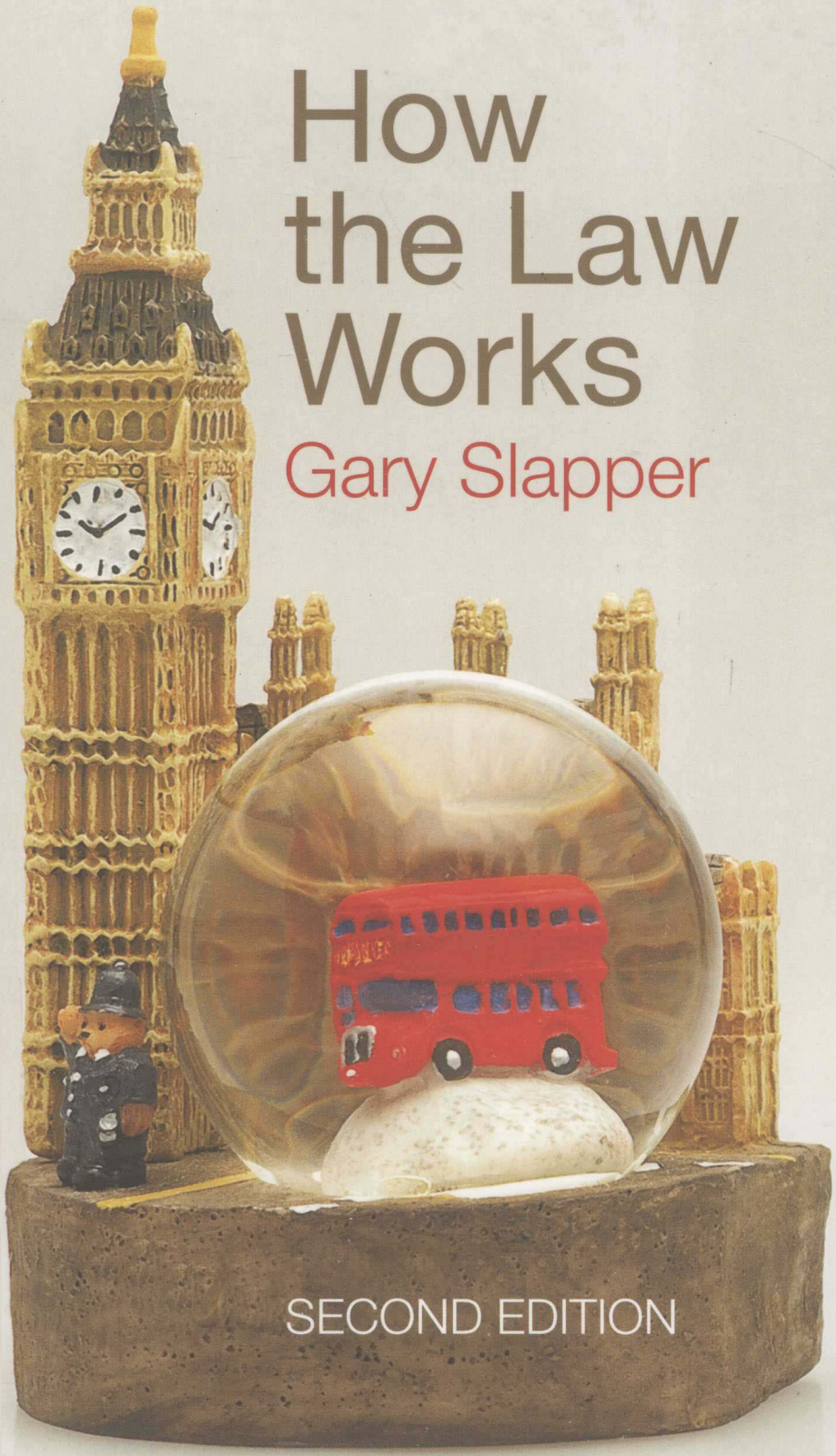
ROUTLEDGE

# How the Law Works

Gary Slapper



SECOND EDITION

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GARY SLAPPER

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"*How the Law Works* is a very useful companion to anyone embarking on the study of law." *Andrew Baker, Liverpool John Moores University*

"*How the Law Works* is a comprehensive, witty and easy-to-read guide to the law. I thoroughly recommend it to non-lawyers who want to improve their knowledge of the legal system and to potential students as an introduction to the law of England and Wales."*Lynn Tayton QC*

**Reviews of the first edition:**

"A friendly, readable and surprisingly entertaining overview of what can be a daunting and arcane subject to the outsider." *The Law Teacher*

"An easy-to-read, fascinating book ... brimful with curios, anecdote and explanation." *The Times*

*How the Law Works* is a refreshingly clear and reliable guide to today's legal system. Offering interesting and comprehensive coverage, it makes sense of all the curious features of the law in day to day life and in current affairs.

