

Law: A Short Introduction

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1. What is Law?

This is a very short overview that gives signposts to ways of thinking about law. The first is to grasp that “law” is at the same time common, in that societies are governed by laws, and different, because it is not a natural creation. Laws are different across the world, based upon different political, religious, or social systems, with different justifications and mechanisms of legitimisation. Further, the labels of law, while largely the same, are often different between cultures. Thus, the same simple terms have massive differences between different systems. Arguably, the story of law has reflected and continues to reflect the development of human society from tiny geographical beginnings, through trade and alliance, to international co-operation and today’s globalisation. Law does not create this, but it is a vehicle for its advance and problem-avoiding and problem-solving where there is will or necessity.

Laws (sets of rules) are concerned with the social control of individuals in communities. Without community, living in isolation, humans would not require laws (although one is tempted to think that isolated individuals would regulate their own existence in that isolation to curb needs). However, man does not live in isolation but firmly in community. In each community, through whatever means, “laws” emerge for the regulation of the individual’s behaviour, to govern the operation of the community. These laws operate with increasing levels of sophistication. The great American jurist, Karl Llewellyn, in his *Law-Jobs Theory* (Llewellyn (1940)), suggested that at its core law is about problem-avoidance and problem-solving. This is very much a functionalist approach and does not make value judgements about the quality or appropriateness of the law, but it is a good starting point for our understanding. Llewellyn indicates that societies require certain regulatory functions to be undertaken to avoid and solve disputes that emerge between individuals within the society. Further, one can see that international arrangements require and find similar avoidance and solving mechanisms. Llewellyn sees that four law-jobs are essential for social order:

- Conflict, or “trouble case”, resolution mechanisms;
- Conflict avoidance measures – “preventive channelling”;
- Recognised power structures; and,
- Ensuring shared goals – “net drive”.

Thus, in every successful society and in successful inter-societal relations we can observe successful mechanisms fulfilling the law jobs. There must be rules that regulate the social order of the group. This is the same for a sports club as it is for a country. There must be clear expectations for and duties upon the members of the group. Where those clear rules are breached there must be a mechanism for conflict resolution. Further the power to create rules, administer the group, adjudicate in disputes, and impose settlements (or punishments) must be recognised. Finally, the group must have and nurture shared goals which are both reflected in the other jobs and also give purpose for the group’s existence. Where there is conflict in society or between societies, the law jobs’ mechanisms are flawed or are missing. This also gives a useful tool for cross-cultural analysis of laws. It would be a mistake to look for the same terms and labels for laws as the basis of comparison between societies, but looking at the same problems and asking how each society would address them in their laws gives a complete picture for comparison. This also applies regardless of the level of development of the society being studied (and one might ask if it is simply a method for analysing human behaviour and society).

In the majority of societies, one can observe law-making institutions, law-enforcing institutions, adjudicating institutions, and then rules that flow from (and regulate) those institutions and that

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regulate the society internally and its international relationships. All of these are for the shared goal of living together in social order and for the advancement of that society. These rules could be categorised into three groups of regulations, those:

- between specific individuals – and here we would see rules of “contract” that bind only the individual parties to the agreement, and “torts” (or civil wrongs) where individuals have liabilities to specific individuals, for example not to behave negligently to them;
- between individuals and everyone else in society – for example property rights that go beyond the relationships between specific individuals and recognise rights against the whole community to respect ownership;
- between individuals and the state – for example criminal law, where the state stands for the whole community, or rules of public administration (and these rules would also regulate the creation and enforcement of rules); and,
- between states – part of the administrative rules will concern relationships between states, for example in informal diplomacy and in formal treaties.

At this point, you should be able to identify your own country’s legal rules and rule-making. If you discuss with other participants from different countries choosing a problem-based approach (for example, how your countries deal with buying a newspaper), you should be able to see differences and similarities between how rules are made, how they are applied, and what social and philosophical values underpin the systems.

2. How is Law Legitimate?

a. *Legal Positivism and Natural Law Theory*

What Llewellyn’s analysis (or indeed your discussion) will not give you is any adjudication between the systems to say if one or another is right, or better, or invalid, or acceptable. For Llewellyn and other Legal Positivists, that is not a problem. They would say that law, if it has the society’s authority – for example, it is made by a court or a parliament, observing all the rules for law-making within that society – then it is law. For them, questions of validity (for example, if the law is morally valid, or indeed efficient for its own ends) are separate questions to ask about that law. But for them it is law. Whether it should be is a different matter. So, if a government enacted a law to punish all speeding motorists by death, so long as the law was enacted within the rules of that society for making law, it would be a valid law. Whether it should have been enacted is a different matter for the Legal Positivists.

