MAKING FAMILY LAW

A Socio Legal Account of Legislative Process in England and Wales, 1985 to 2010

Mavis Maclean
with Jacek Kurczewski

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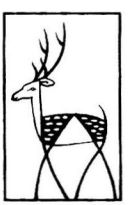

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The legislative process is complex, encompassing a variety of aims and outcomes. Some norms and rules are embodied in law because we are simply expected by government to follow them. Others are there for entirely different reasons. A legislator may wish to send messages about what constitutes desirable behaviour, to demonstrate government's ability to deal with a local and short-term issue or to distract the electorate from other crises. Law is often, though not always, designed as a means to an end. Taking a sociological and empirically-based approach, this book offers a rare insight into the real processes by which lawmakers attempt to influence (or fail to influence) human behaviour.

This account of the legislative process in Westminster rests on the author's observations and discussion with key players from the standpoint of an academic adviser on research to the department responsible for family law-making (originally the Lord Chancellor's department, then the Department for Constitutional Affairs and now the Ministry of Justice) and draws on her longstanding involvement in and knowledge of the processes of law-making. Documenting the little understood processes that occur in Whitehall, in particular how ministers, advisers and officials work together, it reveals a quite different picture from that of the rational lawmaker imagined in textbooks. Instead what emerges is an empirically-based view of the aims and functions of statute law including the different forms and relevance of symbolic legislation and a realistic view of what law aims to accomplish and what can be done in practice.

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Preface

The legislative process is complex, encompassing a variety of aims and outcomes. Some norms and rules are embodied in law because we are simply expected by government to follow them. Others are there for entirely different reasons. A legislator may wish to send messages about what constitutes desirable behaviour, to demonstrate government's ability to deal with a local and short-term issue or to distract the electorate from other crises. Law is often, though not always, designed as a means to an end.

This study of the making of family law in England and Wales draws on the longstanding relationship between the law faculties in Oxford and Warsaw and will be accompanied by a companion volume, which will look at law-making in post-communist Poland.[1] Both studies take a sociological and empirically based perspective. When the empirical study of law began at the end of the nineteenth century and legal thinkers began to introduce this approach into jurisprudence, Leon Petrażycki's, a Russian scholar of Polish origin, pointed to the role of interests and power in social relations. He suggested that jurisprudence, with its focus on rules – whether written, oral or behavioural – fails to take into account the real processes through which law influences (or fails to influence) human behaviour. In order to have influence the law must have a direct impact on individuals, through what Petrażycki described as a psychological processes involving 'legal emotions'.[2] In his view, we act in a certain way because we think we are obliged to an entity, which may be known as God, as the State or simply as the Law. The law exists through our readiness to do something we feel we are obliged to do, or as our right to do something which others will be obliged to accept. The ideas of individuals about how they will act often differ from what is assumed by lawyers and authorities to be the law, but the skill of lawmakers is to either bring human motivation closer to the legislative project or bring

[1] *Law-Making: Politics, Process and Practice; an Empirical Study of Legislative Process in Poland, 1989–2006* (with Jacek Kurczewski) (forthcoming).

[2] L Petrażycki, *Law and Morality*, HW Babb (trans) (Harvard University Press Cambridge, MA, 1995).

the project closer to what could be achieved given a particular state of legal emotion, bearing in mind that there are various motivations for compliance with the law, including simply habit.A scientific or rational legal policy, according to Petrazycki, would consist of law-making based on sound and systematic knowledge of the processes that lead towards the outcome desired by the legislator.

Petrazycki was regarded by contemporaries was as naïvely psychological in his theory of law, but his approach fits the empirical sociology of law developed in the twentieth century so well that he has now been accepted as one of its founders. In 1913 he formulated his central idea in these words:

> The essence of legal policy issues lies in the scientifically grounded explanation of the consequences that one should expect on introducing legal regulation and in the development of such principles that, if introduced through legislation, would bring about a particular and predictable result. The tasks of a legal policy maker are therefore: firstly to manage individual and group conduct through legal motivation; and secondly to improve the human psyche through reducing malicious, antisocial tendencies and implanting and strengthening the opposite.[3]

The first of these tasks is addressed by lawmakers at all times and in all places. As to the second, debate about human progress continues.

