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Law, and Public Health Policy

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Introduction

States have a moral and political mandate to protect their populations from threats to health. Two of the most important tools which assist states in this task are public health policy and public health law. Policy and law play different but interrelated roles in the protection of the public's health.

Public health law has been defined as the power and duty of the state to ensure the conditions for people to be healthy and the limitations on the state's power to constrain autonomy, privacy, liberty, and proprietary interests of individuals and businesses (Gostin, 2000). This definition encompasses both strategic public health policy of the state in terms of its role and responsibilities in relation to population health, and functional policies setting out the interventions it is prepared to undertake to carry out its strategy.

Definition and Boundaries of Policy and Law

Public Health Policy

Public health policy is determined by a process of consultation, negotiation, and research, which leads to a plan of action that sets out a vision of identified public health goals. In the context of public health, policy is usually determined by the political or executive arm of the state, although private public health agencies may also formulate policy in relation to their own public health objectives. The British AIDS charity, the Terrence Higgins Trust (THT), for example, has developed a corporate strategy setting out the purpose, boundaries, and methodologies of their AIDS services (Terrence Higgins Trust, 2004). As with THT, an objective of private agency policy will often be to influence formulation of government policy.

Policy is a statement about values as to the importance of identified goals and the appropriateness of mechanisms for achieving them. In the context of public health, states have developed and refined policies which represent a cohesive and focused set of responses to particular public health problems. Most states have, with a varying degree of sophistication, policies which address threats such as communicable disease, contaminated food, environmental harms, and smoking harms. As new public health threats emerge, such as the obesity epidemic, policy is formulated or adapted to address those threats.

A policy may be descriptive in that it sets out an approach to an issue of public health, or prescriptive in

that it requires some follow-up action (Ham, 1990). The Philippine tobacco strategy consists of both descriptive policy (' It is the policy of the State to protect the populace from hazardous products and to protect the right to health . . .') and prescriptive policy (' . . . the government shall institute a balanced policy whereby the use, sale and advertisements of tobacco products shall be regulated in order to promote a healthful environment . . .') (Tobacco Regulation Act, 2003). Policy may be confidential to the policymaker or published to the wider population. The process of policymaking is ongoing. The values underpinning policy are always up for debate and subject to challenge not only by developments in public health science but also by interest groups. In the United States for example, policies on needle exchange programs to reduce cases of HIV, although supported by scientific evidence, have been undermined by political objections (Rosenstock and Lee, 2002), and in Latin America the development of policies on protection from secondhand smoking have been hindered by the focused strategies of the tobacco industry (Barnoya and Dlantz, 2002).

Policy may be decided after a long period of consultation or hurriedly in response to a new threat, and can be flexible in its response to new knowledge. Policies may be designed to be short term or longer term in their application, but the shelf life of government policy is likely to be limited to the government's term of office.

Not all policies are of equal weight. Within each state there will be a hierarchy of policy determined by who makes the policy and the purpose it is designed to serve. The closer the policymaker is to the seat of power, the more powerful and influential will be the policy. Policy which represents strategic management will rank higher than policy which is task oriented or which defines management functions. Higher-level policies will be of a greater level of abstraction and generalization, whereas lower-level policies, which filter down from strategic policy, will contain more detailed specification. The South African Department of Education has published strategic policy on AIDS and education which makes clear that

> 'the Ministry is committed to minimize the social, economic and developmental consequences of HIV/AIDS to the education system, all learners, students and educators, and to provide leadership to implement an HIV/AIDS policy'
> (South African Department of Education, 1999).

The South African government then published legislation which set out the detailed policies which serve to implement the strategy, such as that 'public funds should be made available to ensure the application of universal precautions and the supply of adequate information and education on HIV transmission,' and 'schools and institutions should inform parents of vaccination/inoculation programs and of their possible significance for the wellbeing of learners and students with HIV/AIDS' (National Education Policy Act, 1996). These more detailed policies contain details of the powers and duties which are necessary to meet the strategic policy goals.