Explaining the law and legal jargon in plain English, it provides an accessible entry point to the different types of law and legal techniques, as well as today's compensation culture and human rights law. In addition to explaining the role of judges, lawyers, juries and parliament, it clarifies the mechanisms behind criminal and civil law.

*How the Law Works* is essential reading for anyone approaching law for the first time, or for anyone who is interested in an engaging introduction to the subject's bigger picture.

# Preface

Today law is a popular subject at universities and colleges. Although people who study subjects like mathematics, music, biology or history will have studied them before while at high school, and know something of the elements and methods of their chosen subject, that is not true of those who study law as a specialist subject. This book is aimed at introducing the subject to newcomers. It has also been written to be of use as a continuing companion to legal study, and of being helpful, I hope, to other citizens.

The number and range of law books, law reports and legislative volumes in the library has grown considerably over the years. In his inaugural lecture at Oxford on 21 April 1883, the distinguished constitutional lawyer A.V. Dicey noted that even until well into the nineteenth century it was possible for a person to read the entirety of English law within the compass of an ordinary adult life. It could be contained in fewer than 200 volumes. Today, an earnest reader would probably need to live for over 600 years to read all law and regulations applicable in the United Kingdom. Whether that would be the most edifying way to spend a 600-year life is another matter.

This book is about both the hardware and software of law. It is about the tangible parts of the enterprise, like lawyers, judges, the dramas of courtrooms, and juries – the hardware. It is also about the theories inexplicitly, and thus invisibly, relied on in law when, for example, cases are analysed or legislation is interpreted and applied – the software.

In 1846, a parliamentary committee on legal education urged in a report that law be taught more animatedly and more widely. But five years after it published that report, another committee discovered that not only had no one done anything about the proposal, no one had even read the report! There was dust on the pages whose obscured writing complained that law was a dusty subject.

Law continued to be seen widely as a subject of limited importance and as something for a social elite. In 1948, in his inspiring Presidential Address to the Society of Public Teachers of Law, W.T.S. Stallybrass accepted that law was a fit subject to be studied at universities. He made many perceptive suggestions, some very advanced for the time, about how best legal education should be carried out. However, he accepted the then prevailing notion that a law faculty should provide the sort of liberal education equated with 'a gentleman's knowledge'. He did not accept that the subject should include any analysis or criticism of the policies embodied in legal doctrines or in the operation of legal principles. He also did not want it to cover the 'those branches of the Law which depend on Statute'.

By contrast, today, legal education seeks to equip students with a wider knowledge and more contextual appreciation of law. Critical technique is important, and today all taught branches of the law suspend a spectacular array of legislative fruit. To those who embark on the study of law for whatever reason, or who are contemplating such study, or who simply want to know how the law works, it is hoped that this book will be of use.

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# Contents

# The Importance of Law

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Law is all-pervasive. It exists in every cell of life. It affects everyone virtually all of the time. It governs everything in life and even what happens to us after life. It applies to everything from the embryo to exhumation. It governs the air we breathe, the food and drink that we consume, our travel, sexuality, family relationships, and our property. It applies at the bottom of the ocean and in space. It regulates the world of sport, science, employment, business, political liberty, education, health services; everything, in fact, from neighbour disputes to war.

The law in the United Kingdom has evolved over a long period. It has, over the centuries, successfully adapted itself through a great variety of social settings and types of government. Today it contains elements that are ancient, such as the coroner's courts, which have an 800-year history, and elements that are very modern, such as electronic law reports and judges using laptop computers. Law has also become much more widely recognized as the standard by which behaviour needs to be judged. A very telling change in recent history is the way in which the law has permeated all parts of social life. The universal standard of whether something is socially acceptable is progressively becoming whether it is legal. In earlier times, most people were illiterate and did not have the vote. They were ruled, in effect, by what we would call tyranny. And this was not just in 1250. That state of affairs still existed in the UK in 1850. Today, by contrast, most people are literate and have the vote. Parliamentary democracy is our system of government. So, it is quite possible and desirable for people in general to take an interest in law. A widely esteemed jurist, A.V. Dicey, said that:

> Where the public has influence, the development of law must of necessity be governed by public opinion.[1]

Like the pen or the knife, law is a versatile instrument that can be used equally well for the improvement or the degradation of humanity. In a healthily participative social democracy, law can be used to serve the general public interest.

