Introduction

1.1 The law is an amalgam of theory and practice. At a theoretical and philosophical level, the meaning and foundation of "law" pose a weighty and perplexing question for philosophers, lawyers, judges and law academics alike. Each of us is also keenly aware of the profound and practical effects of the law in our everyday lives. It is inextricably connected to the overlapping domains of ethics, sociology and economic development, amongst others. Law is thus a "many-splendoured" thing that traverses several disciplines. This brief chapter hopes to elucidate "law" within the broader canvas of its interactions and web of relations amongst these various fields.

What is Law?

1.2 The fundamental question of the meaning of "law" invites numerous queries. Within the narrow scope of this section, we can only hope to provide a brief sketch as to how one might approach the issue. What follows is a very condensed summary of the major developments concerning the foundations of "law". This is known as the study of jurisprudence, the legal philosophy or science of law. We hope that it will serve as a precursor to a deeper appreciation of the bases of law and its interactions with business and society.

Law as Norms

1.3 Let us begin with the rudiments. It is generally accepted that "law" is, at its core, a set of norms which prescribe a course of conduct. These norms state what *should* or *ought* to happen. In this regard, they may be distinguished from the laws of natural science such as "water boils at 100 degrees Celsius" which are amenable to *factual* verification. Legal norms, on the other hand, cannot be either true or false. Instead, they essentially prescribe what *ought* to be. For instance, "one ought not to kill another person" is a legal norm in most, if not all, societies.

Positivism

1.4 Having established the basic core of the "law" as a set of norms, we can explore the various jurisprudential approaches and perspectives. One school of thought, known as *positivist* jurisprudence, treats the "law" as a set of

norms that are created and maintained pursuant to some legal authority within a legal system. The legal positivist, John Austin (1790–1859), defined "law" (in John Austin, *The Province of Jurisprudence Determined* (1954)) as a set of coercive commands from a determinate person or body of persons (known as the sovereign) which are habitually obeyed by the population. These coercive commands constitute a type of norms broadly defined. Hans Kelsen (1881–1973), another legal positivist, contended in *The Pure Theory of Law* (translated by Max Knight, 1967), that the legal system consists of norms backed by sanctions which are derived from or validated by higher norms. This leads us ultimately to the "basic norm" (*grundnorm*) from which we cannot derive any higher norm. This basic norm, according to Kelsen, is selected on the basis of its efficacy within the legal system as a whole (ie, the people generally conform to the basic norm). In some jurisdictions, this basic norm may underlie the highest law of the land embodied in the respective written constitutions.

1.5 H L A Hart (1907–1992), in his work *Concept of Law* (1961), argued for a more sophisticated conception of a legal system as a system of rules. Apart from the "primary" rules which impose duties on the population (which are quite similar to Austinian coercive commands), Hart observed that there are also "secondary" rules within a legal system that create, determine, eliminate or modify the primary rules. Examples of "primary" rules are those found in criminal law (see Chapter 4) and the law of torts (see Chapters 5 and 6). "Secondary" rules include those which stipulate the powers and duties conferred on the Legislature, Executive and Judiciary (see Chapter 3) as well as rules which facilitate the making of contracts (see Chapters 7–9). These "secondary" rules are subdivided into three categories, namely, rules of adjudication (to confer power on officials to pass judgment and implement the rules), rules of change (to confer power to pass legislation to effect changes) and rules of recognition (to ascertain the criteria by which the rules within the legal system are validated). Apart from the requirement that the rules of the legal system must be generally obeyed by its private citizens, these latter rules of recognition must be accepted by the officials within the legal system from an "internal point of view". This "internal point of view" refers to the critical reflective attitude of an official to certain patterns of social behaviour as a common standard. The official, when he or she reflects on social behaviour, inquires whether one ought to do (or omit) certain acts and the underlying reasons.

Natural Law

1.6 Another major jurisprudential school of thought is that of natural law. In contrast to positivism, natural law jurists take the view that positivist laws within a legal system are not necessarily "law", but that there are objective and higher standards or criteria which must be fulfilled before a norm may be regarded as "law". These standards or criteria are generally based on truths about human nature, ethics and reason. Natural law jurists have since time immemorial relied on the existence of a supernatural deity or God, some human life-purpose and its underlying reasons or certain self-evident truths. For example, John Finnis contends in his seminal work *Natural Law and Natural Rights* (1980) that natural law is the set of principles based on practical reasonableness in the ordering of human life and community. There are certain forms of self-evident human good (ie, objects of value to humans) such as life, knowledge, sociability, aesthetic experience, religion and practical reasonableness, and Finnis suggests that the purpose of "law" is to realise the common good of the human community.

