

No.3 The definition of law

Reading:

Harris, P., An Introduction to Law 7th edition, Cambridge, pp.1-25

Please be ready to explain whether "Muslim must not sell alcohol drink" is law or not.

Goal:

The goal of this session is to understand the following issues:

The meaning of the law that is distinguished from other norms.

The social functions of law.

The reason why the people obey the law and, thus, the society can be governed by law.

1. What is law?

The Oxford English Dictionary defines the "law" as:

"The system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties."

With this definition, we may find some questions about the law. At first, who makes the law and who enforces the law? Second, how and why do people recognize the law? Last but not least, who imposes penalties?

However, at the same time, we will find many legal rules that, at least, it seems, do not impose a penalty. Harris explains that:

"Marriage is a good example of the way in which social rules govern our lives. Not only is the monogamous (one man/one woman) marriage supported by the predominant religion in British history – Christianity; it is also maintained through moral rules (hence the traditional idea of unmarried couples living together being ‘wrong’) and by the operation of rules of law which define and control the formalities of the marriage ceremony, lay down who can and who cannot legally marry, specify the circumstances whereby divorce may be obtained, define the rights to matrimonial property upon marital breakdown, and so on.

Marriage is only one example of social behaviour being governed through rules. Legal rules are especially significant in the world of business, with matters such as banking, money, credit and employment all regulated to some extent through law. Indeed, in a complex

society like our own, it is hard to find any area of activity which is completely free from legal control. Driving, working, being a parent, handling property – all these are touched in some way by law. Even a basic activity like eating is indirectly affected by law, in that the food we eat is required by legal rules to meet rigorous standards of purity, hygiene and even description." (Harris, p.1)

What distinguishes the law from other social norms, and what are the differences between them? To examine these questions, let us compare the following two rules:

Rule 1:

Food sanitation act (Law no. 1947/233, the last amendment in 2018)

Art. 1: The purpose of this Act is to prevent the sanitation hazards resulting from eating and drinking by enforcing the regulations and other measures necessary, from the viewpoint of public health, to ensure food safety and thereby to protect citizens' good health.

Art. 6: The following food and additives shall not be sold or collected, produced, imported, processed, used, cooked, stored, or displayed for the purpose of marketing: ...

Art. 71: (1) A person who falls under any of the following items shall be punished by imprisonment for a period not exceeding three years or a fine not exceeding 3 million yen:

(i) A person who has violated the provisions of Article 6...⁷

Rule 2:

2 (173). He has forbidden you carrion, and blood, and the flesh of swine, and what was dedicated to other than God. But if anyone is compelled, without desiring or exceeding, he commits no sin. God is Forgiving and Merciful.

5 (3). Prohibited for you are carrion, blood, the flesh of swine, and animals dedicated to other than God; also the flesh of animals strangled, killed violently, killed by a fall, gored to death, mangled by wild animals—except what you rescue, and animals sacrificed on altars; and the practice of drawing lots. For it is immoral. Today, those who disbelieve have despaired of your religion, so do not fear them, but fear Me. Today I have perfected your religion for you, and have completed My favor upon you, and have approved Islam as a religion for you. But whoever is compelled by hunger, with no intent of wrongdoing—God is Forgiving and Merciful.⁸

⁷ Food sanitation act (Law no. 1947/233, the last amendment in 2018)

⁸ Translation based on: <https://www.clearquran.com/>

Rule 3:**Trade Discriptions Act in Malaysia 2011⁹**

Art. 29 (1) ... the Minister may, by order, impose requirements for securing that the goods are certified, marked or accompanied and regulate or prohibit the supply of the goods and the requirements may extend to the form and manner in which the information or instruction is to be given. ...

Trade Description (Definition of ‘Halal’) Order 2011¹⁰

Art. 3. (1) When food or goods or service in relation to the food or goods used in the course of trade or business is described as “halal” or by any other expression indicating that Muslims are permitted to consume or use such food or goods or service, means the food or goods or service in relation to the food or goods:

- (a) neither is nor consist of or contains any part or matter of an animal that a Muslim is prohibited by Hukum Syarak to consume or that has not been slaughtered in accordance with Hukum Syarak and fatwa;
- (b) does not contain anything impure according to Hukum Syarak and fatwa;
- (c) does not intoxicate according to Hukum Syarak and fatwa;
- (d) does not contain any parts of a human being or its yield which are not allowed by Hukum Syarak and fatwa;
- (e) is safe to be used or consumed, not poisonous or hazardous to the health;
- (f) has not been prepared, processed or manufactured using any instrument that was not free from anything impure according to Hukum Syarak;
- (g) has not in the course of preparation, processing or storage been in contact with, mixed, or in close proximity to any food that fails to satisfy paragraph (a) and (b).

Art. 5. Any person who supplies or offers to supply any food, goods or service in relation to the food or goods which is described as ‘halal’ or any other expression which is not in compliance with this Order shall be guilty of an offence.