Policy can exist without recourse to law, although it may choose to use law as a tool of implementation, as in the example above. Policymakers call upon law when policy has been designed for a long-term purpose, when policy programs of education and voluntary compliance are unsuccessful in achieving policy goals, and when the effective implementation of policy requires a heavier hand. The more detailed the policy, the more likely it is that, to achieve policy implementation, the policy will be embodied in law.

Public Health Law

Public health law consists of legislative (passed by parliament) and judicial (the judgment of a court) statements of rules or norms governing health interventions or health behaviors. Law is by its nature in the public domain.

Legislation consists of written documents setting out rules of behavior of individuals, private and public bodies; powers of public bodies; limitations on powers; and the rights of persons subject to those powers. Such a written document will in some legal systems be called a statute, an act of parliament, or an ordinance, and in other systems be called a code. The statute or act or ordinance or code may be accompanied by 'secondary' legislation, which carries less authority and which sets out in greater detail how the legislation is to be implemented. This secondary legislation may be called a regulation but might also be called a code of practice or a decree or a circular. The characteristics which make these written documents legislation rather than policy are the process by which they are formulated and the authority of the state to enforce the provisions of the document.

Legislation in a democratic state is determined by a parliamentary process that enables the parliamentary representatives of the public to contribute to the shaping of law. The process by which legislation is made will be clearly defined, such that any flaw in the process will render the legislation invalid and unenforceable. The authority of legislation derives from public recognition of the validity of the law-making body together with public confidence that legislation has been determined in accordance with the legislative process. In a nondemocratic context, legislation may be made by rulers of the state without public representation and without compliance with rules of process, and in such a case the enforceability of legislation derives from the power of military support rather than from the rule of law.

In some legal systems, especially those modeled on the Napoleonic Code, the total body of law is contained in the written documents which make up legislation. Other countries, such as Canada, Australia, New Zealand, India, and the United States, have a common law system

modeled on the British legal system, where legislation is complemented by case law determined by a judicial process in which interested parties are given an opportunity to argue their case. In a common law system, legislation passed by a parliamentary process takes precedence over judge-made law, but where legislation is lacking or is ambiguous, judge-made law may assume the importance of legislation. For example, in England and Wales, the law which regulates the age at which a young person can consent to sexual intercourse can be found in a statute (Sexual Offences Act 2003), but as there is no statute regulating the age at which a young person can consent to medical treatment; this is governed by judgments of the courts (*Gillick v. West Norfolk and Wisbech Area Health Authority,* 1985). Case law cannot be found in a definitive legal document but rather results from a synthesis of court judgments giving rise to legal principles.

Law, at least good law, results from and is underpinned by policy and is usually framed after the policy debate is concluded. Although it would be naive to propose that the content of law is unassailable by vested interests, and although law may be based on policy which has been hijacked by political or economic factions, the parliamentary and judicial processes are designed to work toward a balanced reflection of views. Law will reflect but not overtly state values, and any challenge of law in the courts must be confined to a challenge of the process of law and not of the values on which it is based. Objection to law on the grounds of its underlying values will require challenge of the policy which lies behind law rather than of law itself.

The framing of new law, whether by parliament or by the courts, is a slow and often laborious process, which is both a good and a bad thing. The complexity of the law-making process renders law inflexible and impotent in the face of unforeseen harms, so law may be useless if the public threat is new in kind. At the same time, once law is in place, its amendment or removal requires a new process, and incoming governments may have difficulty summarily overturning law which has been made in response to policies determined by an earlier government. Law's advantage lies in its weight. It is difficult to challenge, it carries with it powers of enforcement by the authority or custom of the state, and it is a powerful influence on the attitudes and behavior of citizens. While much policy will never be implemented, law should be, and generally is, enforced. Indeed the enforceability of law is one important factor which distinguishes it from policy.