1.7 Thus, whilst the positivist would treat a legal norm as binding insofar as it is created or made in a certain manner (for example, by Parliament passing a piece of legislation), the natural law jurist would instead look towards certain ethical standards (usually of general or universal application) to resolve the issue. An oft-cited illustration of the difficulties in subscribing to a pure positivist stance concerns the status of the laws of the Nazi Germany regime. These Nazi laws may be consistent with pure positivism, but the natural law jurist would ask whether such Nazi laws *ought* to be regarded as "law". From a natural law point of view, some, if not all, may contend that the so-called Nazi laws were so oppressive and unfair that they should not be regarded as "law", even though they had been duly passed by the relevant authorities. Yet, at the same time, the so-called objective standards within a pure naturalist theory may be vulnerable to criticisms of vagueness and subjectivity.

Positivism and Natural Law: The Middle Road

1.8 Some jurists have thus tended towards a middle path between pure positivism and naturalism. A few examples would suffice here. Lon Fuller's (1902–1978) "internal morality of law" suggested that in order to qualify as a legal system, the statutes must satisfy specific procedural requirements: the statutes have to be sufficiently general, made known to the public, prospective in effect,

clear and without contradictions, capable of being complied with and so on (see *The Morality of Law* (1964)). These procedural requirements, as the reader would be aware, go beyond the pure positivist position that norms are "laws" as long as they emanate from competent authorities within a legal system. Hart, in his *Concept of Law*, described a model of the conditions that are sufficient and necessary for the existence of a legal system. Indeed, he referred to this work as "an essay in descriptive sociology". Yet, at the same time, Hart argued that, to prevent society from descending into chaos, there should be a "minimum content" of natural law based on certain human facts (such as human vulnerability, approximate equality, limited altruism, limited resources, etc). According to Hart, there is a natural necessity for certain minimum forms of protection for persons, property and contracts.

1.9 In addition, Hart would concede that his system of rules is not all-embracing since the scope of some rules may be uncertain. For example, the rule that no "vehicle" may be brought into the park may be unclear as to whether bicycles are disallowed as well, although the central core of the rule may be clear. Ronald Dworkin, a renowned legal philosopher, countered that Hart had overlooked the significance of "principles" (such as "no man may profit from his own wrong") as an important component of the legal system. Principles, he said, argue in a certain direction but do not necessarily lead to a particular legal outcome as compared to rules that are applied in an "all-or-nothing" fashion. These relatively more flexible and malleable principles can, arguably, accommodate natural law precepts, although Dworkin appeared to suggest that there is one right answer to any particular legal problem (see, eg, Dworkin's *Law's Empire* (1986)).

Other Schools of Thought

1.10 Apart from the above, there are numerous other jurisprudential approaches which must be mentioned (if only in passing) such as American Realism which focuses on the use of empirical facts and law to make predictions as to how courts will decide, the *Law and Economics* approach which is based on the economic efficiency of outcomes, the *Corrective* versus *Distributive* justice approaches to particular areas of law such as torts, and the approaches embodied in *Sociological Jurisprudence and Sociology of Law* relating to the interactions between law and society.

The above examples represent only some of the possible approaches and perspectives towards the exploration of "law" and legal systems. Nonetheless, we hope it provides a flavour of the potential richness and complexity of jurisprudence and legal philosophy which the reader might wish to delve further into.

Ethics and Law

Ethics as Norms

1.11 We have mentioned above that "law" is a set of norms that prescribe a course of conduct and that the norm "one ought not to kill another person" is one example of a legal norm. The reader may legitimately ask: is not the norm against killing also an *ethical* norm? As a starting point, we note that "ethics" and "law" are similar in at least one respect, that is, they are both *norms* prescribing a certain course of conduct. Within the legal context, these legal norms may be referred to as "rules", "principles", "guidelines" and other similar terms. For instance, a rule that companies are required to register with the relevant authorities prior to commencing business is a legal "norm". Similarly, within the ethical sphere, we may also refer to ethical norms as "rules", "principles" or "guidelines". For example, the rule or principle that one ought not to lie is an ethical norm. In relation to "form", there does not appear to be any significant difference between the disciplines of ethics and law.

The Differences between Legal and Ethical Norms

1.12 But are there not material differences between legal and ethical norms? Let us examine this issue by reference to questions of the "what, who, how and why" variety:

- Who or which body creates or authorises an ethical or legal norm ("the authority")?
- How are ethical and legal norms created, maintained or modified ("the processes")?
- To whom are ethical and legal norms applied ("the scope of application")?
- What are the respective sanctions for a breach of ethical and legal norms ("the sanctions")?