Natural Law Theory opposes this central claim of Legal Positivism. Natural Lawyers argue that for a law to hold that label with any meaning, given its function in society, it must have a validity and legitimacy beyond mere institutional validity. For the Natural Lawyer, while the fact that certain rules are labelled as “law” is obvious, a law is only “Law” if it has morally validity. They are not agreed beyond this claim. Thus, there are Natural Law Theories based on religious beliefs and upon philosophical justifications. The issue in the speeding motorist example would be that the rule would only be a valid law (Law) if it was morally justified (having made a proper progress through the legislative process). If a moral theory could justify such a rule, then it would be a Law. This points to two things. While a rule might not be valid Law, disobedience could still invoke the sanction (albeit an invalid sanction). Further, the theory does not offer any help in adjudicating between competing moral theories.

b. *Weber and Legitimacy*

The Natural Law Theorists present a particular view of the legitimacy of law through morality. Weber (1954) points to the ways in which law gains legitimacy in different societies. He suggests that there are three ways by which members of society lend their support to authority (and therefore the authority of law). First he points to coercion. An individual may be compelled by force of some kind to accept authority or the rules of an authority. This could be any form of force, but here Weber suggests that the authority based upon force alone has little legitimacy. Second, authority can be granted by the individuals in society on the strength of the charisma of the claimant. There are many examples of acceptance of authority and the rules flowing from authority on the basis of the personality of the claimant. Finally, Weber points to authority claimed through legal-reason. This he finds the most acceptable of the claims to authority. Legitimacy for the rule and authority stems from the objective correctness of the actions.

One must note two things. First, there can be an element of all three, or the mixture of the elements building to the claim for authority, but without the objective validity of the claim, the authority is illegitimate. Second, and most interestingly, a claim to democratic government does not necessarily satisfy the requirement of reason, and arguably, a rational dictator without democratic authority is not necessarily an illegitimate authority. The majority can oppress the minority with the same illegitimate brutality of any dictator.

c. Sovereignty

Following thoughts about Weber's analysis of power and authority one must consider sovereignty. Sovereignty is responsibility for the creation and administration of law. There are many different bases of sovereignty. Perhaps the common ancient thread of sovereignty that is not yet broken is the link between sovereignty and geographical territory. Until the advent of international telecommunications, the Internet and global corporations, territorial claims have been related to geography and the physical extent to which a society could defend what it described as its land. Within those territorial groups, sovereignty also indicates the relationship between individuals in relation to power and rule-making. Thus, individual personalities could lead, groups within the society could lead, all the group could make decisions. Today the number of sovereignty structures, from absolute monarchy, dictatorship, constitutional monarchy, republics, and the like, is very great. Further, with international corporations holding greater economic power over individual geographical sovereign territories, the thread of sovereignty and territory through nationhood is perhaps being stretched to a breaking point. It will be interesting to see if the associations of geographically located states will develop power structures sufficient to regulate international corporations, or whether individuals will see themselves not as citizens of geographical countries but of corporations, enjoying the benefits of their corporate statehood.

The relationship between individuality and sovereignty is very important. In a democratic state, there is an assumption that the institutions of the state are accountable to the individuals given electoral power. This does not mean everyone. There are routine exclusions from electoral colleges across the examples of democratic government. This accountability indicates that the responsibility of government ultimately falls not on the institutions of the state but on the electorate. The institutions are merely the agents of the electors. Consider the implications then of the individual elector's complicity in a decision made on his or her behalf, for example to go to war or to outlaw immigration. The State is not another individual, it is all electors. Perhaps this also calls into question the rules concerning the accountability of the elected and the regularity and involvement of the electorate.

I have made a distinction between electors and individuals. There is a further issue in the basis of membership of the electoral college. Children routinely in western democracies are denied the right to membership of the electoral college. This is justified by requirements of experience or maturity. Other constraints might be based on, for example, gender, education, or nationality. What is the legitimacy of these membership rules? Is it simply a matter of local culture, or does the growing acceptance of human rights require a membership in the electoral college for all? Who must that include? Is the "must" generated by a universally accepted or necessarily required moral standard?

3. How does Law Operate?

a. Separation of Powers

As we have seen in the law-jobs, there are two clear and distinct jobs: rule-making and adjudication. There are two concepts that are common to the two functions: accountability and transparency. The separation of powers concerns accountability. Where the rule-makers or the adjudicators are unchecked, there is a danger to the freedom of the individual. Thus separating those who make the law from those who adjudicate disputes about the law ensures that there is some accountability one to the other. Clearly, there are difficulties presented by judge-made law (in the Common Law system), and the appointment of the adjudicators by the rule-makers. These problems are, to some extent avoided by constitutions. Constitutions are the rules of rule-making and adjudication for a society. This goes some way to the heart of ensuring justice or fairness in society, by providing transparent rules by which the society is governed. The constitution may be written, i.e. in one clear body of rules (e.g. that of the USA or RSA), or unwritten, i.e. a body of

customary and piecemeal rules (e.g. that of the UK). Further, international treaty obligations, for example in relation to human rights, may impose standards upon law-makers that require respect to aspects of fairness.

