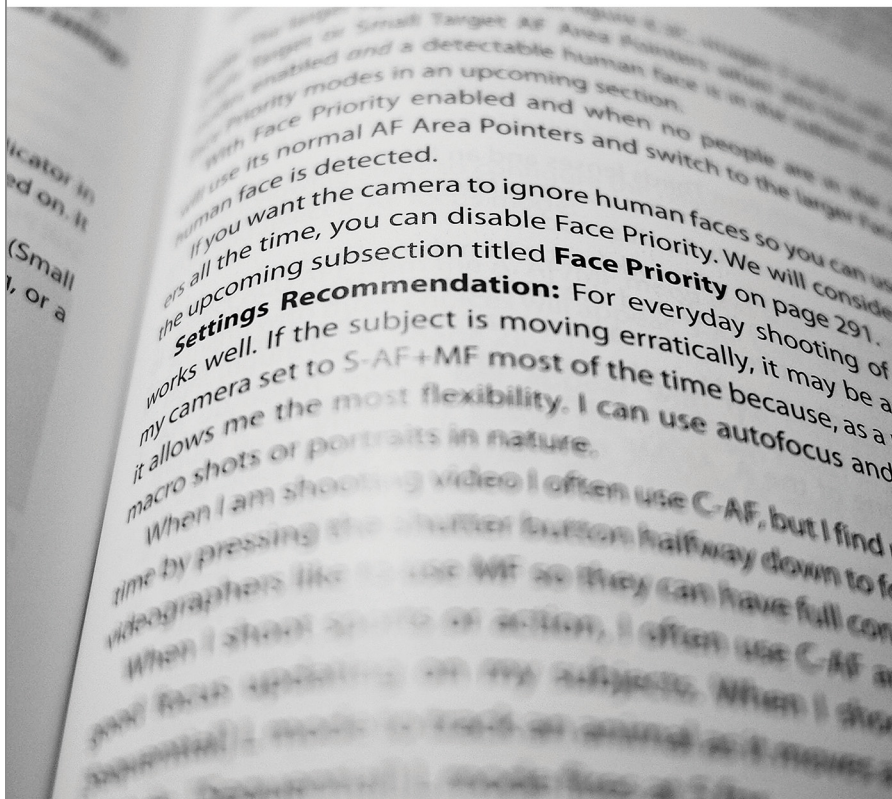


Making and using rules



Making and using rules



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Introduction

This course is designed as an introduction to the academic study of the concept of rules, but will also serve as an introduction to a variety of different writing styles that are used in the academic world. It will challenge you to think about why some statements are rules and some are not, and what it is that distinguishes rules from habits and customs. It also looks at more formal rules and how such rules are applied and enforced. Rules shape our lives because they set out what we may and may not do, and what the consequences of breaking such rules might be. Finally, it discusses how rules have to be written clearly and concisely in order to make sense and examines the structures that exist to ensure that rules are respected, enforced and understood. Throughout this course you will be asked to undertake activities that involve reading articles or thinking through a problem. These activities are designed to help you develop your own thinking and to teach you to read critically. Often there are no right or wrong answers, but the thought processes you go through to arrive at your conclusions are extremely important. You will learn that law is not an exact science and when it comes to designing, applying and breaking rules, there is a lot of room for interpretation.

This OpenLearn course provides a sample of Level 1 study in [Law](#).

Learning Outcomes

After studying this course, you should be able to:

- identify and describe what is meant by a formal rule and understand the problems associated with rule making
- understand how formal rules are constructed
- explain the difference between specific and general rules, and why the difference matters
- explain what is meant by interpretation and interpretive strategies
- understand how formal rules are applied.

1 Making, interpreting and applying rules

The aim of this course is to introduce you to the processes of making, interpreting and applying rules.

We often think about social rules, most of which are unwritten and which we observe because we have a shared social understanding of what they are. We are now going to think about a different kind of rule. A definition of a rule (as opposed to a habit, custom or role) is shown in [Box 1](#).