(1) Authority and processes

1.13 Let us discuss questions relating to "authority" and "processes" together. Assume that "legal norms" are positivist in nature. From the perspective of the legal positivist, the relevant authorities within a legal system are the legal institutions, bodies or persons within a particular jurisdiction that are conferred specific legal powers. For example, the Legislature is empowered to pass legislation in Parliament which prohibits anti-competitive agreements in Singapore. The Executive may be entitled to issue ministerial regulations. The judge is empowered to pass judgment in a courtroom on the appropriate compensation to a victim of a road accident. Hence, we can say that the norms created by the relevant authorities via the accepted legal processes constitute the set of "legal norms" within the parameters of the legal system.

1.14 With respect to ethical norms, however, the determination of the authority and processes is more controversial. The moral actor may determine for himself the appropriate course of conduct when faced with a particular problem. Sometimes, the appropriate ethical response may be obvious, intuitive or largely experiential, such as saving one's baby from threatened danger. The moral actor may, alternatively, choose to look towards ethical reasoning for guidance and direction when he encounters a more intractable dilemma. Since time immemorial, philosophers such as Aristotle, Immanuel Kant, Confucius, John Stuart Mill and others have pondered over these ethical issues and endeavoured to construct and develop theories and frameworks to determine how one should conduct oneself in a consistent and rational manner.

1.15 Mill's general theory of utilitarianism, for instance, advocated that one should act to the extent that doing so promotes general happiness. That is, if the pleasure or benefits accruing from an action outweighs the pain or costs, then the action should be undertaken. Instead of the model of utilitarianism, one may find a distributive justice model more persuasive. A proponent of the distributive justice model may argue, for instance, that the needy in society should obtain proportionately more of the benefits than the wealthy. Alternatively, one might rely on Kantian ethical imperatives that one ought to act according to a rule of conduct that one would will to be the universal

standard for everyone else, and that one should respect human beings as ends in themselves, rather than only as a means to one's end. For instance, slavery ought to be abolished since no rational person would desire to be a slave or to be treated as one; in addition, to treat another human being as a slave is to treat him or her as a means only. These are merely examples of the many theories and modes of ethical reasoning.

1.16 Essentially, the discipline of ethics is a search for underlying objective standards and reasoning for taking, or not taking, a particular course of action or conduct in any given situation. As can be seen, there is potentially, a great diversity of ethical theories, outlooks and judgments on any issue. It may be difficult to accommodate these diverse (and sometimes contradictory) "ethical" theories, outlooks and judgments within a set of precepts applicable to a particular jurisdiction by consensus. The potential diversity gives rise to relatively greater uncertainty concerning the acceptance and legitimacy of ethical norms within a society, when compared to legal positivist norms which may be more easily "located" within the positivist legal system.

1.17 Further, there is no generally accepted process by which ethical norms are created, maintained or modified. The creation and evolution of ethical norms are likely to take place in a more diffuse and indeterminate manner. There is an absence of formal processes for the creation, maintenance and modification of ethical standards and values.

(2) Scope of application

1.18 In terms of the "scope of application", ethical norms may be of general (or universal) or specific application. Ethical norms, such as the Kantian ethical imperatives mentioned above, are of universal application. Ethical norms may also address specifically the obligations and rights of persons in specific capacities or roles, such as the employees or directors of a company in relation to business ethics. Legal norms, similarly, have both general and specific application. Most of the provisions stipulating criminal offences (such as murder and cheating) normally apply to all persons within the jurisdiction, and do not usually single out particular types or groups of persons for separate treatment. In fact, to do so might invite accusations of unfairness and discrimination. There are also legal norms (as in company

law) that specifically address the duties of a director of a company, similar to ethical norms.

1.19 The material difference between ethical and legal norms in terms of the "scope of application" is that legal norms, due to the historical development of sovereign states, tend to emphasise their "territorial" scope or jurisdiction, unlike ethical norms. The domestic laws of one country apply generally to its citizens or to activities undertaken within its territorial boundaries and may differ quite significantly from the laws of another (foreign) country. These divergences in the respective domestic laws can create inconvenience or, worse, chaos especially in transnational affairs and transactions. Thus, countries attempt to seek, where possible, the harmonisation of these disparate laws in this increasingly globalised world we live in. Public international law is the set of laws which governs and regulates the relationships between sovereign states and the international legal system (eg, an international convention regulating the interpretation and effects of treaties signed by states). Private international law, on the other hand, deals with cases involving foreign elements such as issues relating to the applicable governing law in Internet defamation or transborder litigation. Not surprisingly, natural law has played a significant role in the international legal system in the search for universal objective standards applicable to all, such as the development of human rights. It is generally less common for one to speak of ethical norms as having specific "territorial boundaries", though we are aware that historical and cultural factors have at times been employed in attempts to "differentiate" one value system from another à la the "Asian versus Western values" debate of the 1990s.