The Relationship Between Public Health Law and Public Health Policy

Law and Strategic Public Health Policy

Law is not always an effective vehicle for the expression of abstract principles and strategic policy. Nevertheless, law does have a role to play in informing the public of the importance of policy and the seriousness with which the government intends to execute policy. It can also serve to prepare the population for the later introduction of functional policy measures. Law setting out strategic policy will address the actions of public bodies, including political bodies, rather than the actions of private bodies and individuals. Such law will not generally provide enforcement measures, although public law might enable challenge of actions which contravene law. A more important purpose of law in the context of strategic policy is to formulate in unambiguous legal language the government's stance on a policy issue and so to provide tools and language for debate on the ways and means with which government policy is to be implemented. Law implementing strategic policy can be used to establish public entities and to clarify their objectives, values, and functions.

The Hong Kong Legislative Council, for example, initiated its approach to the prevention of smoking harms by establishing the Hong Kong Council on Smoking and Health. This was achieved by means of a statute which expressed a broad mission statement setting out the government's strategic policy goals in relation to smoking harms, such as informing and educating the public, coordinating research, and advising bodies and agencies on health protection measures (Hong Kong Smoking and Health Ordinance). The statute provided no specific duties or powers and no enforcement mechanisms, but it made clear how the government intended to proceed and provided a platform for a more focused debate on the nature of the powers and interventions which might be used to protect against tobacco harms. In pursuance of these strategic goals, and after consultation and debate on how the goals could be achieved, the Legislative Council then passed legislation implementing the functional policy interventions the government intended to take to ensure that strategic aims were implemented, such as regulating tobacco advertising and specifying the information which must be contained on a cigarette packet (Smoking (Public Health) Ordinance). This legislation was then in turn supported by regulations which contain the detail of implementation, such as the powers of the government chemist to determine the nicotine and tar levels of cigarettes (Smoking (Public Health) Regulations).

Law and Functional Public Health Policy

Law is a more effective and efficient tool for ensuring compliance with specific, detailed, and functional norms of behavior than for expressing strategic policy. Laws implementing functional policy can address the actions of public executive bodies, private bodies, and individuals. They prescribe and proscribe identified actions and behaviors and dictate the circumstances of application of law, calling on other branches of law such as criminal law, tort

law, public law (in particular judicial review), taxation law, and licensing law for enforcement. Much public health law is dedicated to stating and enforcing functional public health policy.

Law can uniquely impose enforceable duties on both public bodies and individuals. If implementation of public health strategy requires assurance that an action or activity has been performed, law is the most appropriate mechanism for achieving performance. Communicable disease control, for example, is reliant on data as to the prevalence and incidence of disease, and many states have within their public health armory laws which impose duties of disease notification.

Law can provide powers to act in ways which might otherwise contravene other laws or impinge on human rights. If a public health official is required to act to limit the exposure of a person with infectious disease to others, the state will need to frame legal powers of detention or isolation to enable the official to act without challenge. Otherwise the forcible detention might amount to a criminal trespass or a breach of the right to liberty. The Swedish government was found by the European Court of Human Rights to have exceeded its powers by detaining a man who was HIV positive because it feared his health behaviors created a public health risk. The detention was found to have infringed the detainee's rights to liberty and to private and family life, and he was awarded compensation for breach of rights (*Enhorn v Sweden*, 2005).

Law also serves to provide limits to the exercise of powers. At strategy level, government policy will determine the relationship between the state and the individual and the balance between public good and individual rights. In a nonauthoritarian state, those relationships will need legal expression. Compulsory vaccination and compulsory medical treatment, for example, may serve the utilitarian and communitarian objectives of reducing disease threat, but does the strategic policy of the state endorse such measures? Each state, in light of its political, historical, and social environment, will have developed formal or informal policy on the extent to which public good might justify interference with individual autonomy and privacy. Unless that policy has legal expression, individuals will have no basis for challenging abuses of power, and public health officials will have no clear indication of the limits to their power to act in pursuance of public health goals. Most states will have laws, expressed either in legislative or customary form or through the process of litigation, which determine individual rights and provide remedies for the breach of those rights.