[3] Ibid, 156–57.

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Introduction

THIS ACCOUNT OF the legislative process in Westminster rests on the author's observations and discussion with key players in her role as an academic adviser on research to the department responsible for family law-making, known in 1985 as the Lord Chancellor's Department, then as the Department for Constitutional Affairs and, by the time of writing, as the Ministry of Justice. Any such personal account is only that, and this claims to be no more. It risks getting things horribly wrong. But having read and reread the existing literature, in particular Michael Zander's account *The Law-Making Process*, first published in 1980 and in its most recent edition in 2004, it seemed that there might be value in giving an account of the hitherto little documented stages of the process that occurs in Whitehall, in particular how ministers and officials work together. Zander stated early on in his first edition that 'very little has been written about the process of preparing legislation from Whitehall's perspective',[1] citing only a conference paper given in the mid-1970s on penal policy by Michael Moriarty.[2]

Traditional models of the law-making process tend to assume the rationality of the lawmakers.[3] There is a presumption that a domain can be systematically described, and a law can be devised that is complete and unambiguous in its expression. If law-making is indeed a rational intellectual activity, and the law itself is instrumentally rational, then a precise goal could be defined, and the provisions of that law, if followed in practice, would lead to the fulfilment of that goal. In critical legal studies, on the other hand, it is argued that the process is almost the

[1] M Zander, *The Law-Making Process*, 1st edn (London, Weidenfeld and Nicholson, 1980).

[2] M Moriarty, 'The Policy-Making Process: How It Is Seen from the Home Office' in N Walker (ed), *Penal Policy-Making* in England (Cambridge, Institute of Criminology, 1977) 132–9. The paper describes Ministers as not often bringing in fresh policy ideas but working creatively and with political drive upon ideas, proposals, reports, etc that are, so to speak, already to hand within the department or in the surrounding world of academic penal thinking.

[3] For example, see L Petrażycki, *Law and Morality*, HW Babb (trans) (Cambridge, MA, Harvard University Press, 1995).

reverse. In this formulation, the law-making process is similarly held to be directed by idealised presumptions, but these are held to be based not on reason but on the interests of individual lawmakers.[4]

While accepting the value of both these approaches, this book is written from the perspective of the sociology of law. We draw on personal observation and interview to focus on the social nature of the legislative process, and by commenting on the social process and interaction involved we try to penetrate what Francis Snyder has called the opaque nature of the law-making process. We offer an empirically grounded study of the making of statute law in England and Wales for family matters over the last twenty years. We make reference to the law-making processes in other jurisdictions to highlight the special features of the Westminster process as revealed by comparison. In particular, we have drawn on the historic connection between the law faculties in Oxford and Warsaw, as well as the presence of Adam Podgorecki as Co-Director of the Oxford Centre for Socio-Legal Studies, which led to a close relationship with the Institute for the Study of Custom and Law in Warsaw, headed for many years by Jacek Kurczewski. Over the period 1985 to 2010 the work of rebuilding Polish democracy required the legislative process to become visible and explicit, as alternative processes were discussed and decisions made. Our lengthy discussions over the years of these developments have often cast fresh light on our understanding of parallel processes in London. This collaboration, together with our debt to Michael Zander for providing the first detailed description of the law-making in the Law and Society Series,[5] will we hope permit us to add some insights to the details drawn from empirical observation.

What is Law-making?