(3) Sanctions

1.20 Legal sanctions are normally specific and formal. The main sanctions under criminal law are capital punishment, imprisonment, fines and other penalties. In civil law, the main sanction is the obligation of the person who commits the civil wrong to compensate the other party for losses or damage. For example, the party who breaches a contractual obligation may be required to compensate the other party for the latter's loss of profits resulting from the breach. Other legal sanctions may include the specific performance of the legal obligation or the perpetrator may be restrained via

an injunction from carrying out particular acts. The extent by which legal sanctions are enforced in a particular case may vary from jurisdiction to jurisdiction.

1.21 On the other hand, the sanctions for a breach of an ethical norm are usually more informal compared to legal sanctions. These may include the social disapproval of an action or reprisals from other persons. For instance, lying to friends might invite social disapproval from one's peers but only some forms of lying, such as cheating offences and misrepresentations which induce another to enter into a contract, attract legal sanctions.

Legal Enforcement of Morality

1.22 A related question arises: should all morality be enforced by the law? Mill argued, in *On Liberty* (1859), that legal enforcement should be undertaken only for the purpose of preventing harm to others. The UK Wolfenden Report on Prostitution and Homosexuality (1957) ("the Report") stated that there is a realm of private life which should not be subject to legal control and enforcement. This subsequently led to the now famous Devlin-Hart debate. Lord Devlin disagreed with the Report and countered that the law's function is to maintain public morality, which constitutes an important aspect of human society. He argued that conduct provoking feelings of "intolerance, indignation and disgust" should be suppressed by the law, lest the fabric of the society crumbles as a consequence. Hart, on the other hand, doubted the broad connections drawn by Devlin and cautioned against unduly curtailing freedoms in the name of public morality, though Hart conceded that there should be some core shared morality in any society, such as the prohibition of murder.

Positivist Law and Ethics

1.23 We can now examine, in a general fashion, the relationship between positivist law and ethics. In modern societies, ethical and positivist legal norms would overlap partially. Indeed, some moral norms, such as the concept of equity and fairness, are embedded in positivist legal norms, though the scope and manner of application may vary. Outside this overlapping area, the legal norms are distinct from ethical norms. The reasons why these norms do not correspond perfectly may lie in the difficulty of translating certain moral norms into positivist law, the conscious decision to leave certain conduct to

individual moral conscience, or that positivist law has not kept pace with the development of ethical norms within the society. There could also be other practical reasons (such as limited parliamentary time and resources).

Relationship between Law and Society

Society's Code of Conduct

1.24 It is a truism that no society can function without a system of rules, norms and values (we shall refer to them collectively as "code of conduct"). This code of conduct need not always be enshrined as law for it to be observed and effective. Although commonly used, laws are not the only means by which desirable and desired behaviour of individuals, businesses, governments and other organisations can be encouraged. Consider, for a moment, how families and ethnic business networks regulate their conduct *vis-à-vis* family members and other businessmen. In these social and economic groupings, there is little use of the formal processes of law. Informal rules govern. Even though they do not have the force of law (understood typically as laws found in statute books), they can help to regulate behaviour towards desired ends.

Obedience to Laws

1.25 What is it that makes people obey laws (formal and non-formal) and how can we enhance compliance? People obey the law for various reasons, including obedience to a legitimate authority, abiding by their personal convictions and the fear of sanctions imposed by the law for non-compliance. The law, understood here as legislation passed by a competent legislature, does not offer a one-size-fits-all solution to the issues and problems faced by any society. Often, the law sets the minimum standard of behaviour expected as well as provides a set of sanctions if the law is breached. Let us take the management of road traffic in cities as an example. Laws can be passed to prevent traffic violations such as illegal parking and drink-driving, and to manage the volume of traffic entering the city area during certain designated periods. How do people and businesses react to the traffic law regime? How do the law enforcement agencies respond to the road users' behaviour on the roads? What follows is an outline of some factors that can determine the utility of laws in fostering desired behaviour and the intimate linkages between law and society.

Factors Determining Law–Society Linkages

1.26 *First* is clarity and knowledge of the law. Are the laws in question clear or ambiguous? If the laws are ambiguous on the expected behaviour, then non-compliance could result because road users might be unaware that they are committing traffic violations. If so, the legislation can and should be amended to remove the ambiguity and to make clear the scope of the law. Secondly, are the traffic laws and sanctions for violations widely known by the road users? How accessible are the laws? While ignorance of the law is no excuse, it is essential that non-compliance is not due to road users' ignorance of the applicable laws. If so, making the laws accessible and embarking on an educational and publicity drive might be necessary.