Law performs another, more pervasive role in the implementation of functional policy. Law carries with it status, integrity, and sanctity (a value which should not be violated) which give it authority beyond the expression of policy. In an organized society, citizens look to law to define good and bad, acceptable and unacceptable

behavior. Law is habitually obeyed, not because of the nature of its content but because it derives from a legal act of the sovereign or government of the state (Austin, 1995). Citizens obey laws because they accept law as expressing standards that justify criticism and punishment of deviation from those standards (Hart, 1994). Citizens will, with this view, obey law even where they question its moral or logical merit, simply because it is the law. Law is accepted as a dictator of good or acceptable behavior, and citizens adjust their behavior to comply with law irrespective of the likelihood of enforcement or penalty.

Law has played an important part in the shaping of public health behaviors. Road traffic fatalities in many states have been significantly reduced by laws requiring seat belts and child safety seats when traveling in a motor vehicle. It may initially have been the case that citizens wore seat belts or purchased safety seats because they feared prosecution, but it quickly came to be accepted that the good citizen regarded vehicle restraints as evidence of good behavior. Similar attitudes to acceptability of behavior have been observed after the introduction of smoking legislation. Although it might once have been the case that a nonsmoker would object to a smoker on grounds that smoking invaded the nonsmoker's personal right to clean air, after the intervention of law the smoker in a regulated nonsmoking zone is perceived as offending not against the individual nonsmoker but against society. The smoker's behavior ceases to be an individual nuisance and becomes a public offence, incorporating a moral judgment of the social acceptability of the smoker's behavior.

The role of law as a setter of social norms plays an important role in the execution of functional public health policy. Public health policy on tobacco smoke, even supported by extensive public health advocacy and public health education, did little to reduce the incidence of smoking. Voluntary codes of practice have not proved successful (Jones *et al.*, 1999). Although it is too early to pronounce on the success of law in reducing smoking levels, there is some evidence to suggest that in places where smoke-free laws are in place, the sale of cigarettes has fallen (Euromonitor International, 2006), that workers' health has benefited from protection from secondhand smoke (Allwright *et al.*, 2005), and that law has served to change attitudes to smoking behaviors (Fichtenberg and Glantz, 2002). Evidence also suggests that citizens in states which lack smoking laws are educated by legal developments elsewhere to question the absence of law in their own state (Pilkington *et al.*, 2006).

The Limits of Law in the Implementation of Public Health Policy

Although there is much that law can do to implement policy, there are times when the measures law can provide

are inappropriate or powerless, and policy is a more effective tool than law. Law is not helpful in providing open-ended obligations on state bodies, such as an obligation to protect the right to health. An attempt was made in the South African Constitution to provide that everyone has the right of access to health-care services, and the constitution imposed an obligation on the state to take reasonable legislative and other measures to achieve the realization of this right. When individuals came to challenge refusal of health-care services in the South African Constitutional Court, the court recognized that the reality of such rights was that they were limited by resources. The state could not be held responsible for the absolute health of any individual citizen, and in an open and democratic society based on principles of dignity, freedom, and equality, the principles of rationing of health-care provision were found to be integral to a human rights approach to health care (Chinkin, 2006).

Nor is law particularly effective in imposing obligations on individuals to act positively to protect the best interests of others. Law can regulate intentional, reckless, or negligent behavior, for example by criminalizing reckless transmission of disease, or by providing remedies to persons who have been negligently exposed to radiation, or by clarifying the constraints on medical practitioners in their treatment of patients. But difficulties arise where law purports to require an individual to undertake an obligation such as a duty to rescue an accident victim or a duty to stay away from work if an employee develops symptoms of influenza. The problem lies with the extent to which the law can require an individual to undergo a personal sacrifice for the benefit of another. Should an individual be required to put himself or herself at risk of physical harm to rescue another from drowning or from a violent attack? Should an individual be legally obliged to forego earnings so that others can work without fear of infection? Law tends to operate on the assumption that individuals have responsibility for their own safety outside the deliberate, reckless, or negligent actions of others. Workers who wish to be free of infection risk must make the financial sacrifice themselves by staying away from infection zones.