Following in the traditions of Leon Petrażycki (1867–1931), the founder of the social science approach to the politics of law, we accept the role of law in reinforcing rather than creating new ways of thinking and acting. And following the development by Adam Podgorecki (1925–98) of this view during his term as Joint Director of the Oxford Centre for Socio-

[4] F Snyder, 'Thinking about Interests: Legislative Process in the European Community' in J Starr and J Collier (eds), *History and Power in the Study of Law* (Ithaca, Cornell University Press, 1989) 168–201.

[5] Zander (above n 1).

Legal Studies, we accept too the need to study both the expected and unexpected outcomes of any piece of legislation. Law-making in the Petrażycki/Podgorecki formulation is understood as a purposeful, instrumental and reflexive rational activity, requiring self-reflection by the lawmaker, who uses scientific rational methods to monitor continually the possible and actual effects of a piece of law.[6] But in the light of our experience, we take a rather different approach, which is a little less optimistic about the role of reason.

Drawing on our observations and experiences we suggest that there is another set of analyses to be made of the interpersonal network of roles and relationships that constitute the law-making process as a complex social activity, the goals of which are sometimes almost forgotten, often unclear and always negotiated between the participants involved in the project. There are deals to be done. As Ronald Dworkin has said in his commentary on legislative intention, if we look for evidence about the state of mind of those who prepare a statue so that we may interpret it correctly, whose thoughts should be examined?[7] Should the thoughts of every member of the Congress that enacted it be considered, including those who voted against it? Are the thoughts of those who spoke most often more important than the thoughts of others? And 'what about the executive officials and assistants who prepared the initial drafts? What about the head of state who signed the act and made it law? What about the private citizens who wrote letters to their representatives, what about the lobbies and action groups?'[8] Any realistic view of the legislative process must include the impact of all these actors.

Who Makes Law?

In this account of how legislation is created at Westminster, we begin with the assumption that in Britain, an established democracy, there is a clear division between the role of elected politicians and those of public servants and stakeholders. The importance of this division can be seen more clearly by making reference to Poland, a re-established democracy,

[6] See K Motyka, 'Leon Petracycki: Challenge to Legal Orthodoxy', 23rd IVR World Congress (Krakow, 1–6 Aug 2007).

[7] R Dworkin, *Law's Empire* (Cambridge, MA, Belknap Press of Harvard University Press, 1986).

[8] Ibid, 313.

where the ambiguity of these distinctions has remained during the process of changing from state regulation to democratic legislation.

We have been fortunate in being able to draw on not only our experience as academic sociologists of law but also our direct experience of law-making. Maclean has studied legal policy-making, especially in family law, as an academic in Oxford and has also observed the law-making process from within government sitting in Whitehall as the Academic Adviser to the Lord Chancellor's Department (later the Department for Constitutional Affairs and now the Ministry of Justice) since 1997. Kurczewski has studied the sociology of custom and law in Poland and many other settings. He also took part in the Round Table Discussions that were a key part of the transformation process in Poland in 1989 and became the Deputy Vice Marshall of the first elected assembly of the Sejm in 1992.These experiences are recorded in his book *Living Sociology of Law* published in 2010[9] We have looked behind the scenes in the Houses of Parliament and the Polish Sejm, taken part in the informal social gatherings where ideas are formulated, support is gathered and alliances are negotiated. We have participated in ministerial meetings and committees; observed the relationship between the politicians seeking to initiate change and the officials and draftsmen who are given responsibility for putting these ideas into practice; and seen the attempts of external interested stakeholders to influence the process. Any sociologically based account of the process of law has to include a description of these relationships between the individuals who work together, not always willingly, on particular projects that begin as broad political ideas but must then be refined and nuanced until they are politically acceptable to the electorate, clear enough to make drafting possible and capable of being implemented. In describing and analysing this process we draw a distinction between lawmakers who 'own' and drive forward the law to be made on the one hand and law-workers who actually engage in its production on the other hand.

