

# Symbolic laws

by Catherine Fieschi

*More and more legislation is about sending signals. What's wrong with that?*

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The statute book is filling up with legislation that is increasingly symbolic in nature. The primary aim of such legislation appears to be reassurance rather than redress, prevention or punishment. Recent examples include the racial and religious hatred bill, soon to return to the Commons after revision in the Lords, and even some of the public service reform legislation, such as that introducing foundation hospitals or the current education bill reforming secondary schools.

In the case of the religious hatred bill, it seems to work like this: a signal is sent by the government to the Muslim minority--whose representatives have lobbied hard for the bill--that its concerns are taken seriously, and then the law is drafted and enforced on the assumption that it will only rarely, if ever, be used. The public service legislation is not, of course, only symbolic, but the changes it introduces to the way schools and hospitals are run are comparatively trivial compared with the political heat generated by the legislative process. This has the advantage from the current government's point of view of signalling energetically to the taxpayers of middle Britain that their extra tax is being spent with care.

Many people feel uneasy about the idea of symbolic legislation--and clearly there are potential problems, especially if it leads to political interference into how zealously or otherwise laws are applied. But symbolism is an intrinsic part of the law and one could argue that all legislation is at least partly symbolic. Legislation that is mostly symbolic prompts us to re-examine the law as a trigger for, and shaper of, political debate and a creator of constituencies. Symbolic legislation, one could argue, contributes positively to the making of political society.

Some argue that symbolic legislation fails because in most cases it cannot achieve its own objectives--either because legislation is the wrong instrument for the job or because the legislation does not reassure as it is supposed to. But legislating often has multiple aims, and while the stated or perceived primary aims of a law may not always be fully achieved, the legislation may have important secondary impacts. The controversial Brady (gun) law in the US, introduced in 1993, is a good example of this. Because the law was perceived by some people as the long-awaited gun regulation that would lead directly to a drop in gun-related crimes, its detractors were able to portray it as a failure: it was easily circumvented and statistics showed that whatever caused the drop in gun crime, it was not attributable to Brady. Not so, its framers replied: Brady was not intended as comprehensive legislation, but merely to prevent prohibited purchasers from buying guns in retail outlets. Moreover, Brady was also intended to show gun control advocates that they could break the stranglehold that the National Rifle Association had on congress. Symbolic legislation such as Brady can break a deadlock and pave the way for increasingly effective legislation.

Other symbolic bills are useful because they deal with what the American legal philosopher Ronald Dworkin has referred to as "checkerboard statutes"--statutes elaborated for specific constituencies resulting in inconsistent treatment across groups. The religious hatred bill redresses such a situation by affording Muslims a protection that is already enjoyed by Sikhs and

Jews through race legislation.

Symbolic legislation is not just a feature of America's famously court-based politics, nor has it just been imported into Britain by a Labour government keen to send messages to a patchwork of constituencies. A classic example was the Conservatives' 1986 "Next step forward" campaign, which spawned legislation such as Section 28, which prohibited local councils (and, so some argued, schools) from distributing any material that depicted homosexual relationships as normal. Section 28 was never successfully used, but the debate to which it gave rise and the battle for its repeal are illustrations of the sort of heated arguments triggered by symbolic legislation.

But for sceptics, this kind of soft law is bringing the legislative process into disrepute. The law, argue opponents, should be an instrument that gives clear-cut orders and is applied with equal vigour in each case. Legislation is the wrong way to tackle social problems such as racism and bigotry because laws are simple and limited. The law, in such a view, will change when people change.

This is, however, a rather narrow understanding of the relationship between a society and its laws and lawmakers. Such a view perceives the law as hovering above society, encapsulating certainties and disconnected from messy human and social concerns. In our societies, characterised by rapid change and uncertainty, the attraction of this view is understandable: when everything seems in flux we turn to the law as a source of certainty. But, paradoxically, those deep transformations that invite us to seek such reassurance from the law also account for the necessary shift to a more communicative style of legislation. Partly because policing and enforcement elude us in increasingly borderless situations, the trend, and not just in law, is away from sanction and punishment towards changing attitudes and modifying behaviour. Governments are warming to the notion that it is in part through moral persuasion and debate created by legislation that attitudes and behaviour will change.

This shift has already begun. The question is not whether such legislation "works" but whether the process of legislating makes us better at finding collective solutions.

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