

1 ASPECTS OF LAW AND HUMAN RIGHTS

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WHAT IS LAW?

A child's first experience of 'the law' is to do with rules and rights, likely to be ingrained in their memory as the division between 'dos' and 'don'ts.' This division plays an important part in parental guidance on what is 'acceptable' and what is deemed to be 'unacceptable' behaviour as the child grows and develops their own persona and the morality that comes with it. This process should also sow the seeds for individual morality or ethics as well as future 'respect' of authority and the law. The ethical beliefs of an individual are likely to be influenced by the values of the society in which they are nurtured. However, there are variable factors in different societies, such as religious beliefs, cultural values and the social environment, which will shape such individual values. Accepted societal ethical values, which may be common in different upbringings, may determine how individuals as nurses will view patients' rights. This is clearly demonstrable when dilemmas arise within the nurse–patient relationship and in the course of their employment.

For the patient, however, the more incapacitated they are the more likely they are to have those rights infringed or even abused. Where there is conflict or a lack of clarity, rights may, at times, need to be defined, asserted or protected – by the law. In providing care, especially for the vulnerable patient, the nurse should have nothing to fear as long as they are acting within the confines of the law; their own morality will usually guide them towards the requirements of the law although the two may be in conflict.

2 Aspects of law and human rights

The nurse needs to be aware of the possibility that they are expected (whether in clinical practice or in a court of law) not only to be aware of patients' rights but also to safeguard them from others who may encroach on them. There may be situations in which colleagues or others ostensibly close to the patient may indeed undermine patient rights. Thus, it is important that the nurse be aware of how the law defines patients' rights, which include human rights, and how ethics may influence clinical decisions in both the clinical practice and how this relates to the law. As ethics is a product of society, there is therefore no doubt that ethical views continue to influence legal decisions on crucial issues such as abortion, human fertilization and organ transplant.

Law may be seen as a system of rules or regulations that aim to regulate the conduct of a group of people as well as define their competing rights and obligations. For a law to be effective, it should also have sanctions for punishing those who fail to adhere to its stipulations. The other important element is that the sources of the law should have the authority to enact it in order to give it some efficacy and meaning. It is important to note that, 'law develops continually in response to social, political and economic conditions, and any attempt to divide up its history must largely be arbitrary' (Smith, 1962, p.3). The law should be accessible to all citizens in its application and some of the characteristics of the law are that it:

- should be certain;
- has an identity;
- is also impersonal;
- is applicable to all citizens of a country as well as to a specified group of people, by creating rights and obligations.

A notable ancient codification of law by Hammurabi (c. 1792–50BC) of Mesopotamia, known as the Hammurabi's Code, was a systematic code of laws with a total of 282 articles. The aim of the code was to regulate human conduct, both in private and in public; nevertheless, this was mostly meting out justice based on an 'eye for an eye' basis. The following aspects of the code are examples of the application of this principle:

218. If a physician make a large incision with the operating knife, and kill him, or open a tumour with the operating knife, and cut out the eye, his hands shall be cut off.

221. If a physician heals the broken bone or diseased soft part of a man, the patient shall pay the physician five shekels in money.

229. If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death.

Code of Hammurabi

Throughout most societies, there are ways for individuals to assert their rights as well as to seek redress. It is possible that patients, who are usually a vulnerable group, may not be aware of or able to assert such rights. Hence, it is important that nurses are aware of patients' rights. Laws usually develop in response to the needs of society and the survival of laws depends on customary usage. They may become obsolete in time through lack of use. In some nations some good laws may be seen to be immutable and act as codes or frameworks for all other laws of the system to follow, while other laws are dependent on the 'parent' law and subject to review as times move on, in any given society or within a group of people with a common interest. While most laws are promulgated by democratically elected government, laws may nevertheless be imposed from a superior order such as the dictate of an autocratic ruler. Some may also believe that all good laws should come from a divine authority through a theocratic authority. As a representative of (theocratic) authority, some rulers in the past have been known to override the rights of their subjects.

More acceptable forms of authority in a democracy are elected representatives such as government or a body of individuals. The judiciary is an instrument or arm of the government for safeguarding and defining the rights of citizens. Likewise, democratic representation is applicable to professional bodies such as the Nursing and Midwifery Council (NMC), which are professionally representative of nurses, with the power (delegated by parliament) to regulate standards of professional behaviour (NMC, 2004). Most people would also accept that in the scientific world there are accepted laws of nature, which if breached may have unsavoury consequences.

The law may be invoked, not only in defining rights, but also in creating obligations as well as providing sanctions against those who fail to comply with its dictates; the link between ethics and law is easy to see. This is demonstrable in the following case.

R v Instan [1893] 1 QB at 453

Where, D lived with her aunt, who developed gangrene in her leg and became totally dependent and unable to call for help. The defendant failed to feed or to call for medical help, even though she remained in the house and continued to eat her aunt's food. The aunt's dead body was found in the house decomposing for about a week.

It was held: that the defendant had a duty to supply her deceased aunt with sufficient food to maintain life; in addition, the death of her aunt having been accelerated due to her neglect of this duty of care.

In the same case, it was observed furthermore that nevertheless, that breach of ethical principles does not necessarily have legal implications.

It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement.

**Lord Chief Justice Coleridge, CJ at 453,
R v Instan [1893]**

While some may consider a case such as this reprehensible morally, the courts' objective is to examine whether the defendant has broken the law.

Regarding the purpose of law, the contribution of jurists like Albert Dicey (1835–1922) to the debate on the role of the law in society has been important in establishing its (law's), pre-eminence over disciplines such as ethics. Central to his belief was the suggestion that for it to work the law should be impartial, on the basis that no one is above the law and this includes the government. His argument was that this would ensure protection of the human rights of citizens (Dicey, 1885). Certain aspects of law, mainly related to criminal law but also to other areas, such as employment law, may encroach on citizens' rights in general. In the aftermath of the Second World War, the United Nations Universal Declaration of Human Rights 1948, proclaimed by the General Assembly of the United Nations on 10 December 1948 that:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

**Article 2 (1), the European Convention
on Human Rights 1950**

This ensured that the emergence of human rights would be a framework for legal issues concerning rights and obligations. In the UK, the Human Rights Act 1998 received royal assent on 9 November 1998, 25 years after Britain became a signatory on 1 January 1973 of the then European Economic Community (EEC). This came into force on 2 October 2000, aiming to give effect to UK law, the rights established in the European Convention on Human Rights 1950. The relevant aspects are explored below.