Policy, however, has no difficulty accommodating the obligation to act for the benefit of others. Vaccination policy, for example, encourages individuals to undergo vaccination even where the immunization policy is for the benefit of herd protection rather than for the protection of the immunized individual. Most states have formulated vaccination policies which include advocacy programs to encourage vaccination on the premise that in the interests of public good individuals may be required to make some sacrifices. Rarely do states impose compulsory vaccination, although legal challenges to state powers of compulsory vaccination have not generally been successful, confirming that compulsory vaccination may well be a legitimate use of the power of the state to require individuals to act for the benefit of the public good *(Jacobson v. Commonwealth of Massachusetts)*. Historically, however, attempts forcibly to vaccinate, such as with smallpox vaccination programs in England, the United States, and South Asia, proved counterproductive. Such programs provoked violent resistance and noncooperation, weakened the effectiveness of emergency measures, and caused administrative and financial problems for public health agencies (Albert *et al.*, 2001; Wellcome Trust Centre).

Policy is a more effective tool in these circumstances. If government were to take the view that in certain defined circumstances, for example when pandemic human influenza threatened, all infected or exposed persons should be made subject to isolation powers or should undergo vaccination, then functional policy can be framed speedily and flexibly and be time-limited to address the concern at hand. Measures other than legal enforcement, such as state compensation for loss of earnings or the offer of free medical treatment, are more likely to produce compliance than the heavy hand of law. Some states, such as the United States and France, make childhood vaccination a precondition to state-provided services such as schooling, thus achieving something close to compulsory vaccination by administrative means.

Law is also a poor vehicle for forcing public bodies to use powers they might have. It is common, for example, for public health officials to have the power to isolate persons with infectious disease. If the official declines to exercise that power such that others are put at risk, law rarely provides a mechanism to enable those others to enforce the exercise of the power. This is because the nature of a legal power is such that it incorporates a discretion to act or not act, and responsibility for determining the exercise of discretion lies with the person provided with the power. Rarely do legal systems provide the means to force the official to act, even when significant harm might result from failure to act, for to do so would serve to convert the power into a duty. Had the legislature intended there to be a duty to act, the legislation would have said so. Exceptionally, there might be a remedy when the failure was to prevent a breach of a legally protected human right, or the failure to exercise the power was completely irrational. The Supreme Court of India has recognized that the right to life incorporates the right to the bare necessities of life (*Francis Coralie Mullin v. The Administrator, Union Territory of Delhi,* 1981), and that water is a community resource which is held by the state in public trust. This has been held to mean that the state is under a legal duty to protect water sources, and failure to exercise its powers to do so, by for example cleaning rivers and wells, could be challenged in court (*M.C. Mehta v. Union of India,* 1988). However, in most circumstances policy is better suited than law to directing the exercise

of a power, and might well dictate to public bodies a political or social obligation to exercise powers in certain defined circumstances. Policy has the flexibility to respond to changing circumstances and social needs. Law is too blunt and clumsy an instrument for this purpose.

Another limitation of law is that law is a weak and inappropriate tool where negotiation or compromise is necessary. Law is by its nature adversarial, and although law might be used to establish and authorize mediation bodies, and may well provide leverage to persuade individuals or bodies to engage in negotiation or mediation, it is too inflexible a tool to provide a framework for negotiation or mediation. Again, policy is a better mechanism for setting terms of negotiation and is better placed to compromise those terms when it is pragmatically or politically desirable to do so.