That, of course, puts law in a very important position. In our rapidly developing world, all sorts of skills and knowledge are valuable. Those people, for example, with knowledge of computers, the Internet and communications technology are relied upon by the rest of us. There is now an IT expert or help desk in every school, every company, every hospital, every local and central government office. Without their constantly applied expertise, many parts of commercial and social life today would seize up in minutes.

But *legal* knowledge is often just as important and as universally needed.

The American comedian, Jerry Seinfeld put it like this:

> To me a lawyer is basically the person who knows the rules of the country. We are all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem the lawyer is the only person who has read the inside of the top of the box.[2]

Consider the extensive reach of modern law. Most people would agree that it is desirable to be governed by law and rules so that, in any department of life, we can understand in advance of any conduct, what is democratically permitted and how certain things must be done. Every time we examine a label on a food product, engage in work as an employee or employer, travel on the roads, go to school to learn or to teach, stay in a hotel, borrow a library book, create or dissolve a commercial company, play sports, or engage the services of someone for anything from plumbing a sink to planning a city, we are in the world of law. The extent and influence of law has never been greater. Law governs every aspect of what we do today. In the UK, about 35 new public Acts of Parliament are produced every year, thereby delivering thousands of new rules into our world. The legislative output of Parliament has more than doubled in recent times from 1,100 pages a year in the early 1970s to over 2,500 pages a year today. There are over 12,000 criminal offences under English law. Between 1997 and 2010, 4,289 separate offences were the subject of legislation. These include disturbing a pack of eggs when directed not to do so by an authorized officer, selling or offering for sale game birds that have been shot on a Sunday, and swimming in the wreck of the *Titanic*.

In a democracy, with so much complicated law, lawyers do a great deal not just to vindicate the rights of citizens and organizations but also, through legal arguments, some of which are adapted into law by judges, to help develop the law. Law courts, as we shall see, can and do grow new law and prune old law, but they do so having heard the arguments of lawyers. Consider this observation from the famous twentieth-century judge, Lord Denning, made in a case from 1954:

> What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.[3]

However, despite their important role in developing the rules in a democracy, lawyers are not universally popular. Anti-lawyer jokes have a long history. The ancient Athenian philosopher Diogenes once went to look for an honest lawyer. 'How's it going?' someone asked him after a while. 'Not too bad,' answered Diogenes. 'I still have my lantern.'

The public image of lawyers has not changed much during the 2,400 years since Diogenes decided to close himself off from people by living in a large earthenware jar in Athens. In an

episode of the television cartoon series *Futurama*, during a riot, one of the characters looks at a body on the ground and exclaims to another character: 'You killed my lawyer!', to which the instant reply is: 'You're welcome.'

When Malcolm Ford, the son of film actor Harrison Ford, was asked at his junior school what his father did for a living, he replied:

> **My daddy is a movie actor, and sometimes he plays the good guy, and sometimes he plays the lawyer.**[4]

For balance, though, it is worth remembering that there have been, and are now, many heroic and revered lawyers. Any such parade of fame should include Marcus Tullius Cicero (106–43 BC), Sir Thomas More (1477–1535), Louis Dembitz Brandeis (1856–1941), Nelson Mandela (1918–), Clarence Darrow (1857–1938) and Mohandas Karamchand Gandhi (1869–1948) (see Chapter 10 for descriptions of their contributions).

Comments are sometimes made characterizing lawyers as professionals whose concerns put reward above truth, or who make financial gain from misfortune. There are undoubtedly lawyers who would fit that bill, just as there are some scientists, expert medical witnesses, journalists, academic researchers, preachers, business gurus and others in that indictable category. But, in general, it is no fairer to say that lawyers are bad because they make a living from human problems than it is to make the same accusation in respect of ambulance drivers or IT technicians. A great many lawyers are involved in public law work, like that involving civil liberties, criminal defence work, welfare law, housing law and employment rights, which is not lavishly remunerated and whose quality relies on considerable professional dedication. Moreover, much legal work has nothing to do with conflict or misfortune, but concerns commerce, property conveyancing, document drafting and company work.