Box 1 Rules

A rule is something which prescribes what a person must/must not do, may/may not do, can/cannot do. It is generally possible to go to a text (such as an Act of Parliament, a contract, the written decision of a court, or the holy book of a particular religion) which specifies what the rule is. The authority of a rule is generally accepted and observed by those to whom it applies. Formal sanctions, such as punishment or the payment of compensation, may be applied if the rule is broken.

2 Part A Making formal rules

2.1 The meaning of formal rules

In this part, we will develop our understanding of rules further. So far we have concentrated on social rules. We looked at what is meant by this, at the way such rules develop, at the conflicts which may arise between groups operating under different social rule systems, and at what happens when such rules are broken. Here, we are going to explore rules which are more formal in nature. By this I mean rules which – instead of being the product of shared understanding and practice – are set down in some way, usually in writing. In this section we will be focusing on what is meant by formal rules and the ways such rules are made.

The purpose of Activity 1 is to provide you with an opportunity to study a number of statements and to identify which of them express a rule.

Activity 1 Identifying formal rules

0 hour(s) 10 minutes(s)

Interactive content is not available in this format.

One of the things you may also have noticed about the statements we identified as rules is that they are also the product of a decision by a person or group of people. So, for example, the rules about bicycles, drivers, TV owners and serving alcohol paraphrase rules which have been made under the authority of Parliament (via the Highway Code, the Television Licensing Authority and legislation dealing with licensed premises). The rule about the invoices being paid will have been made under the authority of a contract agreed between the parties, and the rule about breakages will have been made by the owner of the shop in which it applies. It is this element of rules – the fact that they are deliberately created – that we are going to consider next.

2.2 The problems of rule making

It goes without saying that making rules is a complicated process. Just how complicated is illustrated by the American legal theorist Professor Lon Fuller. In his book *The Morality of Law*, which was first published in 1964, he explored the relationship between law and morality, and the criteria by which we should evaluate a legal system (one form of a system of rules). In the passage you are going to read in Activity 2, Fuller tells the story of a fictional law-maker, Rex, who comes to the throne determined to make laws (rules) which will be effective and accepted by the society he governs. The purpose of this activity is to provide you with an opportunity to read a passage, understand it and answer some questions so as to help you better understand some of the difficulties involved in making rules.

Activity 2 Problems of the law-maker

1 hour(s) 30 minutes(s)

Please read Reading 1: 'The morality that makes law possible', and answer the questions that follow.

Click [here](#) to open The morality that makes law possible (PDF, 0.1 MB, 5 pages).

1. What do you think the relevance of not having an education might be for a law-maker? (Section A)
2. Why do you think Rex thought it was important that there should be a pattern in the decisions he made? (Section B)
3. Why should it matter that the legal code Rex wants to create should not be a secret from those to whom it applies? (Section C)
4. Why do Rex's subjects criticise his decision not to apply the reasoning in cases coming before him to future cases? (Section D)
5. What criticisms are made of the code which Rex writes himself, and the one he writes with the help of others? (Section E)
6. What is the general nature of the criticisms levelled against Rex's revised code? (Section F)
7. What is the general nature of the problem set out in Section G?
8. Why should it matter that the decisions of Rex bear no relation to the code? (Section H)

You may have thought of one or more of the following (and you may have thought of others):

1. Education should cover the values of society, powers of reasoning and communication skills in addition to learning from experience. A law or rule which does not reflect these values, powers of reasoning skills and experiences is unlikely to be effective or command respect. A law-maker not having the benefit of some if not all of the above points would have difficulty making laws that were effective or respected.
2. Patterns in decisions indicate consistency, and consistency in rules is one of the values to which Twining and Miers refer in their discussion of the broader benefit which the embodiment of values in rules represents. A system of rules, whatever the values those rules represent, is ultimately a regulatory system – one designed to ensure social order and to guide social behaviour. If there is no pattern in decision making regulation becomes impossible.
3. Unless rules are public and accessible, those to whom the rules apply cannot hope to know whether the behaviour they are engaged in, or intend to engage in, is permitted or not. This is a different point from the phrase you may have heard: 'ignorance of the law is no excuse'. This simply means that you cannot use as a defence in law the fact that you, personally, were unaware of a rule.
4. A system of rules such as a legal system needs to be predictable so that those governed by the system may organise their lives. Again, this relates to the broader benefit indicated by embodying values in rules.
5. The code Rex writes himself is criticised for being obscure and incomprehensible. Unless a rule is clear and can be generally understood, it is impossible for people to use it as a guide (which is what rules are for). The same is true of the code written by Rex's advisers, though for different reasons. A system of rules in which