Art. 7. Any person who is guilty of an offence under this Order shall on conviction be liable—

- (a) if such person is a body corporate, to a fine not exceeding five million ringgit and for a second or subsequent offence to a fine not exceeding ten million ringgit; or
- (b) if such person is not a body corporate, to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding three years or to both and for a second or subsequent offence to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both.

⁹ https://www.jetro.go.jp/ext_images/world/asia/my/ip/pdf/tradedescription2011_en.pdf

¹⁰ https://members.wto.org/crnattachments/2011/tbt/MYS/11_4246_00_e.pdf

Made 2011

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Minister of Domestic Trade,
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Rule 1 is the law of Japan. However, rule 2 may be a law in some countries but may not be in other countries. Even in the countries where rule 2 is not the law, many people follow rule 2. Rule 3 is the law of Malaysia, but is it law as a rule 1 is the law of Japan?

Question:

- Who makes the rules above?
- When are the rules above made?
- What are the purposes of the rules above?

Even though a rule control people's behavior, there is a difference between laws and other non-legal norms. Furthermore, it is a fact that such non-legal norms often transform into a law. In modern society, people's behavior is largely controlled by law. Then, how do non-legal norms transform into law?

Question:

Explain what are the "rules of recognition", "rules of change" and "rules of adjudication?"

In this regard, the theory of H.L.A Hart is the most systematic one. In his book titled "The Concept of Law," first published in 1961, Hart analyses the law in the modern society distinguished from the primitive community. Harris explains Hart's theory as follows:

"Every such social group, Hart suggests, must have certain rules which impose duties upon the members of the group concerning standards of behaviour. These 'primary' rules, which might contain rules approximating to basic criminal-law rules but which might also impose what we would call civil-law duties (akin to duties contained in the law of tort – see chapter 9), could conceivably comprise the only rules within a social group; but, Hart argues, in a developed and complex society, these 'primary' rules will give rise to certain problems which will have to be dealt with by means of additional, 'secondary' rules. The first problem with such a simple code is that there will be no settled procedure for resolving doubts as to the nature and authority of an apparently 'legal' rule. To remedy this, the introduction of 'rules of recognition' is needed: these rules will constitute the hallmark of what is truly a

law, and may do so by reference to a set of other rules or institutions, such as a constitution, a monarch or a representative body, such as Parliament.

A second problem will be that the primary rules will be static: there will be no means of changing the rules in accordance with changes in the circumstances of the social group. The remedy for this defect, says Hart, is a set of 'rules of change', enabling specified bodies to introduce new rules or to alter existing ones. Third, the primary rules will be inefficiently administered, because their enforcement will be through diffuse social pressures within the group. The remedy for this, says Hart, is the introduction of 'rules of adjudication', which provide for officials (judges) to decide disputes authoritatively. It will be appreciated that these secondary rules are really 'rules about rules', and Hart argues that the characteristic feature of a modern legal system is this union of primary and secondary rules." (Harris, p.5)

Hart argues that, in response to social development, the simple rule of behavior in a relatively small static group (the primary rules) can be evolved into the modern legal system by the rule of recognition, change and adjudication.

In the case of the rules above, rule 2, as a religious norm, had been shared by the early Muslim community (*Ummah*). Rule 3 includes the rule of recognition (the Malaysian government recognized the Muslim food restriction as an enforceable rule in the country), the rule of change (the Malaysian ministry can revise the definition of *halal* in response to the development of the food-related technology), and the rule of adjudication (Malaysian authority can decide the offense against the rule).

Rules below are some secondary rules in Japan:

Local autonomy law of Japan

Art.14 (1): A local autonomous entity may enact local ordinances with respect to the affairs referred to in Article 2(2) insofar as they do not contradict the law.

Civil Code of Japan

Art.92: If a custom is inconsistent with the provisions of laws and regulations that are not related to public policy and it is found that the party to the juridical act has the intention to abide by that custom, that custom prevails.

Criminal procedure law of Japan

Art. 2 (1): The territorial jurisdiction of courts is determined by the place where the crime was committed, the place where the domicile or the residence of the accused is located, or the place where the accused is at present.

Article 43(1): Except as otherwise provided for in this Code, judgments must be rendered on the basis of oral arguments.

It is important to note that some primary rules do not receive recognition as law and remain informal rules in a state, but those informal rules have a significant impact on people's behavior, too. This point will be examined again in the lecture on "institutionalist economics" (law and economic development).

Question:

Please provide some examples of primary rules that are not recognized as law but is acknowledged as informal norms in your country.