One further element ensuring fairness is the rule regulating the retroactive effect of law. Clearly, it would be unjust to change the law such that one's previous conduct (although lawful at the time of commission) was declared unlawful at a future time. However, Fuller (1969) shows that not all retroactivity is outlawed. Retroactivity that acts for the benefit of the individual is regarded as necessarily good. Further, it can be argued that any interpretation of the meaning of words in the law requires a degree of retroactive application. However, the fairness principle requires that laws be published in advance of their imposition to the detriment of the individual.

b. Rule-making: Authority, Legislation, Regulations, Codes

Within a constitutional framework (be it written or unwritten) law-making generally falls to an executive (e.g. Government) within a legislative assembly of representatives of the members of society (e.g. a Parliament). The representation and the adherence to the procedural rules of the system give the rules legitimacy as law. "Primary legislation" is generated directly at this level. It has direct effect. It may also contain delegated power to other individuals, for examples ministers of the government, to create further rules under the primary legislation. Such rules are "secondary legislation". Constitutional links ensure that the exercise of secondary legislation is within the power delegated in the primary legislation. For example, in the UK, a Statute (primary legislation) may give powers in a section of an Act "to the Secretary of State to make such rules as he sees necessary". If the Secretary of State chooses to exercise this discretion, the rules are created through Statutory Instruments (secondary legislation), and are laid before Parliament to be approved before they become binding. In the UK, as in many jurisdictions, where power has been delegated to a specific individual or office, it cannot then be delegated by that person to another. Delegated power must be exercised by the person to whom it was delegated.

Legislation may govern a situation through "Regulations". Regulations are binding instruments for certain circumstances. They could appear either in primary or secondary legislation. For example, a Government may see the need to produce rules to impose a set of binding standards upon an industry. The industry is otherwise private, but rules are imposed upon its freedom to achieve specific ends, for example consumer protection or consumer confidence. Thus, a piece of primary legislation will create, either directly or through secondary, delegated powers, regulations setting out the rules within which the industry must act. Regulations differ from Codes of Guidance in the binding nature of their content. Guidance offers best practice within which an industry (or other institution) might work. However rules are framed, they must be promulgated before they can be claimed as legitimately binding upon individuals.

Legislation, be it primary or secondary, and regulations may give discretion to individuals. The legislature may acknowledge that circumstances in which the rules are to apply may change, or that there are reasons to allow some latitude in the application or scope of the law. Discretionary powers are granted to achieve that responsiveness in the law. It is a matter of fairness that the discretion should be exercised within the power granted, and, indeed, that it should be exercised. Therefore a refusal to consider exercising discretion and a fettering of discretion by imposing a blanket decision for all the circumstances in which the discretion applies (rather than considering the exercise of discretion in individual cases) are outlawed. The benefits of discretion are that it gives considerable flexibility in decision-making, but its dangers are that like cases are not treated alike (a central principle in achieving just decision-making). Davis (1969) shows that discretion can be given to avoid open-ended power, and that discretion, focused to specific situations and ranges by the executive, ensures that the benefits of flexibility are maintained without the dangers of arbitrary decision-making.

d. Natural Justice in Adjudication

The second set of institutions of governance are those of adjudication. The adjudication institutions have two functions, first to apply and interpret the law, and second to ensure that the rule-making process follows the constitutional requirements and other supervening obligations such as human rights. Both these elements, especially the latter, depend upon the constitutional position of the

adjudication arm. Adjudication will take place, in a complex legal system through a number of different fora, and this variety is required for a number of considerations. For example, where the issues to consider are relatively simple and the sums of money or rights in question are equally small, a more informal tribunal may be employed to ensure relatively cheap and quick decision-making. As more complex issues and greater rights become involved, so the formality of the proceedings may change in reflection of that. There will also be a hierarchy of courts to give an appeal structure, culminating in a final right of appeal. This both gives the possibility for mistakes to be corrected, but also for a case to be completed.

Natural Justice is a practical part of ensuring legitimacy of adjudication within a society. The principles are not universally held, but they are simple methods to ensure some degree of legitimacy for the rule of law within society. The two main principles at the heart of Natural Justice are "*audi alteram partem*" (that hearings must be fair) and "*nemo iudex in causa sua*" ("no one can be a judge in their own cause"). Craig (2003) gives a clear explanation of the development and scope of these principles in English law. The key is procedural and administrative fairness in the operation of law and also that it should be seen to be so. Thus, fairness can be ensured when the law is promulgated before it is binding, when the charges or allegations made are fair, when representation is available for all, when the participants have a right to hear and to be heard, and when the judiciary is independent.

e. Common Law: an unfortunate hybrid?