The Purpose and Limitations of Law-making

The case studies presented here come from our own experience, but we hope to take this socio-legal reflection on the law-making process beyond a merely anecdotal collection of examples towards developing an empirically based view of the aims and functions of statute law. For governments

[9] J Kurczewski, *Living Sociology of Law* (Warsaw, University of Warsaw Press, 2010).

with an acute awareness of the power of the media and the need to maintain their majorities in forthcoming elections, it is all too easy to turn to symbolic legislation as a tool to communicate messages about high-profile issues, and this practice is easy to criticise. We look therefore at the different forms of symbolic law-making and what it can achieve. We also look at the limits of law-making, exploring the boundaries of what is possible.

It is important to distinguish between what law aims to accomplish and what can be done in practice. To take an example from English family law, legal regulation cannot stop individuals harming their partners or children. But it can give clear signals that this behaviour is unacceptable and punishable. The law cannot create the resources needed to support a family that has separated into more than one household, but it can insist that the existing resources are fairly distributed. Nonetheless, there are always policy goals that can never be attained through legislation. For example, a recent report endorsed by the Conservative Party and entitled 'Every Family Matters' seeks to use the law to promote marriage, in order to mend what the authors call 'Broken Britain' and to move away from what is described as a culture of family breakdown.[10] This report attributes blame for high divorce rates in part to the law and ancillary procedures, which are said to be causally implicated in high rates of family breakdown. But to those who have studied the working of family law, it seems improbable that any legislative change will substantially affect the ways in which men and women organise their private lives. Any attempt to reform the law in order to make people good and happy is unrealistic.

The Legislative Context

The need to facilitate a more realistic approach from legislators, together with a reformulation of public expectations, is a key driver for our work. The cases presented herein arose under different political and organisational contexts. Some involved governments with large majorities, which facilitate purposive legislative activity, while others involved governments constrained by the struggle to maintain their hold on power. There were times when teams of experienced and skilful public servants with carefully defined roles were able to work together throughout a legislative project, and times when external consultants played a strong

[10] Family Law Review, 'Every Family Matters: An In-Depth Review of Family Law in Britain' (Centre for Social Justice, 2009).

part or when individual activists were highly visible. The press is always a factor in determining government action in a democracy, but there were occasions when press involvement was particularly visible, when the media took a clear position and pressed hard for a particular course of action, exerting influence on ministers.

We look at the role of the Parliamentary processes for scrutiny and review in giving rise to pressure for reform. We will also point to cases that highlight the idiosyncratic nature of law-making as a collective social enterprise. Even in those rare cases in which a legislative initiative can be attributed to a single individual, any legal proposal that is highly personalised must still become acceptable to a number of collective bodies both in government and outside in order to obtain legitimacy and be capable of being implemented. As part of the normal process of group activity, the development of mutual understanding or, if this is impossible, the acceptance of the need to present a unified front is important in order to make progress, as law-making is a sequential process with many stages.

Development of Legislative Content

As part of this sequential process, we observed the unfolding of various levels of meaning during the work of preparing specific laws. Each form of words opened up the possibility of competing interpretations, which needed to be reconciled, at least in part. But each on-going working interpretation is also reflexive and leads to wider formulations that are not necessarily part of the original purpose of the law; alternatively, a part of the original design may be excluded.

The practical process of law-making is made more difficult for law-workers by the lack of continuity in the underlying assumptions. Changes in the expectations about what is wanted from the law are constantly brought about by political pressures from outside the process, as well as by the law-workers involved in the process themselves. These sources of change include ministers, who guide particular matters through the legislative assembly; officials, who work with them to facilitate this process; and legal draftsmen, who provide the text and advise on relevant precedents.

Anglo–Polish Comparisons

As we have mentioned above, the origins of this book lie in the wish of the two authors to share their conversations about the experience of

legislative process over the past twenty years. In the late 1980s when transformation from authoritarian communist rule began in Poland there was a perception that many of the problems experienced could not occur in the free West. It was a surprise to both of us to find that some of the restrictions felt in Central Europe were in fact familiar to those living under the longstanding Conservative government led by Prime Minster Thatcher, and that Britons might learn from the experience of colleagues in Central and Eastern Europe how to develop ways of getting around some of the bureaucratic and legalistic hurdles we all were facing.

