

LGST 230

The Canadian Legal System (Rev. C3)

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STUDY GUIDE

Unit 1: What is Law?

Role of Law



Chapter One of the textbook introduces a recent famous case to help broaden your understanding of the role law plays in society. In *Canada v. Bedford* the Supreme Court of Canada considered the constitutionality of then existing criminal laws governing prostitution. This case generated wide debate amongst legal professionals and the general public in Canada concerning the role of law in society.

Before reading about each of the traditional and contemporary theories of law described in the chapter, consider what you thought about this case when you first heard of it. Did you think:

- The existing law properly punishes activities which support prostitution and people who break those laws should be punished severely for their crimes, regardless of the circumstances, or
- The law should be upheld, and people such as Bedford should be convicted, but, since the circumstances were sympathetic, the sentences should be light, or
- The law regarding prostitution was out-of-date, unsympathetic to women, and needed to be changed anyway?

How you feel about the decision in the *Bedford* case will likely relate to your perspective on the role of law in society. Is that role to enforce the rules and provide predictability in all circumstances? Is it to ensure a safe and peaceful society in which people's rights are respected? Does the same law apply to everyone, regardless of their circumstances? Is the role of law to lead or to follow public opinion on difficult issues? Would your opinion about the role of law change if, instead of the sympathetic facts in the *Bedford* case, the case had been about tax evasion?

'Is the role of law to lead or to follow public opinion on difficult issues?'

Whatever your personal opinion on the role that law should play in our lives, it is important to understand that the people who make, enforce and interpret the law bring different perspectives about the role that law plays in society. Further, their perspectives could change depending on the nature of the issue that is before them. The foundations of some of these varied perspectives will be explored in the next section of this unit.



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STUDY GUIDE

Unit 1: What is Law?

Theories of Law in Society

The second part of Chapter One of the textbook deals with how perceptions about the legal system have evolved into a range of traditional and contemporary theories of law. Understanding the basics of these theories helps to place our understanding of the role of law into a philosophical framework. As you work through the other units, this framework will help you analyze why certain laws were made and why cases might have been decided the way they were.

Traditional legal theories are the result of centuries of analysis and debate among legal scholars. The first of the theories is **positivism**, which is based on the idea that law should be a logical process, not subject to the influence of values or morality. Boyd suggests that for positivists, "adherence to a just legal process is more important than the specifics of law", and it is the process that "protects liberty and democratic institutions, and prevents the abuse of political power". The foundation of positivism is the concept

of the social contract, in which citizens are bound to obey rules that are made democratically.

Positivism has been criticized for ignoring the importance of morality in making valid laws; critics argue that there must be a limitation on the right to punish under a morally-invalid law. Others think that, rather than being an absolute, the quantity of law could vary depending on the presence of informal means of resolving disputes in close communities, as opposed to the formalized structures needed in a more decentralized and less community-oriented population. Law could also vary depending on the 'respectability' of citizens. Boyd thinks that, although they are rooted in social science rather than law, such theories follow the positivist tradition as they focus on legal process rather than morality.

The second legal theory discussed in the text is **natural law**, which stresses the strong link between law and morality. Boyd cites the naturalist legal maxim that "an unjust law is no law at all". Naturalism has a long history and is rooted in traditional Greek philosophy and the values expressed in formal religious traditions. The fundamental question, however, is whose set of values or morality should prevail in a rapidly-changing modern society? Although some scholars think that natural law theory has become outmoded, the *Canadian Charter of Rights and Freedoms* protects conscience and religious expression, and it protects against cruel and unusual punishment, all of which, it could be argued, are based on moral values. The key for the modern naturalist is that there not only must be a link between law and morality, but that the operative moral premises of the law must be specifically stated.

Legal realism is the third traditional theory discussed in the textbook. This theory is founded on the concept that, to understand legal process, one must also understand the political, social and economic circumstances in which it arises. Making laws and deciding their outcomes are processes shaped by a variety of factors, including personality, community priorities, the economy and politics. Because of these variations, legal outcomes may not seem as predictable as they might be in a system solely based on logic, precedent or morality.

Another challenge to strict positivist or naturalist constructs is reflected in the **Marxist** theory of law. At its core, Boyd describes the Marxist theory as an interaction between the state and its citizens in which the resistance of labourers to material circumstances will lead to an uprising, new structures and an ultimate diminishment in the role of the state. At the end of the process "human beings would live in equality and harmony in a utopian communist state". Although society has evolved since Marx's time, economic inequality persists, and the underlying concept of 'dialectic materialism' still resonates for many legal scholars.

Working beyond the traditional theories, legal scholars have developed new theories for modern times. The first of the contemporary legal theories discussed in the textbook is the **critical legal perspective**. As quoted in the text, according to law professor Mark Kelman, critical legal theory ". . . seeks to strip away the illusory certainty upon which the language of law is based.". Theorists take a sceptical view of conventional legal analysis and aim to uncover and discuss underlying hierarchical, political and cultural perceptions.

Feminist theorists argue that law has historically been made by men and, since it has not reflected female perspectives, has served to preserve male power. To them, law is 'gendered.' Boyd outlines the three waves of feminist legal theory from the beginning of the last century to now, and the influence it has had on laws and legal institutions. The impact of feminist theory on the legal system has been significant, but Boyd argues its future is difficult to ascertain since no single feminist perspective has prevailed.

The final legal theories discussed in the textbook are the **anarchist** and **libertarian** perspectives. According to Boyd, anarchists suspect all forms of state control, but "endorse a communitarian ethic quite distinct from contemporary libertarian perspectives". To anarchists, all forms of government should be abolished and replaced by an economy of communal ownership. Libertarians emphasize the rights of individuals and reject the security of the state. They want to run their lives as they wish, without the interference of laws.

It can be difficult to understand

all these legal theories in the abstract, so the textbook applies each of them to the reasoning of the *Bedford* decision and the *Safe Streets and Communities Act*. Which theory most closely aligns with what you thought about the case at the beginning of this unit? If you wish to consider this further, the supplementary materials for this unit provide links to documents related to these matters.

'Which theory most closely aligns with what you thought about the case at the beginning of this unit?'

This brings us back to the beginning and the observation that, in order to understand the legal system, you need to understand the perspectives that underlie it. Consider your own perspective, and the perspectives of others on the law, as you work through the study questions and complete the Unit One assignment.



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