Originally publishers did this solely in the printed law reports but nowadays cases are also published electronically. In fact, electronic publishing is now the main source of case law even though printed law reports are still published.

12. *Donoghue v Stevenson* [1932] AC 562, 580 per Lord Atkin
13. *Donoghue v Stevenson* [1932] AC 562, 567 per Lord Buckmaster

Ratio Decidendi and Stare Decisis

Courts create common law in the process of deciding cases by the operation of two processes.[14] First, courts articulate the new common rule when they decide the case. To do this, they formulate a rule that fits the facts and is pivotal for the court's decision.[15] This rule is referred to as the *ratio decidendi* or *ratio* for short. This means the reason for the decision. It is so called because the rule that the court formulated is the reason for determining the case one way rather than another.

Second, the decision that the court makes is treated as precedent so that courts will generally follow it in subsequent cases of similar ilk.[16] This rule is called *stare decisis*, which means literally to stand by what has been decided. Consequently, the original decision that created the rule affects not only the parties to the case but all other citizens as well, since they are bound by the ratio.[17] However, once a court has made a rule it is highly likely that later courts will modify it over time by extension, qualification or reformulation as it faces and adapts to new situations.

Retrospecitivity and Prospectivity

This form of law-making used for common law raises a problem in that the law as it affects the parties to the case is made retrospectively, whereas it is made prospectively for all other users. Thus there is always the risk for parties who litigate in the common law realm that the law deciding the dispute will not be clarified or formulated until the case has been decided. This proposition has a major implication for common law. It means that common law justice depends on predictability. Only if a party can accurately foresee how a court will respond (which is not always likely) can the law that affects them and their dealings be ascertainable, as the rule of law requires.[18]

Textbooks

Case law can be messy because the rule may not be clearly stated by the court or becomes enmeshed in the case with the reasoning that created and justified the new rule. Consequently, in practice the best source of case law is often a textbook, which is why it is said that common law is also found in the 'writing of lawyers'.[19] A textbook gathers rules that are scattered throughout a multitude of cases and ideally puts the rules together to form an ordered account of the law. This is a great advantage because it tidies and shapes the law, thus making it accessible and easier to understand.

To illustrate how a textbook tidies and shapes the law, consider the extract above from the judgment of Lord Atkin in *Donoghue v Stevenson*.[20] Modern textbooks that state

14. Schauer (1995)
15. Commentary 2.3
16. Commentary 2.4
17. Commentary 2.5
18. Atiyah (1992)
19. *Hollis' Hospital and Hague's Contract* [1899] 2 Ch 540, 552, and see *Cochrane v Moore* (1890) 25 QBD 57, 74, per Lord Esher
20. *Donoghue v Stevenson* [1932] AC 562, 580 per Lord Atkin

the law of negligence obviously have the benefit of more consideration and explanation of negligence from both judgments and legal writing than did the court in *Donoghue*. Nevertheless, the components of negligence as currently understood are largely found in the cited passage from Lord Atkin. There would, however, need to be one addition. Commonly there are defences to a tort (or crime). These operate by exempting a defendant from liability or guilt even though they have satisfied the positive elements of the wrong.

Ideally a texbook will describe a legal rule by dividing it into its ingredients, or elements, as lawyers commonly call them.[21] A textbook account of negligence formulated on these lines would describe negligence in a manner that would be something like the account below. It is put in the form of a table here to emphasise how elements provide an organising framework, whereas a text writer would more likely not tabulate the material but set it out as plain text:

Element 1. Duty of Care
The defendant owes the plaintiff a duty of care. You must take 'reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.[22] This raises the question of how 'neighbour' is defined. Neighbours are 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.[23] In modern terminology this is a test of forseeability. It means that a duty exists if the person in question can foresee that someone will be injured if they do not take care.
Element 2. Breach of the Duty of Care
The essence of the tort is that there is a duty of care and that the defendant breaches that duty. This breach can be either of the following: 1. Act. It can be an 'act'. Here the defendant does something that they should not do. 2. Omission. It can be an 'omission'. Here the defendant fails to do something that they should do.[24]
Element 3. Injury
The plaintiff's breach of their duty of care injures the defendant. As Lord Atkin put it succinctly: '[Y]ou must not injure your neighbour'.[25] In amplified from, Lord Atkin stressed the need for injury in the following way: 'You must take

21. This method of organising law for writing a legal text is explained in Chapter 3 Organising Law.
22. *Donoghue v Stevenson* [1932] AC 562, 580 per Lord Atkin
23. *Donoghue v Stevenson* [1932] AC 562, 580 per Lord Atkin
24. *Donoghue v Stevenson* [1932] AC 562, 580 per Lord Atkin
25. *Donoghue v Stevenson* [1932] AC 562, 580 per Lord Atkin

reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.[26] This means that however careless someone has been, if they cause you no injury you have no action against them for negligence.
Element 4. Defences
There must be no defences available to the defendant. [For the sake of brevity this chapter does not detail the defences. A reader can find them in a textbook on torts.]
Consequences
1. Liability. The defendant is liable to the plaintiff in negligence. 2. Damages. The court will assess the monetary measure of harm that the defendant caused the plaintiff. It will order the defendant to pay this amount as damages to the defendant.
Diagram 1.3 Elements of Negligence