1.27 *Second* is the concept of deterrence. The current laws may not have the requisite deterrent effect. The intuitive regulatory response to a situation of (traffic) "lawlessness" is to increase the legal sanctions or punishment. More severe disincentives would act as "sticks", discouraging would-be violators. This would be relevant in cases where the punishment is too light to serve as a serious deterrent. However, as studies have shown, there is an upper limit to deterrence. Even with punitive sanctions, hard core or irrational violators will not be deterred by sanctions that other law-abiding and rational road users otherwise would.

1.28 It should come as no surprise that there is a regulatory pyramid with a range of sanctions, from deterrent to incapacitative measures, for the different types of traffic violations. For instance, as drink-driving is a very serious problem, severe punishments ranging from suspension and revocation of driving licences to jail terms, reflect the level of moral culpability of such violators and society's abhorrence of such conduct. Also, there is a need for proportionality in the sanctions meted out. Legal sanctions that are excessively harsh might affect the legitimacy of the laws. Law enforcers may then be reluctant to enforce them, resulting in the sanctions being paradoxically underused. Hence, it is critical for the legal system to be sensitive to the dynamic interactions between the law and the adaptive strategies of those that the law in question seeks to regulate. This would enable the authorities to better calibrate the effective zones of deterrence. Another complementary approach is to provide incentives or "carrots", for example, lower insurance premiums, for motorists who obey the laws and have good driving records.

1.29 *Third* is the need for consistent and fair enforcement of the law. A well-drafted set of laws clearly sets out the expected minimum behaviour. Such laws require effective and impartial enforcement to achieve their desired effect. Non-compliance may well be an issue of enforcement (especially the lack of it). Weak and ineffectual enforcement of traffic laws translate into road users' perceptions that they can get away with their violations. Studies have shown that the extent of a proscribed activity (in this case, traffic violations) is negatively correlated to the perceived certainty of punishment. Therefore, there will be fewer violations when road users perceive or believe that active enforcement is in place resulting in offenders being more likely to be caught.

1.30 Enforcement can also be aided through the use of technology, such as closed circuit TVs, and giving the police more enforcement powers such as requiring mandatory blood tests or breath analysis of suspected drink-drivers. The intent is to demonstrate that there is a commitment to the enforcement of traffic laws, with increased surveillance being facilitated by technology. This must be supported by effective and efficient law enforcement, otherwise violations would resume once the lackadaisical commitment and efforts towards enforcement are noticed. In some societies, there may also be a problem of corruption where violators get away with their offences by bribing law enforcement officers. If so, then efforts would also have to be directed towards curbing the corrupt practices of the law enforcement officers.

1.31 *Fourth*, the legal system has to manage perceptions. In deciding whether to obey a law, a person's perceptions on the likelihood of his transgression being caught would matter. While media blitzes and intensive enforcement crackdowns would result in "deterrence effectiveness", success is often temporary unless the enforcement efforts are sustained. Furthermore, if keen enforcement is accompanied by publicity campaigns and blitzes, the perception of the likelihood of punishment is likely to be positive for law enforcement efforts as public consciousness of the law and its enforcement is raised ("the sermon effect"). However, such efforts will see declining utility if they are accompanied by poor or inadequate enforcement, as was discussed earlier. Using traffic law as an example, there is the need for such laws to have regulatory credibility and their acceptance as a legitimate source of regulatory authority. This requires that the laws are — and are seen to be — just and for the common good (public safety considerations) as well as their being applied fairly without undue harshness or laxity.

1.32 *Fifth*, as legislative fiats cannot be completely effective in inculcating desired legal norms, informal and decentralised sanctions such as social norms and peer pressure can complement the formal legal framework. Such informal controls are potentially a more effective mode of enhancing compliance. In a weak legal environment, particularly, social norms and informal sanctions can have the desired regulatory effect in preventing opportunistic behaviour. Where formal laws are in alignment with community standards of appropriate behaviour, the fear of external non-legal sanctions and social disapproval has a significant regulatory and conforming effect.

1.33 An appeal to one's own moral commitment to obey laws can also engender strong compliance effects. As laws cannot compel compliance, the objective of internal compliance is to socialise road users through the internalisation of the desired norms and an appreciation of the public good that the traffic laws seek to uphold and promote. Informal sanctions are likely then to be more effective in dealing with minor transgressions, such as not coming to a complete stop at stop signs.

1.34 Given the practical limits to policing and prosecution, such an internally driven mode of compliance could be far more effective. Even for more serious violations, social norms — in addition to formal, legal sanctions — can raise compliance levels through the social stigma and shame attached to such illegal and socially (and morally) repugnant conduct. For instance, drink-driving can be targeted through demonstrating the moral callousness and culpability and the negative repercussions of such an act. Here, moral suasion provides an additional layer of deterrence and informal sanctions on violators.