A final limitation of law is that laws are generally promulgated by national legislatures and judiciaries, with the result that laws rarely operate beyond state borders. Public health threats, however, do not respect borders. The power of states to act extraterritorially is extremely limited, although such powers have been invoked exceptionally to prosecute pedophiles operating abroad in recognition of obligations under Section 34 of the United Nations Convention on the Rights of the Child, which requires states to take national, bilateral, and multilateral measures to prevent the exploitative sexual use of children.

The exception to the domestic character of law is law made by a supranational body such as the European Union, which has power to issue directives with which member states are obliged to comply. Supranational law-making powers may facilitate public health in member states by imposing coordinated frameworks for protection against global public health threats such as contaminated food or environmental harms. But supranational law which is framed to serve a purpose other than public health may have the consequence of constraining a nation state from protecting its citizens from health harms. The European Common Agricultural Policy, for example, is credited with increasing the price of healthy fruit and vegetables by requiring that produce be destroyed to maintain prices, but one of the concerns in the struggle to contain epidemic obesity is that processed food is cheaper than fresh food.

International agreements, strategies, conventions, and regulations also operate across states. These international instruments address the actions of states and may dictate strategic policy, and although they do not generally address directly the actions of private bodies and individuals or dictate issues of functional policy, they can be an important public health tool. Functional policies derived from internationally agreed strategic policy are then embodied in national laws. The World Trade Organization (WTO)-administered TRIPS agreement (Trade-related Aspects of Intellectual Property Rights)

is an agreement that, among other things, sets out strategic policy on the patenting of pharmaceutical products with the objective of reaching a balance between technological innovation and the social and economic welfare of consumers. In 2003 it was amended by the Doha Declaration to enable developed states to export pharmaceutical products to other states in which there was an identified national health concern, so long as products were not exported as part of a commercial arrangement. The agreement relies on signatory states to then make appropriate laws, and provides justification for state laws which derogate from patent-holder rights in circumstances such as national emergencies. The WHO DOTS (Directly Observed Therapy) is a strategy for tuberculosis control that sets out standardized TB treatment practices, some of which may require legislative backing. Russia, for example, has passed regulations to support TB control in line with the DOTS strategy in order to address its serious tuberculosis threat (Marx *et al.*, 2007).

International conventions are mostly aimed at the obligations of the state to protect the rights of its citizens. The strongest expressions of obligation lie in instruments that contain civil and political rights such as the right to life and the right to be free from torture, for example the International Declaration of Human Rights. Convention signatory states are expected to provide such protections in national law. Instruments which aim to protect economic and social rights such as the right to work, the right to education, and the right to freedom from discrimination in the distribution of public goods such as health services, are premised on more 'progressive' realization of rights within national law, recognizing that the social and economic environment of some states may make these rights more difficult to implement. But in relation to all rights conventions, implementation depends on the state's willingness to enact laws which reflect agreed international policy.

A more novel use of the device of the convention instrument is the WHO Framework Convention on Tobacco Control, which advocates the use of law at both the international and national level in support of policy in relation to tobacco harms. The Convention constitutes a unique use of WHO's international treaty-making powers to address a global public health concern, in recognition of the enormity of scale of tobacco addiction and tobacco-related disease across the developed and underdeveloped world. Unlike problems of alcohol and obesity, tobacco harms are greatest in the poorer countries as a consequence of the efforts of the tobacco industry to target these markets (Taylor and Bettcher, 2000). Although it has long been recognized that implementation of tobacco control strategies can serve to avert the health costs of tobacco, and that law is an essential vehicle for such strategies (World Bank, 1999), the use of international law to address an international health concern is a new approach.

Although the WHO has power to make regulations for the protection of health, it has rarely used this power. With the renewed awareness of the threat of communicable disease following severe acute respiratory syndrome (SARS), in 2005 the WHO revised their dated and ineffectual International Health Regulations to provide an international legal regime for communicable disease control. The TRIPS agreement, the DOTS strategy, human rights conventions, the Tobacco Convention, and the International Health Regulations all presuppose that national laws will be framed to reflect international control measures. It is the international documents which contain in legislative form the global policy strategies, and national laws will serve to implement the functional strategies aimed at particular public health interventions or particular health harms.