Legal systems can be classified as civil law or common law. Unfortunately, as with any terms they depend upon their context and have a variety of meanings. Civil law, for example, is often used to distinguish a body of rules from criminal law. Common law, in English law, is a specific jurisdiction alongside, for example, Equity (Chancery), or the Law Merchant (with its customary law roots) (a distinction made to some extent obsolete by the Acts of Judicature in the late 19th century). The interesting meaning of Civil and Common Law jurisdictions for our purposes is the distinction between a highly codified system of rules (as for example in France with the Code Napoleon and subsequent codified law) and the Common Law jurisdictions (as for example in England). In Common Law systems there is a distinction between the codified law of parliament and the operation of judge-made law through precedent in the courts. In a Common Law system, the interpretation of the codified law itself becomes binding and "law" through the work of the adjudicators in court. However, the adjudicators also have areas of law that they have created outside statute and that they maintain through precedent decisions within the hierarchical court structure. This poses difficulties for the separation of powers and because rules of conduct are imposed upon members of society not through the democratic institutions of rule-making, but also by the adjudicators. Where the society sees democratic election of its rule-makers as important, rule-making by unelected adjudicators is difficult to explain.

4. International Treaties

a. Freedom v Paternalism

This paper perhaps suggests that laws are inevitable. This is to some extent true. However, the extent of the impact of law-making upon individuals' lives should not be underestimated. Law is an intervention in the freedom of the individual to express him- or herself as he or she chooses. The degree to which the state can intervene to curb self-determination by the individual is at one level a political issue. Left wing rule-makers may feel that centralisation of decision-making and needs provision for society is the most effective way of ensuring that needs (physical, social or spiritual) are met. The engines of the state can, in such politics, be seen as benevolent and paternalistic to the individuals in their charge. This is anathema to the liberal right wing politicians who would claim that intervention by the state is a denial of freedom and citizenship of the individual. Giddens (1998) has noted, however, that the concerns and responses of the left and right have historically not been fixed. He shows that there are no necessary political positions to be taken to be "right" or "left", or "liberal" or "interventionist", rather there are responses to issues that change within the overall package of policies adopted by political parties and movements at any one time. For example, free trade and protectionism have moved around the political spectrum, being seen as central for the left and right at different times. The important element to notice is that there are a variety of political positions in rule-making that have a profound effect on individual freedom.

b. Human Rights

National constitutions have defined human rights for many years. Human rights emerged on the international stage after the 1939-45 conflict. The Universal Declaration of Human Rights produces a benchmark of rights, and various further treaties bind their signatories to implement those rights into national law. They go some way to meeting the point that Giddens raises about the movable nature of political positions. Human rights, being benchmark standards, give individuals a set of freedoms and rights that can only be removed in the face of supervening claims to the breach of other individuals human rights. The rights cannot be breached for political expediency or any other cause save the protection of the rights of others, and even then, the removal of the rights is an issue of balance. The major rights concern fundamental rights and freedoms such as a right to life, freedom of expression, freedom of speech, rights to family life, and the like. Further treaties introduce rights to shelter, food and the like (although these do not seem to have attracted the same enthusiasm as the primary treaties).

c. Economic Treaties

Human rights treaties are but one example of international co-operation around an agreed theme. Nation states have equally seen the value of forging links for trade and economic purposes. This has great implications the area of biotechnology. Treaties are negotiated by different groupings of states. The United Nations has been the forum for many biotech treaties. Another post-1939/45 creation, the World Trade Organisation (WTO) has seen economic treaties, especially through the General Agreement on Tariffs and Trade. Whereas intellectual property rights were harmonised through individual treaties and then through the World Intellectual Property Organisation, the TRIPS agreement has brought the regulation of intellectual property rights under the power of the WTO. Further, nation states have always made alliances to strengthen their individual positions. This continues, for example, in the European Union. The Union had modest initial ambitions in the harmonisation of coal a steel production in the 1950s. It move in the 1960s and 70s to a European Economic Community, and then into a European Community. Today it is a Union with aspirations to a common currency, social regulations and foreign policy beyond its economic harmonisation through the single market. It is a Union that also extends geographically further to the east.

d. Treaties and Sovereignty

Treaties depend first upon a critical number of countries signing the treaty and then upon the implementation of the treaty into national law. They are concerned with the subjugation of the national into the international. This is their strength and weakness. As Llewellyn suggested, the success of international treaties depends upon their ability to forge a new community with mechanisms to fulfil the law-jobs. The treaties derive their authority from the negotiation and acceptance by signatory states, impose behaviour requirements upon the signatory states, have adjudication systems with sanctions for failure to comply with the treaty obligations, and manifest shared goals of the signatory states. However, there are, perhaps, too many examples to show that we have not yet managed to set aside our national interests to find the crucial international goals that will allow the rest of the law-jobs to be successful.

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