

LAW

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Keywords: law, ethics, justice, systems of law, structure of law, philosophies, functions of law, law institutions.

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Summary

The main role of law is to ensure the fair, just, and efficient ordering and operation of human societies. Ideally, law and its accompanying institutions provide all members of society with equal economic and social opportunities and ensure that each will be treated equally by the government. Beyond that, there is little agreement about the role of law in society and its relationship to such related concepts as morality, ethics, and justice.

The aim of this theme is to show how law, together with its institutions, reduces expectations about human behavior to a set of discoverable norms and rules. While the values underlying most legal systems today are the values of liberalism—the rule of law, capitalism, democracy, and an emphasis on individual rights—these values are by no means universal. The functions and structures of legal systems, however, share certain similarities even when the ends and ideals of those systems differ.

Most legal systems are the product of centuries or millennia of accretion and growth, and have attained considerable complexity. As a result, in almost every country, a professional legal class has grown up. This theme addresses the restrictions placed upon this class, with particular attention to the duties owed by professional lawyers to their clients. In addition, because in many countries the law has grown so complex that it is inaccessible to much of the populace, this theme attempts to provide entry into the often daunting field of legal research. Within any given legal system there exist many fields of specialization; many of the articles in this theme are allotted to the discussion of particular specialties within the law.

1. Introduction

Law, formally recognized as such or not, is an essential life support system; it is an essential ingredient in the functioning of every human society. Yet there is no more agreement on the meaning of the term “law” than there is on the meaning of many other apparently basic concepts, such as “art.” All of us live our lives in accordance with, or at times at odds with, “law;” an entire profession is devoted to the study and practice of “law;” governments everywhere proclaim, at times sincerely and at times hypocritically, their allegiance to the “rule of law.” All of us seem to think we know what law is, yet most of us rarely if ever examine the concept critically.

Almost any definition of law will meet with objection from some group of philosophers or legal scholars. Perhaps the most generally acceptable statement that can be made without being so over-inclusive as to lose all meaning is that law is a set of normative expectations about the behavior of individuals and groups within a society. Each member of society recognizes certain rules of behavior, expects that most others will act in accordance with these rules most of the time, and understands that those others have similar expectations. Each individual undertakes to fulfill those expectations—that is, to act in accordance with the rules—to a greater or lesser extent.

It is the creation of and failure to fulfill those expectations that gives rise to the study and practice of law. It is probable that all members of a society behave in a way at odds with that society’s formally expressed expectations some of the time. There may be any number of reasons, among them ignorance, accident, a desire to avoid inconvenience, a desire for profit, and malice. An important part of the work of law is sorting out the types of non-compliance with expectations that can be accepted and those that cannot; in other words, creating a second level of expectations.

The origin of that first level of expectation—the basic rules with which most members of a society are expected to comply most of the time—is subject to considerable debate. At one end of the philosophical spectrum is the belief that at least some absolute rules exist in immanent form long before they are “discovered” by a society and its lawmakers, lawyers, and judges. At the other end is the belief that a society has no rules other than those that it chooses to make for itself, and that all of these rules are thus subject to change. Between these two extremes, and perhaps beyond them, lie countless other schools of thought. However, lawyers in general are pragmatic and spend little time worrying about the misty origins of Law; they are far more concerned with the application of the law to particular sets of facts and with future developments in the law.

2. Functions and Structures of Law and Its Institutions

Any legal system must perform three functions. It must make rules, it must enforce those rules, and it must resolve disputes arising from the application of those rules. Different legal systems have evolved different structures to perform these functions. A common overall structure, however, is tripartite, reflecting the three functions the system must perform. Typically, a legislative body of some sort makes the laws, an executive branch of government enforces those laws, and a judicial system resolves disputes.

Most of the world's countries make at least a pretense of representing the people they govern, and the legislature is generally elected. The executive may be directly elected or chosen by the legislature, or may be hereditary. In some hereditary monarchies, the legislative and executive functions are combined, while in others the monarch appoints the legislature.

Under ideal conditions in a democracy, the legislative process and the laws will represent the interests of a majority of the people. In a monarchy or non-democratic state, the laws will represent the interests of those in power. In either type of state, a judiciary is necessary not only to resolve disputes but also to protect the interests of those not empowered in the law-making process. This judiciary functions most effectively when it is independent of the rule-making and administrative authorities.

A democratic society without an independent judiciary becomes the tyranny of the majority. Nothing but the good intentions of the majority protects minorities from laws discriminating against them. In the absence of some mechanism for judicial review, a majority can vote to impoverish or disenfranchise members of a minority, to deport them or sell them into slavery, or even to exterminate them, although these last extreme examples may be subject to constraints of international law.

One of the most important functions of courts in a democratic society, then, is the protection of minority interests and rights. In pluralistic societies founded on classical liberal principles, the courts tend to win approval when they protect the interests and rights of racial, ethnic, or religious minorities; only a marginalized extremist minority in most countries objects to this form of protection of minorities. On the other hand, it sometimes becomes the job of the judicial system to protect this extremist minority, as when the United States court system protected the right of American Nazis to march through a Chicago suburb. Decisions of this sort are often much less popular. Other decisions polarize a community along political lines: decisions protecting the interests of the rich are likely to prove unpopular with the political left, for example, while decisions protecting the rights of accused or convicted criminals are likely to prove unpopular with the right. In order to function effectively, courts must be insulated from the political process in a way that legislatures and executive bodies cannot and should not be.