Law and Policy as Dual Mechanisms in Public Health

Neither law nor policy on their own can provide effective means to deal with contemporary public health concerns. Policy is more effective when it is enshrined in law, operating a strategy of law and policy as dual mechanisms. Such an approach might consist of strategic public health policy, embodied perhaps in legislation to indicate political will, combined with purpose-oriented functional policies, some of which are embedded in law to provide duties, powers, and enforcement provisions.

An example of how law might be used as a tool for the realization of policy can be seen in relation to the issue of cyclist road safety. In the region of Wuhan, China, cyclists account for 45% of traffic fatalities, and cycle accidents are the leading cause of brain injury in China (Li and Baker, 1997). Bicycle and motorcycle safety is recognized as a serious public health issue in China, as it is in many other states. The WHO has addressed the problem of cycle safety, and its Helmet Initiative is one component of a policy strategy to reduce bicycle and motorcycle fatalities. The implementation of policy has, however, been hampered in many countries by social attitudes and by availability and price of safety helmets. In China, as in Vietnam, Thailand, and the Philippines, states with fatality rates similar to those in China, cycle helmets may be available only in luxury-good stores and at a luxury price. Yet many helmets on the market are manufactured in these states.

It has been shown elsewhere, in Sweden for example, that public health education programs do not significantly reduce cycle fatalities and that mandatory helmet wearing is one of the most effective strategies in reducing fatality and injury rates from cycle accidents (Svanström *et al.*, 2002). In pursuance of WHO policy, Thailand introduced helmet wearing laws, and this was followed by a 56% reduction in fatalities (WHO, 2002). Law works not only

by providing enforcement mechanisms by way of penalties and license suspension, but also by educating riders and drivers as to good and bad road behaviors. Law can also impose speed restrictions for two-wheeled vehicles or regulate the built environment to provide cycle paths. In lower-income countries such as China, law could also play a part in facilitating access to helmets by requiring factories producing helmets for export to use excess plant capacity to produce helmets for local consumption at reduced or subsidized cost (Hendrie *et al.*, 2004).

Policy underpinned by law has proved the most effective approach to public health harms resulting from alcohol abuse. The contribution of alcohol consumption to mortality and morbidity is well recognized. Many states, particularly English-speaking and northern European states, have developed strategic policies (for example, the Alcohol Harm Reduction Strategy for England) in relation to alcohol-related problems, accompanied by functional policies addressing particular concerns such as alcohol-fuelled violence, alcohol-related motor accidents, alcohol-induced psychiatric disorders, and alcohol-induced physical disease. Such policies support a range of programs including education and public information campaigns, but these have largely proved unsuccessful in reducing alcohol consumption. The powerful interests of the alcohol industry have been influential in inhibiting the implementation of policy-based programs (Room *et al.*, 2005).

Legal measures in support of policy, however, have been effective. Taxation of alcohol to increase alcohol prices, introduction of driving laws stipulating maximum alcohol levels, imposition of licensing conditions on pubs and restaurants, and civil liability of persons who serve alcohol to inappropriate persons have all worked either to reduce alcohol consumption or to reduce alcohol harms.

Similarly, it is now accepted that policy strategies to address epidemic obesity will work only with the support of law. Voluntary agreements for broadcasters on advertising of foods high in fat, salt, and sugar (HFSS) aimed at children, voluntary codes of practice on nutritional standards of school food, voluntary codes on inclusion of nutritional information in food labeling, and voluntary agreements within the retail trade on the pricing of healthy foods have all failed to achieve strategic policy objectives. Food manufacturers argue that unlike alcohol and tobacco, HFSS foods are not intrinsically harmful if eaten in moderation, and that it is therefore inappropriate to make food products subject to regulation. The food lobby is an economically powerful one, and potential loss of revenue from food advertising and food marketing has discouraged compliance with policy strategy. Governments across the world are turning to law to provide more powerful tools to tackle obesity, and some states (for example, Sweden and Quebec) have begun to legislate to constrain the actions of food manufacturers in the cause of obesity prevention.