For example, in Oxford, publication of a small study of judicial decision-making in divorce cases was delayed by the then Lord Chancellor, Lord Hailsham, as the study caused government embarrassment by revealing the degree of variation in the exercise of the matrimonial jurisdiction of registrars.[11] In Warsaw in 1980, on the other hand, a parallel study of decision-making by the judiciary in family courts could be published as soon as it was completed, though in small numbers with frequent new editions, as censorship did not apply to print runs of less than one hundred copies.[12] An elected government in England with a long period in power and a comfortable majority could thus behave in a quite authoritarian manner. In Poland, on the other hand, the traditions of democracy and freedom of expression died hard: the rules of censorship could be accommodated. In England, freedom of expression, though taken for granted, is not always easily achieved. These 'Alice through the Looking Glass' experiences have helped us to think harder about the origins and outcomes of the law-making process.

Stages in the Legislative Process

Under Adam Podgorecki's formulation for legal reform,[13] at the design stage a problem will have been identified on which there is wide agreement that something must be done but often little agreement as to what action is desirable, never mind feasible. A policy will then be proposed, and a programme of action must be prepared. This involves firstly a procedural plan, then the anticipation of likely problems, followed by redesign until all serious reservations have been overcome. The final stage in

[11] B Barrington Baker, C Clarke, S Raikes and J Eekelaar, 'The Matrimonial Jurisdiction of Registrars' (Oxford Centre for Socio-Legal Studies, 1977).

[12] M Fuszara, 'The Judges Room', mimeo (1980), later published in M Fuszara, *Family, Gender and Body* (Warsaw, The University of Warsaw, 1990).

[13] A Podgorecki, 'Three Levels of Functioning of Law' in A Podgorecki, J Alexander and R Shields (eds), *Social Engineering* (Ottawa, Carleton University Press, 1996).

Podgorecki's typology is 'action', when a policy or project must be piloted and tested. This 'road testing' not only helps to identify further problems but also can help to create a culture of compliance among the key stakeholders, which will facilitate implementation. And finally the process and outcome of a new project must be evaluated.

This structure offers a useful framework. But in addition to this linear process, we will be looking also at the interactions and relationships between those involved in the law-making process, as well as the impact these may have on the direction of change. Different skills come into play at the various stages, and part of our story is about the stresses that occur when responsibility passes from one set of law-workers to another at every level, minister to official, official to draftsman, draftsmen to legislative assembly and back through the stages of amendment to the political owners of the policy. Not only different skills but also different strengths are displayed by the various players. A government minister has the power to demand action or to veto a project; but without the substantive knowledge and the technical skills of his or her staff the minister can do little. Similarly, the legislative assembly has the power to accept, reject or amend proposed legislation; but in a parliamentary system in which party discipline is firmly maintained, this power, too, depends on decisions made by party leaders in government. The lawyer who drafts the actual words of a bill has no power to do other than take instruction from his or her political masters, but at the end of the day this detailed work also plays a large part in determining the form of the resulting legislation. In the case of the Children Act (England and Wales) 1989, for example, it was the skill of the draftsman that finally enabled the Bill to go before Parliament. For when the managers of Parliamentary time insisted that the number of clauses to be discussed must be strictly limited, to an extent that would have made the Bill unworkable, the draftsman redefined the sections of the Bill as schedules rather than clauses, and the Bill was presented and passed.

British Legislative Procedure

In England and Wales statute law is the most visible part of the regulatory framework, but it is only one part of the law-making system; it is supported by the decisions of the judiciary, who provide binding precedents, and augmented by layers of regulations, which can be made by Parliament without any vote being taken. This study is limited to statutory reform.