2.1. The Professional Practice of Law

An essential adjunct to the judicial system is the existence of a trained professional community of lawyers: the practicing bar. While the judges are employees of the government, the majority of attorneys are not. The existence of a professional bar provides individuals seeking redress of wrongs with multiple avenues of approach to the courts. Not only is it far less expensive for government to privatize this function, it is far more effective than setting up a government grievance procedure for every imaginable wrong.

The standards and procedures by which one becomes a member of the professional bar vary greatly from one jurisdiction to the next. In the United States, admission to practice in each state is regulated at the state level; admission to practice in one state does not

guarantee admission to practice in others, although lawyers admitted in any state may be admitted to the federal bar. There are certain relatively uniform elements to the process, however.

With only minor exceptions, admission to the practicing bar is contingent upon satisfactory performance on a bar examination, usually lasting two or three days, and upon a determination of good moral character following an investigation of the applicant's background. Almost all bar applicants first complete a program of post-secondary preparatory education. Typically this consists of a four-year undergraduate degree and a three-year program of graduate study culminating in the J.D. (Juris Doctor, or doctor of laws) degree. Most state bars require that the J.D. be obtained from a law school accredited by the American Bar Association (ABA); there are about 180 such schools.

The barriers to entry are obviously formidable, and have been criticized as protecting a monopoly. Two major bottlenecks in the system are the requirement of a J.D. before taking the bar examination and the bar examination itself. On examination, each of these can be seen to serve a useful function, although in some states at some times their application may be excessively stringent.

The requirement of a J.D. or equivalent degree is generally defended as necessary to ensure a well-qualified bar. Opponents argue that the bar exam alone should serve that function, and California has made it possible for applicants to show eligibility for the examination in other ways than completion of the J.D. (Very few of these alternative applicants pass the bar examination.) Proponents, on the other hand, point out that three years of law school does far more than prepare the student for a three-day examination; it teaches a way of thinking and a body of knowledge, it familiarizes the student with legal research and the practice of law, and does everything possible to assimilate the student into the culture of the law.

The examination itself is generally recognized as necessary, although Wisconsin considers satisfactory law school grades earned within the state to be equivalent to passage of the bar examination. The format and content of the examination have frequently come under attack from a variety of directions, though. Over the years bar examinations have been accused of almost every imaginable failing, from discriminating against members of ethnic minorities to testing skills unrelated to the practice of law. As a result, the examination is under nearly constant critical examination and revision. At the same time, there has been a move toward nationwide standardization of the examination. Most states have voluntarily adopted the Multistate Bar Examination, a multiple-choice test that makes up one-third to one-half of the total examination. There is also a Multistate Professional Responsibility Examination, and multistate performance and essay tests have begun to gain currency.

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Bibliography

Blaustein, A. P.; Flanz, G. H. (eds.) 1971 to present. *Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies*. Dobbs Ferry, N.Y., Oceana.

Campbell, D.; Thomas, P. (eds.) 1971. *The Nature and Sources of the Law* by John Chipman Gray. Aldershot, UK, Ashgate/Dartmouth. [Legal theory.]

Cockfield, A. J. 2001. *Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform*. *South Dakota Law Review*, Vol. 46, pages 8–71 [The relationship between authority, taxation and personal autonomy.]

Danner, R. A.; Bernal, M.-L. H. (eds.) 1994. *Introduction to Foreign Legal Systems*. Dobbs Ferry, N.Y., Oceana. [A general guide to research in other legal systems than the United States'.]

Davies, M. 1996. *Delimiting the Law: Postmodernism and the Politics of Law*. London, Pluto. [Legal theory.]

Declaration of Independence (United States), available from US National Archives and Records Administration, <http://www.nara.gov/exhall/charters/declaration/declaration.html>.

Declaration of the Rights of Man (France), available from the Avalon Project, Yale Law School, <http://www.yale.edu/lawweb/avalon/rightsof.htm> (English text); Déclaration des droits de l'Homme et du citoyen, 26 août 1789, available from Ministère de la Justice de la République Française, <http://www.justice.gouv.fr/textfond/ddhc.htm> (French text).

Douzinas, C. et al. 1991. *Postmodern Jurisprudence: The Law of the Texts in the Texts of the Law*. London, Routledge.

Dworkin, R. 1986. *Law's Empire*. Cambridge, Mass., Belknap. [Legal theory.]

Higginbotham, A. L. 1978. *In the Matter of Color*. Oxford, Oxford University Press [Information on the law of slavery and related matters.]

Olson, K. C.; Berring, R. C. 1988. *Practical Approaches to Legal Research*. Binghamton, N.Y., Haworth. [A general guide to research in the legal system of the United States.]

Schwabach, A. 1997. *Jefferson and Slavery*. *Thomas Jefferson Law Review*, Vol. 19, pages 63–90 [Information on the law of slavery and related matters.]

Sommerset v. Stuart, 12 George III a.d. (1771–1772) Lofft, 20 How. St. Tr. 1. [Case effectively ending slavery in England.]

Vandevelde, K. J. 1996. *Thinking Like a Lawyer: An Introduction to Legal Reasoning (New Perspectives on Law, Culture, and Society)*. Boulder, Colo., Westview. [Practical legal reasoning and theory.]

Biographical Sketch

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