1.35 The above example of managing traffic issues demonstrates that law is not always a panacea for the multifaceted societal problems. Indeed, there is a patent need to consider law in its societal context. What would be apparent is that no legal system is fully autonomous in that it is completely independent of the society in which it operates. While law matters immensely in a legal system, such a system cannot be effective if it ignores considerations such as ethics and pressure from interest groups serving business, civil society and economic interests. These social forces operating outside of the legal system provide a better understanding of the interface and interaction of law, society and business. The rest of this section looks at common explanatory concepts used, namely, legal structures, culture (including legal culture) and

legal traditions, in helping us to better understand the relationship between law and society.

Legal Structures

1.36 A legal system's structure can be regarded as its "hardware". Legal structures are the composite units that do the work of legal systems and include legal actors, for example, lawyers, legislators, police, judges, legal scholars, etc (J H Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law" (1981) 17 *Stanford Journal of International Law* 357). The structure determines the patterns and framework of processes, actions and outcomes of the legal system. Blankenburg's innovative comparative socio-legal studies of the then West Germany and the Netherlands, two countries similar in socio-economic terms and attitudinal cultures, demonstrate how the legal infrastructure can create incentives and disincentives for the use of the formal legal system (E Blankenburg, "The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behaviour in the Netherlands and West Germany" (1994) 28 *Law and Society Review* 789). Usage of the court system is effected through the inculcation of either a litigation-avoiding (Dutch) or a litigation-prone (West German) mindset. The Dutch "infrastructure of avoidance" has "filtering institutions" in the form of more alternatives, such as pre-court conflict institutions, many forms of legal consultation beyond the formal legal system, the "routinising" of issues such as traffic cases to displace them from the court calendars, and "dejudicialisation" in which social institutions rather than the courts regulate private conflict. The German system, on the other hand, draws conflicts into the courts by discouraging alternative dispute resolution and by consciously keeping the courts effective (efficient and inexpensive), creating little incentive for disputants not to use them.

1.37 The legal structure interacts intimately with the legal culture to condition the Dutch legal actors' attitudes, values and beliefs towards alternative modes of dispute resolution. This interaction is demonstrated in Haley's classical study of the "reluctant Japanese litigant" myth where he shows that there are cultural attributes in Japanese social organisation and values — shame, communitarian consciousness and fear of community ostracisation — that make the Japanese relatively litigation-averse (J O Haley, "The Myth of the Reluctant Litigant" (1978) 4 *Journal of Japanese Studies* 359).

However, there are also structural factors that reinforce these cultural inhibitions to litigation, including institutional incapacities, such as delays in the court system, the lack of lawyers, the courts' limited ability to enforce their decisions and provide adequate relief, affecting access to justice. Consequently, the widely held belief, inside and outside Japan, is that the Japanese are a non-litigious people. Thus, we have a legal structure aiding in, and in turn supported by, the successful transmission of a mythic aspect of Japanese legal culture!

1.38 While legal systems can be fruitfully studied by examining formal processes, much can be gained from a study of informal systems of regulation, enforcement and social norms. Such alternative structures tend to occur in places where the legal infrastructure is not well developed. Here, "moral communities" develop with their particularistic networks of insiders (usually kinsmen) and in-built compliance mechanisms centred on trust. Macaulay's classical study of the use of non-contractual relations in American business is an excellent case in point, where informal regulatory mechanisms either lower transaction costs or provide additional informal governance structures to reduce opportunistic behaviour (S Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *American Sociological Review* 55). However, one should not ignore prejudices, cultural preferences, bias and the importance of closed family networks for business transactions in the structuring of these mechanisms. There is a close nexus between formal and informal controls. The former is likely to supplement, and perhaps substitute for, the latter when informal controls become inadequate.

Legal Cultures

1.39 Legal culture refers to the "historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society" (J H Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law" (1981) 17 *Stanford Journal of International Law* 357, at 381). It is the "ideas, values, attitudes, and opinions people hold, with regard to law and the legal system" and forms the basis for the creation and sustenance of legal norms which either promote inertia or change in the legal system and legal actors (L M Friedman, "Is There a Modern Legal Culture?" (1994) 7 *Ratio Juris* 117). The internal legal culture of legal actors, such as lawyers and judges, impact upon the legal system as well. Lawyers are both transmission and

transformation agents and they can affect how clients perceive the law (the external legal culture). Hence, the management of the legal actors' deeply rooted and firmly held attitudes in many societies is important in helping to entrench the norms desired. This is well demonstrated in Abe's study of the Japanese judiciary's internal control mechanism in the selection, training and promotion of legal personnel resulting in the self-production of the judiciary's internal legal culture, ensuring a perpetuation and transmission of norms (M Abe, "The Internal Control of a Bureaucratic Judiciary: The Case of Japan" (1995) 23 *International Journal of the Sociology of Law* 303). Through a careful process of central control, the legal personnel are socialised, and shared norms are maintained and sustained in an environment where organisational autonomy is critical amidst antagonistic political forces.