Another source of social disaffection for lawyers, and sometimes disaffection for the law, is a deficiency in public understanding of how law works, why it is cast as it is, and how it could be changed. Greater clarity and openness about these issues – through systematic education and legal public relations – would reduce many aspects of public disgruntlement with the law.

## THE NATURE OF LAW

Throughout recorded history a great many statements have been made about the nature of law, and why we need it. There is an enormously varied and rich literature on this subject. Here we can really do no more than consider a few samples of these opinions. The writers who have addressed this theme come to it from a startling variety of viewpoints, and hold fundamentally different underlining assumptions about their subject.

The thirteenth-century Italian philosopher, and Dominican friar, St Thomas Aquinas, set law in the context of nature.

> There is in man a natural aptitude to virtuous action. . . . There are, indeed, some young men, readily inclined to a life of virtue . . . But there are others, of evil disposition and prone to vice, who are not easily moved by words. These it is necessary to restrain from wrongdoing by force and by fear. When they are thus prevented from doing evil, a quiet life is assured to the rest of the community . . .[5]

Another type of analysis of the nature and purpose of law, focusing on necessity, is one like this of the eminent twentieth-century lawyer and academic Denis Lloyd:

> In any society, whether primitive or complex, it will be necessary to have rules which lay down the conditions under which men and women may mate and live together; rules governing family relationships; conditions under which economic and food-gathering or hunting activities are to be organized; and the exclusion of acts which are regarded as inimical to the welfare of the family, or of larger groups such as the tribe or the whole community. Moreover, in a complex, civilised community . . . there will have still to be a large apparatus of rules governing family, social, and economic life.[6]

Some writers have paid particular attention to what they regard as the *moral* purposes of law. This was the view of Sir Patrick Devlin, a judge who was later elevated to the highest level of the judiciary, the House of Lords. He said:

> Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first state of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity . . .[7]

In science, in order to understand or appreciate the nature of something, or its function, it is sometimes useful to remove it from its surroundings to see what happens or ceases to happen when it is not there. A similar sort of experiment, although really a 'thought experiment', has been done in books that depict societies without law. Sir Thomas More, a distinguished lawyer, and later a famed Lord Chancellor, wrote in his story *Utopia* about a society without lawyers. The intriguing world he describes can provoke many thoughts about the role of law in our own society:

> They have very few laws, because, with their social system, very few laws are required enough . . . For, according to the Utopians, it's quite unjust for anyone to

> be bound by a legal code which is too long for an ordinary person to read right through or, too difficult for him to understand. What's more, they have no barristers to be over-ingenious about individual cases and points of law. They think it is better for each man to plead his own cause, and tell the judge the same story as he'd otherwise tell his lawyer. Under such conditions, the point at issue is less likely to be obscured, and it's easier to get at the truth – for, if nobody's telling the sort of lies one learns from lawyers, the judge can apply all of his shrewdness to weighing the facts of the case, and protecting simple-minded characters against the unscrupulous attacks of clever ones.[8]

Some writers have used the structure of the political economy as being the main explanatory factor when exploring the nature of modern law. Friedrich Engels, the nineteenth-century writer, took this approach. He argued that:

> Laws are necessary only because there are persons in existence who own nothing. . . . If a rich man is brought up, or rather summonsed, to appear before the court, the judge regrets that he is obliged to impose so much trouble, treats the matter as favourably as possible, and, if he is forced to condemn the accused, does so with extreme regret, etc., etc. and the end of it all is a miserable fine, which the bourgeois throws upon the table with contempt and then departs. But if a poor devil gets into such a position as involves appearing before the Justice of the Peace . . . he is regarded from the beginning as guilty; his defence is set aside with a contemptuous 'Oh! We know the excuse' and a fine imposed which he cannot pay and must work out with several months on the treadmill.[9]

One modern, and widely accepted, encapsulation of the nature of law is that of Professor A.W.B. Simpson. He says:

> The principal functions of the law are, I should suggest, to be sought in the resolution of conflict, the regulation of human behaviour both to reduce conflict and to further social goals, the distribution of powers, the distribution of property and wealth, and the reconciliation of stability and change.[10]

The 'reconciliation of stability and change', Professor Simpson goes on to explain, is the balance that the law seeks to make between:

(a) the need for the rules of a society to remain stable and predictable so that people can organize their affairs without the fear that they will constantly change, and
(b) the need for rules to change and develop to reflect significant changes in social circumstances.

These various views on law, and analyses of it, are some illustrations drawn from a very diverse literature on the subject. People's basic assumptions – about morals, or science, or

religion, or class, or human nature – will affect they way they regard any part of the law and its machinery.

