

## Functions of the law

The worksheet "What is law?" identified six functions of the law, with special reference to social issues that are the concern of social workers. These functions can now be explored in more detail (see *Braye and Preston-Shoot, 1997*).

1. To preserve the power structures of society. Arguably the law reflects class, race and gender biases, for example in the judiciary, and colludes with structural inequalities in respect of child care, mental health, employment and marriage and family life.
2. Social engineering. The social control function of the law becomes apparent here. The law establishes norms of behaviour and uses sanctions to coerce people into conformity. It proscribes and prescribes lifestyles, such as who may marry and who may have children.
3. To provide solutions to social problems. Once again, the social control function is evident. The law assumes a norm for behaviour and seeks to cure or control individuals who deviate from that norm. This is evident in mental health and youth crime. Moreover, the vulnerability of the law to moral panic is evident here. The law is a social construct. What is defined as a social problem, about which something "must be done", can change quite rapidly, which highlights why the law can evolve quite quickly. Criminal justice is the best example of this currently.
4. To shape attitudes and behaviours. Anti-discriminatory legislation in relation to race, gender and disability is remedial rather than fundamentally reforming. It aims to promote equality of opportunity but it does not address a more radical aim, namely equality. The legislation does not challenge the structures that maintain inequality. Equally, whole areas of discrimination have until recently remained relatively untouched by legislation, for example ageism and heterosexism.
5. Avoidance. Two examples of avoidance have just been given. Another is the limited powers available to health and welfare practitioners to protect adults from abuse and the relative ineffectiveness of the criminal law in this area.
6. Ideology. The law reflects beliefs about how society should be organised and run. Key questions for analysis, therefore, in respect of any 'client' group or social problem include: who defines something as a problem? Why is something being defined as an issue or problem? For whom is something an issue or problem? Why is it a concern now?

## Images in the law

Embedded within these functions of the law are images of people and at least by implication, the social issues relating to them. These images are not always consistent, either within single pieces of legislation or across different statutes. For the purposes of analysis here, five images will be discussed.

### Images of competency

Within the *Children Act 1989* children and young people are sometimes portrayed as competent individuals, capable when of sufficient age and understanding of making decisions about medical assessment and treatment, about seeking to initiate legal proceedings and about determining with whom they might want to live. For this reason, the *Children Act 1989* has sometimes been portrayed as being concerned with children's rights, although this is only one of several competing orientations to child care and child protection within it (*Fox Harding, 1991*).

However, in relation to special educational needs (*Education Act 1996*), the image is of children as incomplete adults, and they have no right to participate in tribunals when these quasi-judicial bodies are asked to resolve disagreements between parents and local education authorities about provision for children with learning difficulties. Moreover, even when children are deemed competent, courts sometimes overrule their decisions about accepting or refusing medical treatment.

Similar issues of competency surround, for example, the ability of learning disabled people to bring up children safely, or the ability of mentally distressed people, who do not require compulsory hospitalisation, to determine what treatment they might need.

### Images of moral worth

People seeking asylum in this country are currently portrayed as "spongers" or "dishonest" and "fraudulent". The image perpetrated by some politicians and media is that the request for asylum is a thinly veiled attempt to benefit from the welfare provisions available in this country.

Those who request assistance from social services departments, for example because their children are in need, often have to prove their eligibility to entitlement, because of ever tightening eligibility criteria that are the result of financial constraints on local authorities. As also with eligibility for some welfare benefits, a distinction is made, explicitly or implicitly, between the deserving and the undeserving poor. Need is associated with stigma and personal pathology. The implication is that someone needs assistance through some fault of their own.

## Images of race

This paper has already referred to asylum seekers and it is possible to discern images of race in the ever-tightening immigration and asylum rules. Whilst the *Race Relations Act 1976* and the *Race Relations (Amendment) Act 2000* seek to counteract racial discrimination and to promote equal opportunities, more punitive images are demonstrated through asylum and immigration legislation. They can also be found in the media and political reaction to the murder of Jonathon Zito by Christopher Clunis (*Harris, 1994*) and to other homicides perpetrated by black mentally distressed people. The image conveyed is that black people are mad and/or bad.

## Images of gender

There is evidence that women caught up in the criminal justice system, are more likely to receive psychiatric or custodial sentences than men, perhaps reflecting gendered images about behaviour. There has also been ongoing concern that courts respond differently when women murder violent partners than when men do so, with women much more likely to receive life sentences and to find it difficult to argue provocation. Indeed, the legal framework continues to fail to provide adequate remedies for women who are oppressed in domestic settings. Gendered assumptions can also be found in community care policy and practice, with the reliance on family carers and in child and family policy where women can be subjected to continued financial dependence on and involvement with previous partners through the operation of child maintenance and contact provisions.

## Images of disability

Health and welfare provision for disabled people assumes that what is required is care, adjustment and rehabilitation in order to maximise a disabled person's presence and participation in society. Provision does not question whether that society itself needs to change because of the barriers it erects that discriminate against disabled people. The focus of health and welfare provision is based on an individual and medical model, treatment for the person, rather than on a social model of disability which assumes that the focus of change should be social structures.

Equally, it is possible to discern images of disabled people as incomplete persons, for example in the concern that is sometimes expressed about the need to protect them from sexual behaviour. Whilst disabled people have now secured protection against discrimination in employment and in the provision of goods and services (*Disability Discrimination Act 1995*), it too does little to alter the structural position of disabled people. It remains to be seen whether the duties on public bodies contained with the *Disability Discrimination Act 2005*, to counteract disability discrimination and promote equality of opportunity, will change this picture.