1.40 Although legal culture is malleable, it is slow to change. Transition economies in the former communist bloc countries often have to deal with the lack of a culture of legality and legal consciousness among the legal system's actors and users. Because it is perceived to be an instrument of the state, post-Soviet Russia's legal system lacks legitimacy, fails to inspire confidence and is not depended upon for organising economic relations (K Hendley, "Legal Development in Post-Soviet Russia" (1997) 13 *Post Soviet Affairs* 228). Markovits' sensitive treatment of the then East German legal system highlights how the internal legal culture (and structure) influences the Judiciary's view of their role (I Markovits, "Last Days" (1992) 80 *California Law Review* 55). They resolved social crises rather than adjudicated on individual rights. The courts functioned as a "schoolhouse" to protect public order, which might seem alien to another legal tradition. Contrary to popular perceptions, East German courts were not kangaroo courts, especially in non-political cases. The outcomes arising from their resolution of legal disputes may have differed but they reflected a different ideological system and its particularistic systemic objectives. In socialist legal systems, law is often used by the communist party as an instrument of control and to improve governance. These two objectives are not regarded as mutually exclusive; in fact, they are seen as being complementary.

1.41 Social change impacts upon the legal culture, influencing changes in the legal system. For instance, given the pervasive and influential role of the media, Macaulay poignantly shows the images of law in everyday American life that the education system and the mass media portray (S Macaulay, "Images of Law in Everyday Life: The Lessons of School, Entertainment, and

Spectator Sports" (1987) 21 *Law and Society Review* 185). These alternative, particularistic and anecdotal representations of law and the legal system affect people's understanding and deserve closer scrutiny. These perceptions and assumptions of the legal system constitute the external legal culture and influence the users' perceptions of the legal system's legitimacy and relevance. In turn, this affects how they interact with the legal system and the legal actors.

Legal Traditions

1.42 Legal traditions, such as the common law, civil law, socialist, Islamic and Talmudic, originate from different sources and influences. They contribute to the persistence of distinctive styles of legal thought and practice in a legal system. Thus, legal systems, including legal transplants, from the same legal tradition exhibit common characteristics in the legal processes and operations of the legal system. Legal culture and legal tradition collectively constitute the "software" of a legal system. It is this "software" that helps explain why countries with similar socio-political ideals and legal traditions may approach similar issues such as crime and punishment, defamation and privacy issues in very different ways (see J Q Whitman, "Enforcing Civility and Respect: Three Societies" (2000) 109 *Yale Law Journal* 1270; and J Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (2003)).

1.43 In a similar vein, although Singapore, the US and the UK share a common legal tradition, their contrasting approaches in dealing with defamation of public figures reflect deeper political values and different legal and historical developments leading to a variegated understanding of freedom of expression, journalistic freedom and culture, and the public interest. Even then, legal tradition alone has inadequate explanatory power. Structural differences and particularistic developments in the politico-economic and bureaucratic systems in different societies can provide a nuanced understanding of why societies with similar legal traditions diverge rather than converge in different facets of societal life.

1.44 Legal culture, structure and traditions are not only of theoretical interest; they enable us to have a holistic understanding of how the legal system actually works. Each concept, on its own, lacks the nuanced explanatory power for the differential evolution and development of legal systems. The mutual

interactions among culture, structure and traditions affect the development of the legal system and vice versa. Legal structures develop from legal cultures and traditions and, in turn, they help mould the evolution of legal culture and tradition. Thus, notwithstanding the apparent tendency towards the convergence of legal systems globally, legal pluralism remains a persistent reality in today's globalised world.

