

One purpose of this learning object, The Body of Law, is to enable you to develop a theoretically reflective analysis of the inter-relationship between law and social issues.

To that end, it is concerned with identifying that:

- Law is a social construct, serving social and political ends
- Law is the outcome of political and moral debates or controversies and therefore questions of social policy
- Law reveals much about the society in which it exists, for values and ideologies underlying basic relationships in society are embodied in law as rules and principles.

We have established that the law is a system of legal rules and that these rules relate to the structure, rights, powers, immunities, duties and liabilities of the state (public law), or regulate the relationships between citizens (private law). These rules are to be found in legislation, secondary legislation (regulations), policy guidance, practice guidance, and case law. Thus, the legislative (Parliament) makes the rules through legislation; the executive (government) formulates and executes policy, and the judiciary adjudicates by deciding disputes on the basis of rules. This arrangement is known as the Separation of Powers, but the separation is not absolute. This was demonstrated recently by the debate about whether the Lord Chancellor, a member of the government, should also adjudicate cases in the House of Lords. Other examples include the Law Lords who also sit in the House of Lords when it acts as part of the legislature and government ministers who are part of the executive but also members of the House of Commons.

Another core notion is the Rule of Law. There are three elements within this notion. The first is government according to the law, a notion that is meant to curtail the exercise of arbitrary power. The second is equality before the law. The third is that the law is developed by judges on a case by case basis. There are several problems with this core notion. First, legislation often delegates to ministers the power to make regulations and much welfare law gives powers and duties to health and local authorities, which contain discretion. How is the exercise of discretion to be controlled? Second, not everyone is equal before the law. The State has a wide range of powers, and resources, which are unavailable to ordinary citizens. Then, class, race, gender, and age, to name but a few social divisions, have been shown to result in different experiences of the law. Third, many cases are not now decided in courts but in tribunals. These are not idle questions. For example, government has recently restricted the judiciary's autonomy in relation to sentencing (Crime (Sentences) Act 1997). This legislation, and other developments like the restriction on the right to a jury trial, are examples of mechanical regulation, attempts to simplify the disposition of cases. Moreover, the increasing use of discretion, for example in local government, may have offered organisations flexibility,

but has been used to deny individuals due process and services, for example in community care. Authorities do not, for example, always follow the rules relating to consultation or to the exercise of discretion (see *Braye and Preston-Shoot, 1999*), and the available forms of redress for individuals are retrospective, difficult to access and limited in their scope.

Another fundamental question relating to the rule of law relates to ethics or morals. A positivist view of the law separates 'what is' from 'what ought to be'. The law may be criticised for its moral content but it remains law until legally altered. Other theorists argue that law must have a basis in morality and that if law does not comply with such a moral requirement then it is not truly a legal system. This is known as natural law.

Major moral and political controversies are turned into legal rules, which judges are then called upon to interpret, and which agencies such as the police must enforce. The positivist approach, taking the law as given, ignores judgements of value, the motivations of legislators and the value judgements inherent in decision-making about which problems should be selected for attention. It ignores questions about who controls and the adequacy of controls upon the processes of law making, interpretation and enforcement. A positivist approach restricts inquiry, entertains a narrow view of justice and side-steps questions of wisdom and efficiency. It separates regulation from policy analysis. The question is whether this is right. A further line of inquiry arises from minority judgements in the Court of Appeal and the House of Lords, some of which have been critical of the intentions behind some (welfare) legislation and from the implementation of the *Human Rights Act 1998*, which will bring values to the forefront of United Kingdom law.

This distinction between positivism and natural law gains added importance when one considers the effectiveness of the legislative-making process. Law making is affected by a number of constraints, namely:

- Politics - the legal framework is influenced by political reality, by what ministers judge is (un)popular.
- Parliamentary time and structure - when the government has a large majority and/or strong ideological views, it may push through controversial measures. It may use parliamentary devices to curtail debate. Indeed, time available is already limited.
- Consultation processes - major legislation is usually preceded by green and white papers, which provide for public comment. However, sometimes bills are published and parliamentary debate begun before any wider consultation. In any case, government is under no obligation to take notice of the results of consultation.

There is a danger that these constraints, together with the interpretation and enforcement of legal rules because they are rules, will create disenchantment. The

limited consideration of the moral worth and political virtue of the rules will result in order but not change routine rather than vision.

So, once again, the discussion returns to the relationship between law and society. There are several issues worth considering at this point. First, the question of the distance between law and citizens. There is evidence (see *Cotterrell, 1992*) of citizen ignorance of the law, resulting in powerlessness to invoke it. However, legal rules assume that ignorance of the law is no defence. Moreover, the complexity of the legal rules and of statute creates the risk that the law will become the preserve of lawyers alone.

The second question, returning to the separation of powers, is the relationship between the judiciary and government. To what degree should judges be critical of legislation? Are they unduly timid in the face of government pressure? To what extent should government be answerable for the intentions behind legislation? Are judges, in searching for internal consistency between case law judgements and in interpreting the goals of statute, ignoring unnecessarily or unfortunately the problems and circumstances of individuals?