## Overlapping images

Whilst separated out for ease of analysis, these images of course overlap. Black women may, for example, be doubly disadvantaged, whilst black, disabled women may experience "triple jeopardy". The dominant position reflected by the law might be said to be white, male, non-disabled, competent and responsible (*Braye and Preston-Shoot, 1997*).

## Conflicting imperatives

The complexity of the functions that the law is asked to perform and the divergent images that exist, result in a number of competing demands. These can contradict each other and are best explained as polarities. Between each polarity is a continuum and it is possible to locate different statutes along each continuum.

## Needs versus rights/citizenship

In health and welfare legislation there is often a tension between the requirement to prove need before an individual may gain access to assessment and services and rights to assessment and services. Health and welfare legislation usually does not give rights to individuals. For example, no-one has the right to treatment by the NHS. Rather, health and welfare authorities are given duties and powers, the exercise of which must be lawful, rational and reasonable. This, of course, allows resources into the equation. It also means that individuals do not have social rights, for example to having one's basic needs met for survival and autonomy (*Braye and Preston-Shoot, 1994*).

## Welfare versus justice

*The Mental Health Act 1983* represents a tension between an individual's health and safety and the health and safety of those around the individual and the civil liberty of the individual. The duty of doctors and social workers here, is expressed as the requirement to find the least restrictive alternative.

When a young person has been sexually abused, or has witnessed abuse, they may be interviewed by police officers and social workers and their evidence put on video for court purposes. The question here is how the right of the accused to a fair trial is balanced against the right of the child to give evidence and to receive treatment and support to help counteract the effects of what has happened to them.

A final example here is the question of mentally disordered offenders. Should they be diverted out of the criminal justice system and treated through psychiatry, or should they remain in the criminal justice system?

## Right to autonomy versus the right of the state to intervene

To what degree should the State intervene to regulate, for example, abortion and fertilisation treatment, or advanced directives about what an individual wishes to happen to them in the event of a terminal illness or loss of mental capacity? To what degree should the State intervene to override an individual's wishes, for example, about the imposition of caesarean sections to 'save' a baby's life, or of blood transfusions to save life even though this is against the religious convictions of the individual concerned? How should the right of the State to intervene in child protection, through social workers and other professionals, be balanced against the right of parents to bring up their children free of interference? To what degree should the state be able to impose compulsory medical treatment on individuals?

To these three conflicting imperatives may be added others. For example, care versus control, self-determination versus protection and needs versus resources. Occasionally, the values or principles underpinning legislation can be found in statute. For example, the *Family Law Act 1996* contains a statement about the importance of marriage, and the *Crime and Disorder Act 1998* contains a statement about counteracting youth offending. More often, the inspiration behind statute is implicit. For example, it is possible to see an increasing authoritarianism in the *Mental Health (Patients in the Community) Act 1995* and in recent criminal justice legislation.

Policy guidance and practice guidance does sometimes contain more detail about how statute is to be understood and implemented. For example, the *Code of Practice* that accompanies the *Mental Health Act 1983* contains the key principles through which the Act is to be implemented.

## Human rights act 1998

This handout has already identified that, in general, people do not have social rights and that, in relation to health and welfare services, the framework is one of powers and duties delegated to local authorities by central government. In disputes between authorities and individuals about the exercise of these powers and duties, the Commission for Local Administration (Ombudsman) and the High Court (occasionally then upwards to the Court of Appeal and the House of Lords) may investigate whether decision-making has been lawful, procedurally correct and based on sound administration and a rational assessment.

*The Human Rights Act 1998* has introduced into United Kingdom law many of the articles contained in the *European Convention on Human Rights* and *Fundamental Freedoms*. These articles, which are concerned with political and civil rights, will nonetheless have a major impact on social issues. The articles include the right to a fair hearing and trial, the right to life, the right to liberty and security, the right to respect for private and family life and the right to marry and found a family. This Act then may shift law towards a positive rights based system and may have a considerable impact on the development of law affecting social issues.

The Act does require that public bodies, when intervening in ways that restrict people's rights, act proportionately. That means having a clear view of what objectives are sought and intervening just as much as is necessary to achieve them. For example, in care proceedings it requires a council with social services responsibilities to have a clear rationale for seeking a care order as opposed to a supervision order.

## The limits of legal intervention

Some commentators (for instance *King and Trowell, 1992*) doubt if the legal system can deal with complex and delicate social issues. They argue, for instance in respect of the welfare of children, that the legal system may actually harm young people because of in-built delay, the adversarial rather than problem-solving nature of the system and because legal rules of evidence overshadow the needs of children. They also point out that the law can be a relatively blunt instrument, for instance in the face of parental intransigence on such questions as contact between separated parents and their children. If two of the functions of the law then, are to manage conflict and to protect rights, is the law ill equipped to achieve either outcome? Can the complexity of social issues and human experience be reduced to binary decisions: guilty/not guilty, yes/no?

The question, perhaps, to ask here is whether the law per se is limited in its ability to deal with social issues, or whether it is how the law is presently constructed, through its systems and rules, that limits what it can offer. *King and Trowell (1992)* argue that social issues and problems are transformed into legal problems and that this masks the damage done by lack of resources for health and welfare. To this may be added that it masks the impact of social and economic structures on life chances. It obscures the absence of debate and consensus on major social questions. It fails to consider what rights should be guaranteed to ensure quality of life.

## References

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