Relationship between Law and Economic Development

Law and the Management of Risk

1.45 The rule of law and the legal system provide a necessary but insufficient condition for good governance. Simply put, the rule of law means and requires that everyone, including the government, is subject to the law. There is a vast literature on the relationship between law and economic development, and this section can only touch on some of the key ideas on the role of law in economic development. A distinction should be drawn between "risk" and "uncertainty". Law and institutions, if properly applied, help to manage risk and reduce uncertainty. To political economists, "risk" (when quantified, measured and priced with a degree of confidence) represents economic activity that is conducted by those able and willing to bear the potential threats and insecurities, with the promise of commensurate returns from such risk-bearing activity. With risk properly managed, economic actors can project their time and investments over the long term rather than engage in speculative economic activity (H L Root, *Capital and Collusion: The Political Logic of Global Economic Development* (2006)). Thus, a viable legal system helps ensure that risk, rather than uncertainty, prevails in the economic environment. Where "uncertainty" prevails, the proper allocation of risk and the expectation of returns on investment become more problematic. No investor or individual is prepared or incentivised to put their money in business ventures, bank deposits, etc, in such an economic environment.

1.46 On the other hand, if uncertainty rather than risk prevails, individuals and business entities will not be willing to pool their resources together (that is, to share the risk) to invest in larger economic activity outside of their parochial confines of family and closed communities. But it is this pooling of resources over a longer time horizon that makes economic progress possible through the mobilising of the sources of production to generate economic activity that benefits more people. Besides developing a viable and

legitimate legal system, the management of risk also requires investments and innovations in social and political structures. All these work together to provide a property rights regime that inspires confidence. A property rights regime is, in essence, one that respects ownership rights and the ability to deal with that property (whether real or personal). Such a regime recognises the individual's right to property and the appropriate protection of such a right.

1.47 This connection of risk to property rights assumes that individuals and businesses have information for which they can then make appropriate decisions. In reality, information asymmetry — where one party to a transaction knows more than another party about it — is common. A stable business environment, undergirded by the rule of law and institutions, helps to ensure that asymmetric information is not widespread or is minimised. With risk ably managed, capital can then be applied productively; otherwise, capital will be used speculatively which may benefit individuals and organisations in the short term but will otherwise compromise a society in the long run.

Box 1.1

Reflecting on the law **Should the right to property be a constitutional right?**

The right to property has been considered as part of man's natural rights and on par with the right to life and liberty. Many constitutions, such as the American and Malaysian, provide for the constitutional right to property. However, the Singapore Constitution does not provide for such a constitutional right to property. The approach has been a communitarian one in which the rigid adherence to property rights is seen as being detrimental to economic development in land-scarce Singapore. The larger public good is to be preferred over the individual interest.

This utilitarian approach is also evident in that, under Singapore's Land Acquisition Act (Cap 152, 1985 Rev Ed), the state can compulsorily acquire land if it is needed for economic development. This weighting in favour of public interest enabled the massive transformation of Singapore through extensive infrastructure works such as industrial estates, land transport and public housing development in the 1960s and 1970s.

Consider whether a constitutional right to property would enhance the management of risk with regard to real property. Or is such a right a luxury in small city-states like Singapore?

1.48 In short, a society that wishes to promote economic development will need to have good laws, a stable legal system, a viable ethical framework, and sustainable political and economic institutions with the goal of allocating capital efficiently under the rule of law. There also needs to be adequate investments in education and public health as economic development entails not just a legal framework but non-market improvements as well. This ensures that economic development is accompanied by equity, fair play and adequate social safety nets.

Law and Economic Development in Singapore

1.49 Singapore's economic development highlights the interplay of the issues raised above. Since its modern founding in 1819 by Sir Thomas Stamford Raffles, Singapore has transformed from a colonial seaport to being the second richest Asian country, with one of the world's most competitive economies. But this development did not come about by chance or good fortune. The development of a sustainable framework for economic progress was meticulously planned and determinedly implemented. Bold decisions have been taken and innovative changes implemented since Singapore's independence in 1965 in the drive to develop an autochthonous legal system that responds to the needs of the people who live, work and do business in Singapore. Singapore's economic development drive necessitated the establishment of an efficient and effective legal system, complemented by political will and economic ingenuity, to support the varying needs of commerce and trade. Technology, supported by a facilitative set of laws, is also harnessed to good effect. Undergirding all these is the commitment to the rule of law.

1.50 Today, Singapore is consistently one of the most business-friendly places in the world, as measured by the World Bank's *Doing Business* indicators. Her laws and legal system provide a robust framework for doing business and is a key building block of the economy, which is heavily dependent on international trade and investments. The economic competition will become even more intense and the law, with society, must respond with nimbleness to keep the economic lifeblood flowing.

Conclusion

1.51 Laws and the legal system do not exist in a vacuum. This chapter has attempted to demonstrate that together they constitute a social system continually having to respond to the needs of society. Much as most business people view law as a set of rules, appreciating the law in its socio-economic, cultural and political context provides us with a better understanding of the structure of the legal system and how it can facilitate or impede economic activity. Most importantly, laws, working in tandem with an individual and society's ethical values, play a big role in ensuring that economic activity can benefit society and the people who live, work and play there.