## THE RULE OF LAW

So it is clear that law is everywhere, and that opinions about its true nature are quite divergent.

It is now worth noting that in a democracy like the UK's, law is the highest power. The police or the military forces might have the most physical force at their command but only because they are invested with that power by law. In theory, and, generally in practice, the law is above everyone. Other forces, like morals, peer pressure and religion, exercise influence over people but, ultimately, the law is the set of rules that is most forcefully and systematically applied. It might be that the economy exercises a powerful influence over how things change, as with the end of apartheid in South Africa or the beginning of Sunday shop trading in the UK, but such changes are not established unless and until they are made in law.

The outcome of the 2001 American presidential election was only finally determined after a ruling by the Supreme Court of the United States. Similarly, just as the UK was about to go to war in Iraq in 2003, the legal opinion of senior law officers of the UK was sought to decide whether a war would be legal. Whatever one's opinion is about these matters, the fact that a legal opinion was seen as important is a telling fact.

Alongside the big questions such as these are hundreds of thousands of lesser ones about such things as whether manufacturers can camouflage the amount of salt they put in food by labelling it as sodium, or whether you can grow your leylandii three metres high.

Over the last thousand years in the UK, and in several other parts of the world, the law has been used progressively less as a tool for social repression, and more as â code utilized and relied upon by the majority of people in the conduct of everyday life.

The *rule of law* is now widely regarded as a desirable feature of social governance. Albert Venn Dicey, a Professor of Law at Oxford who died in 1922, noted that when we speak of 'the rule of law' as a characteristic of British life we mean:

> **. . . not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals . . .**[11]

Few things can be more important to a modern democracy than the rule of law. This principle is the cornerstone of stable society because every person, group or social entity needs, at any

time, to be able to determine what the social rules are on any given matter, and to act within them or to try to change them. The rule of law is the first rule of a democracy.

In an English High Court case in 1977, the late Lord Denning summed up the gist of the principle of the rule of law when he said:

> **To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: 'Be you never so high, the law is above you.'**[12]

The law, in other words, stands above the heads of even the most elevated people. In 2002, for example, Princess Anne was fined £500 for an offence under section 3(1) of the Dangerous Dogs Act 1991 after her English bull terrier bitch had bitten two boys in Windsor Great Park. Her case was listed at East Berkshire Magistrates' Court as 'LAURENCE, Anne Elizabeth Alice Louise, dob 15/08/50', she was asked in the normal way to stand up when the charge was addressed to her in court, and the case immediately following hers was of Stewart William Barber, a 19-year-old mechanic who had been charged with failing to provide the police with a second specimen of breath in a suspected 'drink driving' incident.[13]

It is worth noting that some early attempts to bring the mighty within the law failed. The scandal of Governor Edward Eyre was an early case in point. Eyre was appointed Governor of Jamaica in 1864. In 1865, in response to an alleged riot, 600 people were killed or summarily executed under his governorship and the same number savagely flogged. William Gordon, a black member of the legislature, was accused of being a ringleader, brought forcibly into an area of martial law and summarily executed. Eyre was dismissed, but for years afterwards the Jamaica Committee (comprising members of the Victorian intelligentsia) attempted to get Eyre tried for his crimes. Among the committee members were the philosopher John Stuart Mill (who was chairman), the scientist and writer Herbert Spencer, Charles Darwin and Thomas Hughes, author of *Tom Brown's School Days*. Ultimately, Eyre escaped trial and was given a pension. The story is fully told in *Leading Cases in the Common Law* by A.W.B. Simpson.

In contrast to this, in recent times, there have been several instances of major public figures and national leaders being taken through the courts. Nowadays, the law is not just above the heads of powerful or wealthy people, it is above the heads of heads of states. They were never so high but the law was above them. The court appearances of General Augusto Pinochet of Chile, the former Chilean president, and the late Serbian leader Slobodan Milosevic are cases in point. At the end of 2003, four former government ministers of Rwanda were put on trial at a United Nations tribunal, indicted for their part in the 1994 genocide. That legal procedures are invoked against them is in itself indicative of a social stance that is less genuflexive towards political leadership than in the past. In 2004, Silvio Berlusconi, prime minister of Italy, and EU president, was indicted for serious criminal charges of corruption. A law was passed in Italy in 2003 which would have afforded to the prime minister immunity from prosecution, but in 2004 the Italian constitutional court annulled that law because it breached the principle that 'all must