Conclusion: A Marriage of Law and Policy?

Traditionally, law and policy have operated as separate but interrelated tools. Some states are considering a new form of public health law which enables law to serve as a public expression of state public health policy even as that policy evolves to respond to changing public health concerns (Martin, 2006). The potential inflexibility of law in the advent of new and unpredictable health threats was realized in the face of SARS, and since 2003 many states have begun the process of rewriting their infectious disease laws. Some have attempted a complete rethinking of how law might best serve public health, premised on the notion that contemporary public health practice operates in a framework of risk regulation. Risk is not a concept that has traditionally been addressed, overtly at least, in law, although more recently reforms in environmental law and in occupational health law, both areas with implications for public health, have incorporated risk assessment into their legal approaches.

Western Australia has published a discussion paper on public health law reform in which it is suggested that law should take a 'new approach driven by risk' in which legislation should be 'driven by the philosophy of minimizing risk to the public's health' (Department of Health, Western Australia, 2005). What is proposed is legislation which includes, alongside traditional duties and powers, a statement of policies and guidance detailing risk assessment criteria to assist in the exercise of those duties and powers. A similar approach has been suggested in the New Zealand consultation paper on public law reform, which proposes application of its public health laws not only to defined diseases and conditions but to any condition, disease, risk factor, or other matter of public health concern (Ministry of Health, New Zealand, 2002). The proposed legislation, far from purporting to remain value neutral, would make clear the value framework of law, listing the fundamental principles which would guide any exercise of risk assessment or discretion in exercise of public health powers.

Such law is new in that it brings policy, as well as ethics, into the fold of law. The new proposals envisage that primary legislation will consist of a statement of strategic public health policy, in that it will express in legislative form the state's policy approach to communicable (and potentially noncommunicable) disease control, together with principles, values, and ethics which will govern exercise of policy. Such legislation might, for example, introduce into risk regulation the precautionary principle, a principle now familiar in the context of environmental law, which would justify public health interventions in the event of serious public health risk even when there was an insufficient supportive scientific evidence base for the intervention. One objective of primary legislation would then be to make clear the state's policy determination of acceptability of levels of risk. The precautionary principle in the context of public health results from a recognition that public health risk analysis is relevant not just at the functional level of policymaking, but also at the strategic level of public policy determination, that it is relevant not just to quantitative risk assessment but also to more discursive qualitative risk, and that it is relevant not only to economic risk but also to value system risk (Steele, 2004). Subsidiary legislation in the form of regulations and codified rule of practice would then set out details of functional health policy, on the understanding that subsidiary legislation can, within limits, be amended and extended without requiring a full parliamentary process.

This new-generation public health legislation is still in the gestation stage. Its importance lies in recognition that the separation between policy and law, which has proved valid in protection against harms with identifiable and isolated causes, may be artificial and unhelpful in dealing with public health concerns which result from manmade risks, lifestyle choices, health inequalities, and social living conditions. Legislation which can incorporate refinement of policy as circumstances dictate, and which can accommodate policy change at a functional level, will provide a far more useful public health tool than traditional public health law. Whether there can be a successful, workable, united expression of law and policy within a legislative document remains to be seen. What is clear is that public health law must be sufficiently flexible to provide a vehicle for public health intervention in unforeseeable circumstances, and the incorporation of strategic policy into the legal framework of health protection might serve both to enhance the status of public health policy and to provide law which better reflects the realities of public health practice.

See also: Environmental Protection Laws; Foundations in Public Health Law; Health Policy: Overview; Human Rights, Approach to Public Health Policy; International Law, and Public Health Policy; The State in Public Health, The Role of.

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