A third question relates to the individualism of the law. In the responsibility that the law imposes on citizens, for example, in relation to parental responsibility for children, the law neglects social or cultural factors. When sanctions are imposed, for example, for rule breaking, they comprise supervision and sometimes treatment, rather than interventions that focus on the circumstances confronted by the individuals concerned. Thus, a disabled person might be entitled to social services but the reason for that need, which may lie in the social and economic arrangements and structures surrounding them, remains untouched by any provision.

A fourth question is the balance between law as domination and law as co-operation. There is evidence, for instance in criminal justice, asylum and immigration and mental health legislation, of an increasing authoritarianism and regulation. In a number of social fields, as a result of moral panics and/or moral crusades, the law is being used to control and regulate. This contrasts with the view that law is, or should be, built on consensus of values and beliefs, on negotiated compromise, on commitment, solidarity and reciprocal obligations. Perhaps the distinction here, in part, lies in whether legislators build law on trust or mistrust of citizens.

Allied to this question is the degree to which the state, through law making and regulation, should enter into organisational and private life. For example, professions such as journalism and medicine argue that they should be allowed to maintain self-regulation. Gay men and lesbians argue that the expression of their sexuality within their homes should not come within judicial scrutiny.

A fifth question is whether the law is the appropriate mechanism for regulating and resolving social issues on which, often, there is little consensus. This question concerns the effectiveness of law. Thus:

- Can the law substitute or make good social ties that have been broken? For example, is the law effective in enabling children to have contact with divorced or separated parents? Is the Child Support Agency effective in ensuring that young people receive adequate income?
- How far can the law influence beliefs, achieve social change and educate? If the law is seen only as the exercise of state power, does it lose moral power?
- How far can the law control attitudes and beliefs, or can it only control observable behaviour?
- If the law is not based on strong cultural and social values, is it likely to encounter resistance and/or to prove ineffective?

The law is often a compromise between vested interests. However, it does have some potential to shape institutions and organisations. It does provide an institutional framework with which to address social issues, such as the Disability Rights Commission and the Commission for Racial Equality (to be replaced by one agency under the *Equalities Act 2006*) to challenge discrimination. The question remains, however, that when tackling discrimination, drugs and other social issues, what makes for effective legislation and is statute the best or only way of tackling these issues?

Within this concern with the effectiveness of law, is the issue of conformity. Why do people conform? Why do you conform? Is it because you do not wish to be excluded, or is it to avoid punishment? Is it because rules are rules, or a belief that you should support order? Alternatively, why do you not conform or what influences you when deciding whether or not to conform? Evidence here suggests that the certainty of sanction rather than the severity of sanction might be influential. Embedded within these questions is the issue of deterrence. Are potential deviants weighing up choices rationally, do they act on impulse, or are they adapting to their social and economic circumstances? The notion of deterrence is often used as a justification for legislating but evidence for it is unconvincing (*Cotterrell, 1992*).

There is some evidence to suggest what might help to ensure conformity to legal rules.

Relevant components here include:

- The nature of the enforcement agencies used and their commitment to enforcement (including ideological commitment, morale and resources)
- Timing
- Continuity between the legal rules and cultural and social values (hence appeals to equality or citizenship, for example)
- Positive incentives to conform and to use the legal rules
- Effective protection (as an incentive to use the legal rules; domestic violence provisions can be critiqued here)

So, by way of conclusion, what is law? There are some images of the law that should be subject to critical analysis, indeed perhaps viewed as myths. The first image is that the law promotes justice - but what is justice and is whatever justice is, mediated by class, social status, education levels, access to knowledge and opportunity? The second image is that the law promotes welfare - but what is welfare and who decides? How are conflicting ideas about what is in someone's best interests to be resolved? The third myth is that of the law's neutrality - are we all equal before the law or does the law actually promote some interests more than others? Perhaps, not consistently or uniformly, but there is evidence that the law extends power relations. The fourth myth is that law promotes good and right solutions and is helpful - again, from whose perspective?

These images or myths have to be set alongside the purposes to which the law is put, particularly the resolution of conflict, the allocation of authority, and the formalisation of power relationships. The myths, in relation to welfare law, are explored further by *Braye and Preston-Shoot (1997)*. However, it is fair to conclude that law is both the control of power and a weapon of power (*Cotterrell, 1992*). Put another way, arguments that see the law either as an expression of consensus or conflict, either as an expression of coherence or repression, over-simplify the picture. Law, to some degree, is a reflection of economic and social structures, of class and social status and of the need for a framework of rules that are predictable and allow people to achieve their goals. In no small measure, it is state power, and a set of rules to ensure social control, process disputes and limit arbitrary action. However, it is not purely a repressive mechanism since it does not consistently favour one set of interests, nor is it just an expression of a basic unity, since dominant ideas and beliefs are very influential in shaping what is legislated. Finally, whilst the law may not express the clarity that we seek, perhaps its use of vague concepts, such as 'partnership' and 'empowerment' (in community care law and policy) disguises conflicts, limits dissension and promotes unity. Or, does it obscure the real debates that need to take place?

So, the final questions for you to consider include:

- By what processes were your attitudes about the law formed?
- What influences your acceptance of law?
- What should the law be used for?
- How and when should law respond to social issues?
- What forces shape law making?

References

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