

## Practice questions for chapter 1 – What is law?

### Essay question

Explain the different meanings of the phrases 'common law' and 'civil law.'

- Students new to the study of the law can often be confused by the mass of terminology they are required to understand. Understanding legal words and phrases can be even more confusing given that certain words and phrases have more than one meaning.
- The phrases 'common law' and 'civil law' are perfect examples of phrases that can cause considerable confusion, give that the phrase 'common law' has three different meanings, and the phrase 'civil law' has two different meanings. It is vital that you understand which of the various meanings is being used at any time.

### Common law

- As noted above, the phrase common law has three different meanings, namely:
  1. The first and perhaps the most common use of the phrase common law is to describe the body of laws and procedures created by the judiciary (the judges) and applied via the doctrine of precedent. In other words, the phrase common law is another word for case law.
  2. The second meaning of the phrase common law refers to those legal systems around the world that have based their legal system on that of England, notably the USA, Canada, Australia and New Zealand. Such countries are said to have common law legal systems. In such systems, the bulk of the law is usually found in case law, but statute is playing an increasing role. Common law legal systems tend to have a well-established system of precedent.
  3. The third, and final, meaning of the phrase common law refers to the unified system of law that emerged following the Norman Conquest in 1066 that was created and administered by the common law courts. In this sense, the common law stands in contrast to the system of law created by the courts of equity. Today, the common law courts and the court of equity have been merged, but the two systems of law still exist, which equity forming a supplementary system to the common law (although, in the event of the common law and equity conflicting, then equity prevails).

### Civil law

- The phrase civil law has two different meanings, namely:
  1. The first, and perhaps the most fundamental, meaning of the phrase civil law refers to the body of law that stands in contrast to the criminal law. Most breaches of the law result either in the commission of a crime or a civil wrong. Civil law refers to the law and procedures, the breach of which results in civil (that is, non-criminal) liability.  
Contract law and the law of torts constitute perhaps the two most notable areas of civil law. It should be noted that civil law and criminal law are not mutually exclusive and an act can result in both civil and criminal liability.
  2. We noted above that those countries that have based their legal system on that of England and known as common law legal systems. Common law legal systems stand in contrast to civil law legal systems, the latter of which have not based their legal system on that of England, but on that of Roman Law, notably Emperor Justinian's *Corpus Juris Civilis* (Body of

Civil Law). Whereas common law legal systems tend to be based on case law, civil law legal systems tend to be based around a written codified body of laws. Civil law legal systems vastly outnumber common law legal systems.

### **Problem question**

Look at the following scenario and discuss how a natural lawyer and a legal positivist would view the actions of Eva.

Charlie and Eva are a married couple living in Germany during World War II. Charlie is a soldier in the German army fighting against the Allies. Eva lives on the barracks where Charlie is based, where she is having an affair with another soldier. In 1944, a failed assassination attempt is made on Hitler's life. Charlie writes a letter to Eva, in which he states that he wished the assassination attempt had succeeded. A month later, Charlie returns to the barracks and discovers that Eva has been unfaithful to him. Eva takes the letter that Charlie wrote and gives it to a SS officer. Charlie is promptly brought before a court-martial and charged with sedition which, in Nazi Germany, was a capital offence. He is found guilty and the presiding judge sentences Charlie to death. Charlie's death sentence is commuted and he is instead sent to fight for the Nazis on the Eastern front against the Russians. Charlie survives the war, returns to Germany and initiates legal proceedings against his wife, arguing that her actions unlawfully deprived him of his liberty under the German Criminal Code 1871.

- The above scenario is actually based on a real case (although the names have been changed) and formed the centerpiece of an intense debate between legal positivists and natural lawyers. The rise of totalitarian regimes in the 1930s and 1940s raised stark questions regarding a State's proper use of the law, especially where such regimes passed laws that could be viewed as immoral or oppressive.
- Such so-called 'grudge informer' cases, whereby a person uses a tyrannical or oppressive law to rid himself of a person he dislikes, starkly bring into focus the differences between legal positivism and natural law.

### **Legal positivism**

- Start off by briefly defining positivism as a philosophical theory (that is, the belief that knowledge can only derive from that which can be observed and quantified). Accordingly, issues of morality or good and evil are irrelevant, as they cannot be quantified.
- Legal positivists (notably HLA Hart) therefore argue that it is irrelevant whether or not a law is viewed as immoral or unjust, and such concerns do not affect the legality of a law. An unjust law has as much force as a just law, and the courts should not invalidate or ignore validly passed laws simply because the court views the law as unjust.
- What matters to a legal positivist is whether the law was passed by a body that is empowered to pass laws, whether the laws passed are clear, whether clear sanctions are in place for breach of law, and whether there are clear mechanisms in place for enforcing and reforming the law.
- In the case of Nazi Germany, the laws were passed by the German Parliament, the laws were clear and the punishment for their breach was also clear (if extremely severe). The laws were vigorously enforced and it was clear that there was a procedure in place for reforming the law.
- Accordingly, Hart viewed the anti-sedition laws of Nazi Germany as valid and the fact they were clearly unjust was irrelevant. The wife, in submitting the letter to a SS officer, was merely obeying the validly passed law and therefore Hart argued that she had not unlawfully deprived her husband of his liberty.

### **Natural law**

- In contrast to Hart's positivist view was the view of a natural lawyer called Lon Fuller. Natural lawyers argue that there is a strong relationship between law and morality and laws which do not meet basic rules of morality (what Fuller termed the 'inner morality of law') cannot be properly categorized as laws.
- For Fuller, the laws prevalent in Nazi Germany breached the inner morality of law. For Fuller, obedience to principles of morality can outweigh obedience to the law. The anti-sedition laws of Nazi Germany were immoral and therefore powerful reasons existed for not obeying them.
- Accordingly, as the anti-sedition laws were not legitimately laws, the adherence to these laws could not excuse the wife's breach of the German Criminal Code, and she should be found guilty of unlawfully depriving her husband of his liberty.

### **The result**

- The result of the actual case was that the wife was found guilty of breaching the German Criminal Code. The German court noted that the wife was under no legal duty to report her husband's sedition. By giving the letter to the SS officer, she knew that a range of consequences could come about, the most likely one being her husband's execution. She therefore deliberately made use of a clearly immoral law in order to rid herself of her husband.