2. The function of law

According to Hart's argument, secondary rules clarify the content of the law, give it legitimacy, and make enforcement more feasible. On the other hand, primary rules perform the function of law, which is to control human behavior. The functions of law include the following:

"He [Summers] identified five techniques of law, which may be used to implement social policies. These are, first, the use of law **to remedy grievances** among members of a society; second, the use of law as a **penal instrument**, with which to prohibit and prosecute forbidden behaviour; third, law as an **instrument with which to promote certain defined activities**; fourth, the use of law for **managing various governmental public benefits**, such as education and welfare policies; and fifth, the use of law **to give effect to certain private arrangements** between members of a society, such as the provisions of the law of contract in our own legal system." (Summers, as referred by Harris, p.4)

- a. Remedy of grievances among members of a society (e.g., respecting and protecting rights of people)
- b. Penal instrument (e.g., controlling personal behavior by imposing punishment)
- c. Instruments to promote certain defined activities (e.g., controlling personal behaviors by giving incentives)
- d. Managing various governmental public benefits (e.g., allocating resources for public welfare policy)
- e. Giving effect to a particular private arrangement (e.g., providing legal effect to the contract among people).

3. Why do people obey the law?

Another question about the law, in general, is the reason for obedience to the law. Even if a rule is recognized as formal law, the law cannot fulfill its prescribed functions without people's obedience. There are two possible reasons for obeying the law. One is coercion and the other is voluntary compliance.

Austin represents the former position. According to Austin, "the habit of obedience to the sovereign body in a society, which, together with the ever-present threat of sanctions, explains obedience to law." (Harris, p.7) Hart also takes a similar position but paying attention to the complex social and psychological process. Hart argues people obey a law because they "accept the legitimacy or authority of the source of the law; we obey because we consider it 'right and proper' to do so." (Harris, p.7)

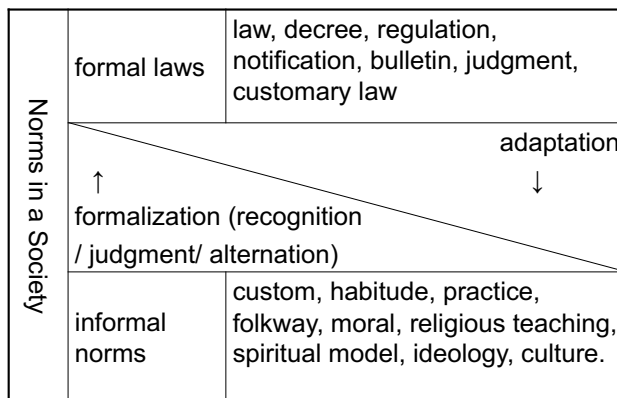
For them, the reason for obedience comes from the authority in a society, and people obey the law because they are afraid of the authority or recognize the legitimacy of the authority. Any laws that do not come from the authority, do not have effect as law and people will not obey. As for a reason for authority, Max Weber identified three types of authority in social groups, namely: charisma, tradition and rational legality (see Harris, pp. 7-8).

Legal sociologists such as Llewellyn take the latter position. According to Llewellyn, members of a social group accept the law because the law performs to "ensure that the group survives as such, and by providing for the prevention of disruptive disputes within the group" (Harris, p.3). Law also provides the authority structure of the group and allocates the power. As Durkheim argues, the more a society develops more a society becomes complex (see Harris, pp.9-10). Therefore, the law becomes significant to coordinate different interests based on occupational specialization or division of labor in an advanced society. As a result, the role of law is not the imposition of duty by the threat of penalty anymore. "Whereas law in the 'simple' type of society is, according to Durkheim, repressive, or penal, law in the 'advanced' type of society takes on the form of compensatory rules, where the object is not to punish, but to solve grievances by trying to restore the aggrieved person to the position he or she was in prior to the dispute" (Harris, p.10).

4. Implications for law and development

In real society, coercion and voluntary compliance are not exclusive to each other. We need to see how those are interacting. Coercion is effective for social control, but it demands higher enforcement costs. To compensate for enforcement costs, stronger authority is needed. In contrast, voluntary compliance requires fewer enforcement costs. However, the change of law shall be slow because people prefer to obey their accustomed behavior (customary norms) and it is hard to catch up with rapid social transformation.

Thus, in making legal policy, policymakers must be aware of the interaction model below:



According to this figure, informal norms will be transformed into formal laws through recognition. In this process, the transformed formal law can expect more voluntary compliance from people. However, it must be noted that informal norms are often conservative, outdated, or discriminative to minorities. In that case, the lawmaker should make new laws to address social problems caused by such informal norms by imposing formal laws. For this purpose, lawmakers should consider a coercive way to have people obey the law.

Question:

Please explain the case in which the lawmaker tries to change social conditions by enforcing the law but faces social resistance.

Please explain the case in which the new law successfully improves the social problem.

Next session:

4. Theories of law and development (1): Economic theory of law and development

We will review some theories that explain the relationship between law and "economic" development. Especially, the session will focus on the law and market economy.

Readings:

"Chapter 3: Institutional theories of development" and "Chapter 10: Property rights, contracts and development" in Michael J. Trebilcock and Mariana Mora Prado, Advanced introduction to law and development, 2nd edition, Edward Elgar, 2021.¹¹

The E-Book is available on the Nagoya University Library website

(<https://ebookcentral.proquest.com/lib/nagoyauniv/detail.action?docID=6837135>)

¹¹ E-book is available on the Nagoya university library website