Common Law as Transnational Law

While common law originated in England, it is now transnational. Because of the colonising actions of Great Britain, common law spread to many other countries. In this it was driven by a rule of British constitutional law – on settlement a colony received as much of British common law (and statute law) as could apply to the colony. This was the standard mechanism by which common law was received into British colonies. In some special cases, though, it was transplanted by legislation – a statute declared that common law applied in a colony. Since its reception, courts in these countries (now freed from their colonial status) have taken up, endorsed, extended and changed this common law. In the early days courts of these countries drew extensively on the decisions of English courts for guidance and inspiration. They still do this to an extent but they now will make up their own mind, while still consulting for guidance decisions of other jurisdictions, including of course the United Kingdom. In this way common law operates in many legal systems, although the rules are not always identical. Obviously there are good reasons for the both the similarities and the differences. Two obvious reasons are these. Some rules are similar because the problems and circumstances they face are similar; some rules are different because the problems and circumstances they face are different.[27]

Statutory Common Law

There is a new wave of common law being created called statutory common law. To understand its nature it is necessary to know that common law resides on a continuum. At one end is pure common law, which is law made entirely by judges. At the other end is judicial interpretation of a statute where a court must decide between two or more fairly specific competing meanings.

26. *Donoghue v Stevenson* [1932] AC 562, 580 per Lord Atkin
27. Commentary 2.6

In the middle of the continuum are places where the law is statutory so that courts must interpret it, but as they do so, courts also make law in a substantial way.[28] This happens where a statute uses a wide and open term such as 'just,' equitable,' or 'appropriate,' and a court interprets the provision. To do so the court must flesh out these malleable terms with description, components, guidelines and criteria. This process is done through an ever-extending line of cases. It can be conceived as thick interpretation. It can also be conceived as statutory common law in that interpreting a statute with wide and open terms constitutes a simulated form of making common law. It is common law developed from a statutory base,[29] or arisen from a statutory launching pad.[30]

Interpreting Law

Cases that interpret common law are clearly part of the common law itself; indeed with common law the processes of making, modifying, amending and interpreting blur into each other. Cases that interpret legislation can be conceived in either of two ways – as statute law since they attach meaning to statutes, or as common law since courts make the interpretations. It really does not generally matter how one conceives or describes it since it does what it does.

Secondary Sources

Secondary sources are so-called because they are a second hand account of law. Examples are textbooks, articles and encyclopedias.[31] Secondary sources perform several tasks that make them highly valuable for learning law[32] and working with law. They organise, summarise, explain, criticise and analyse law.[33] Doing these things potentially makes a textbook a great aid for learning law. In the initial phase of obtaining a general grasp of major principles a textbook saves the reader from having to trawl through the cases and statutes for themselves. Instead, the textbook writer does it, or has done it, for them. To put the point simply, it is generally more efficient to use a textbook as the first point of entry into an area of law rather than to distil the law from primary sources, namely the relevant statutes and cases. Reading these can come later if and when the reader wants a more detailed understanding of the law.

Tertiary Sources

'Tertiary sources of law' is a useful if not totally apt expression coined to describe other material that lawyers use apart from primary and secondary sources. There are two broad types that are disparate – material related to law and working documents:

1. Material Related to Law. Some publications are related to law. An example is a report by a law reform commission that analyses and proposes possible changes to the

28. Easterbrook (1983) p 544
29. Commentary 2.7
30. See Kirby (1992).
31. Commentary 2.8
32. Commentary 2.9
33. An example is given above in discussion of common law where there is an illustration of how a legal text would describe a common law rule.

law. Another example is a text that examines the history, operation or policy of some part of the law.
2. Working Documents. Tertiary sources also include documents such as opinions, pleadings, contracts, wills and affidavits that lawyers generate in the course of working with law. Most law firms will store these types of documents as precedents in a central depository to enable other lawyers to access them when required.

Part C. Law as a Social Science

In the diagram above, law as a set of rules is surrounded by spaces representing eight disciplines – sociology, philosophy, psychology, economics, linguistics, literature, management and history. These eight disciplines are chosen as some of the major human or social sciences that affect law. They represent, by way of illustration, the full panoply of disciplines that bear down on and intermesh with law.

There is a simple reason that law meshes with social and human sciences. People make law for people. Therefore to understand it fully it is necessary to bring to bear an understanding of these connected human disciplines when one learns the rules. That law enmeshes with social science will become apparent as this account of legal method unfolds, especially when it uses various methods of reasoning. These methods of reasoning are described in a companion text by the author *Legal Reasoning* to which this book refers as the occasion requires.

