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Autonomy of Law

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Why does it matter whether law is autonomous? That depends on the questioner's perspective. Consider citizens. Legal norms provide them with distinctive reasons for behaving in certain ways and not others, and those reasons may be different from the reasons provided by norms of morality, religion, etiquette, and so on. Therefore, it is important for citizens to be able clearly to distinguish legal norms from other types of norms. Conversely, legal norms confer on authorities responsible for application and enforcement of law distinctive powers to act in certain ways; and so it is important for them to be able clearly to identify relevant legal norms to know when those powers exist.

Lawmaking

The same is true of lawmaking authorities, but for them, law's autonomy (or distinctiveness) from other normative systems has added significance. Lawmaking may be understood as a process of creating a distinctive normative regime. The paradigm of lawmaking, so understood, is legislation. Much legislating consists of giving legal force to (or legalizing) norms that already exist in some form in a nonlegal normative system.

The common law is different. It responds to a desire for consistency over time in the resolution of disputes between individuals, in all their variety. Unlike legislation, common law norms are provisional and typically retrospective in operation. In **[p. 113 ↓]** tandem, provisionality and retrospectivity may jeopardize consistency and unsettle expectations. Therefore, officials with authority to make common law have a strong obligation of fidelity to past acts of lawmaking recorded in authoritative legal literature—statutes, case reports, and so on. This obligation—to resolve disputes, if possible, by reference to norms that have already been legalized rather than by legalizing a norm—puts a premium on maintaining a clear distinction between law and nonlaw.

Law as an Academic Discipline

Some concept of autonomy also underpins the idea of law as a separate academic discipline, and the views of academic lawyers about the autonomy of law play an

important role in determining their position in the law school in particular and the academy more generally.

Not surprisingly, the sense in which, and the extent to which, law is autonomous is a central concern of much theorizing about law and legal reasoning. Distinguishing law from morality (and other normative systems) is a core analytical concern of legal positivism, developed most notably by H. L. A. Hart (1907–1992). Positivists typically do not deny that law and nonlegal normative systems are linked in various ways, but they suggest that such links are not (or, perhaps, should not be) central to our concepts of *law* and *the law*. Conversely, many antipositivists (often called natural lawyers) do not deny that law can be distinguished from other normative systems, but they argue that its relationship to other systems is integral to (our understanding of) its nature and normative force. From a different perspective, social theorists, such as Niklas Luhmann (1927–1998) and Gunther Teubner, argue that law is best understood as an autopoietic system, containing within itself the resources needed for its own development and, relatively speaking, impervious to influence by, and unable to affect the operation of, other social systems, such as politics and the economy.

Positivists tend to account for legislation and common law similarly in terms of relatively determinate rules documented in the official literature of the law. By contrast, antipositivists understand common law more in terms of an ongoing dialectic of reasoning toward resolution of individual disputes in particular ways. The positivist approach stresses both the autonomy and the limits of (the common) law, while the antipositivist account places the common law in a larger landscape of practical reasoning. Ronald Dworkin's interpretive theory of law is the most influential example of this latter approach.

In the academic arena, belief in law's autonomy manifested itself, at the end of the nineteenth century, in an approach known as formalism. Traditional formalists stress the role in law of syllogistic reasoning, in which an individualized legal conclusion is derived from an established rule coupled with a statement of facts falling within its scope. In the United States of the 1930s, legal realists rejected traditional formalism, primarily on the ground that legal norms lack the determinacy of meaning and reference assumed by the syllogistic account of legal reasoning. Realism had a fundamental effect on the practice of legal scholarship, especially in the United States.

In the 1960s, rejection of formalist accounts of law spawned the influential law and society movement in the United States and the law-in-context approach in the United Kingdom, both of which stressed the importance of exploring the place of law and legal reasoning in broader political, social, historical, and intellectual landscapes. In the United States in the 1980s, the critical legal studies movement drew from the premise that legal norms are indeterminate the conclusion that law is politics in disguise, but the impact of critical legal studies' corrosive message was limited.

Contemporary formalists, such as Ernest Weinrib, seek to quarantine legal from political reasoning by stressing that law—especially private law—should be understood in terms of its normative structure (its form), not its social functions. Such formalism is largely a reaction against economic analysis of law, developed by jurists such as Richard Posner in the 1960s and 1970s. This school of thought (which has been much more influential in the United States than elsewhere) is based on the idea that law should be understood instrumentally rather than in terms of ideas of interpersonal and social justice. The **[p. 114 ↓]** distinction between instrumental and noninstrumental understandings of law lies at the bottom of many debates about its autonomy.

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See also

- Courts, Lawmaking by
- Custom and Law
- Deconstruction
- Economics, Law and
- Instrumentalism
- Intent in Norms
- Legislatures and Lawmaking
- Luhmann, Niklas
- Morality and Law
- Positivism and Legal Science
- Realism, American Legal
- Reflexive and Autopoietic Law

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