Part D. Commentary

Commentary 2.1 Footnote 3

1. Statute Law. For a general account of statute law see Bennion (1983) and Schwartz (1978).
2. Statute Books. In earlier times, once made, statutes are gathered into statute books – see Finemore (1988). Now statutes are generally published in electronic form.
3. Power of Statute Law. On the impact of statute law see Evershed (1956).
4. Inconsistent Statutes. Statutes may also be inconsistent – see Burrows (1976A).
5. Displacement of Common Law by Statute Law. See Beaten (1997), Milsom (1980-82).
6. Influence of the Civil Service. Since the civil service has a major input into policy-making for statute, it exercises considerable power in this regard – see Wishart (1993).
7. Operation and Economic Function of Statute Law. For discussion of the operation of statute law and the economic function of statute law see Ruabon (1989), Sunstein (1990A), Sunstein (1990B), Sunstein (1993), Stewart (1982-83), Schott (1990), Samuelson (1964), Salter (1982), Roach and Trebilcock (1996), Rogers (1988), Groom (1990), Kamesar (1997).
8. Improvement of Statute Law. See Statute Law Society (1979).
9. Understanding How Statute Law Operates. See Bennion (1979) and Wise (1988).
10. Making Statute Law Clear and Simple. See Statute Law Society (1972) and Statute Law Society (1974).
11. Making Statute Law Uniform. See Mann (1983).

12. Formulate Standards for Legislation. See Freund (1965).

Commentary 2.2 Footnote 10

Here are some plausible illustrations of the operation of custom as a way of developing rules:
1. Surfing. In the sport of surfboard riding there has now developed a type of customary rule that either the surfer closest to the breaking part of the wave (also called the inside or the peak of the wave), or the first surfer to their feet, has the right of way or priority for catching the wave. A person who violates this rule is considered to be stealing the wave by 'dropping in'. [What is also of interest about this practice is that it involves some notion of property in a wave.]
2. Queues. The British people have a notorious penchant for queuing in an orderly manner. So much is this the case that 'it is just not done' for someone to jump the queue. [Note here that the phrase 'it is just not done' illustrates at least one way, perhaps the central way, in which a customary law can arise – long standing practice of the doing something in a certain way generates a customary rule that this is how it should be done. Julius Stone referred to this as the normative force of the actual.] This customary law of queues seems to have been received into Australia. In current political debate, some people refer to aliens who have arrived in Australia by boat without a visa as 'queue jumpers'.

Commentary 2.3 Footnote 15

From the viewpoint of precedent, the rule that the court lays down as it decides a case is called the *ratio decidendi*, meaning the reason for deciding the case. See Chapter 11 Common Rules.

Commentary 2.4 Footnote 16

The rule that a later court should follow an earlier court (to put it very broadly) is referred to as *stare decisis*. The phrase means literally to stand by what has been decided. For further discussion see Chapter 11 Common Rules.

Commentary 2.5 Footnote 17

Lucke (1982-83) explains, that a case performs two functions:
1. Arbitral Function. A case resolves the dispute between the parties.
2. Law-Making Function. A case has a law-making function since it creates or affirms a legal rule that binds all citizens (including, of course, the parties to the case).

Commentary 2.6 Footnote 27

1. Transportation of Common Law. The common law rule for the reception of common law operated for the eastern part of Australia, which now comprises Queensland, New South Wales, Victoria and Tasmania. This meant that common law was initially received there on settlement, which was on 26 January 1788. This changed in 1828 when the British parliament enacted legislation to put the reception of English law – both common law and statute law – on a statutory footing. There were two reasons for enacting legislation. First, there were doubts about the application of

the common law (and statute law) of England to the eastern half of Australia – the British had established it as penal settlement so there were doubts as to its colonial status. Second, since the arrival of the British in Australia in 1788 the British parliament had had made significant reform to its statute law. In response to both of these problems the British parliament put the reception of English law – both common law and statute law – on a statutory footing by enacting s24 of the *Australian Courts Act 1828* (Imp) (9 Geo IV c83). Section 24 made two provisions. It declared that the common law and statute law of Britain applied to eastern Australia. It set the date for the reception of English law, so far as applicable, on 25 July 1828; this meant that common law and statute law of Britain applied in the eastern part of Australia in the form it was on 25 July 1828.

2. Seeking Guidance from Courts of Other Jurisdictions. See Von Nessen (1993).

3. Transnational But Not Uniform. Although common law is transnational it is not uniform among the various jurisdictions. That said there are large tracts where it is similar. For a comparison between common law in England and the United States see Tunc (1984).

Commentary 2.7 Footnote 29

For discussion of common law and statutory common law see Atiyah (1985), Beaten (1997), Burrows (1980), Burrows (1976B), Calabresi (1982), Finn (1992), Kelly (1986), Kirby (1992), Rubin (1982). One place where statutory common law flourishes is tax law, where according to Lehman (1984) it operates in a mathematical culture.

Commentary 2.8 Footnote 31

Feldman (1989) discusses the general nature of legal scholarship. McDowell (1990) discusses the audience for it. Wilson (1987) discusses English legal scholarship, Tushnet (1997) discusses United States legal scholarship, while Chesterman and Weisbrot (1987) discuss Australian legal scholarship. Young (1993) discusses the extra curial writing of judges. See also Tushnet (1987).

Commentary 2.9 Footnote 32

In this regard it is worth noting a related point that law can also be taught through literature – see Turner (1985). A good example is the role of the comic opera writer Gilbert as a legal satirist – see Turner (1987-89).