the rules contradict each other is not a system, and they are – arguably – not rules (though it is sometimes possible for different systems of rules to contradict each other, as is the case where different countries have different rules dealing with the same conduct).

6. The general criticisms would be that the code is unfair and unreasonable. To make rules which cannot, as a matter of fact, be complied with, does not provide guidance. Rather, it represents despotism and the exercise of absolute power. We will be considering the difference between rules and commands in [Activity 5](#).
7. Unlike customs, formal rules do not evolve over time. Once they are made they apply unless and until they are repealed by another rule. This means that rules reflecting social attitudes at one particular time may not reflect the attitudes of a later time, because they may have changed. Similarly, rule-makers cannot anticipate the social and technical advances which take place over time and will constantly have to introduce new rules to deal with those (the introduction of laws governing embryo research and regulating surrogate motherhood are good examples of this problem). We will be considering this problem in more detail in [Activity 5](#).
8. Put simply, there is no point in having a system of rules unless the person charged with interpreting and applying them uses them when making decisions. If that person does not use the code then we are back to where Rex started, simply making things up as he went along and with his subjects none the wiser about how they might behave.

In *The Morality of Law* (1969) Fuller summarises the consequences of Rex's failure to make law in the following passage:

The Consequences of Failure

Rex's bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.

A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian¹ sense in which a void contract can still be said to be one kind of contract. Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its

administration, but at some point obedience becomes futile – as futile, in fact, as casting a vote that will never be counted.

¹The phrase 'Pickwickian sense' comes from Charles Dickens' novel *The Pickwick Papers* in which Mr Pickwick and his friends trade insults without really meaning them. Thus, the phrase has now come to refer to something that should not be taken too literally. In his discussion of why law may fail, there is a factor that Fuller does not mention – the policy context. (By policy, I mean the underlying thinking behind a rule or legislative initiative.) Although a rule that is not the product of policy decisions is still a rule, the chances of it being respected and complied with by those to whom it applies are diminished. This is because we tend to think that rules should be the product of a process of discussion or debate in which relevant interests and considerations are explored and discussed first. It is the relationship between policy and rule making that we are going to consider next.

Summary of Part A

After studying Part A you should be able to:

- describe what is meant by a formal rule;
- identify a formal rule;
- describe the problems associated with rule making.

3Part B Policy and rule making

3.1 Introduction

Formal rules do not just appear from nowhere! In this part we will be exploring how such rules are the product of a process of policy making. As an example, we will be using the Irish Government's policy on banning smoking in the workplace, and the law which arose out of this policy. Part B will also provide you with an opportunity to apply some of the reasoning skills you have been developing by applying your understanding of the Irish law to some factual situations.

One of the most obvious differences between the development of a custom within a community and the introduction of a rule which applies to that community, is that the rule will almost invariably have been the result of a policy decision. In other words, at some point in time those with authority to make a rule will have decided that the behaviour of those in the community should be guided or controlled in a certain way, and that a rule is necessary in order to do that. This may be for a number of reasons. For example, it may be that the behaviour in question is not something which people in the community will do voluntarily. Or it may be that the rule-maker has changed its view on the propriety of certain behaviour and wants to bring about change on ideological grounds. (This is what happens when control of a **Parliament**, as the rule-maker, shifts from one political party to another as the result of a general election.) Or it may be because a rule change is necessary in order to bring about a socially or economically desirable outcome for the community: there are many other reasons.

3.2 The policy behind Ireland's ban on smoking in the workplace

In order to explore these issues, we are going to look at the introduction of a rule in the Republic of Ireland – the ban on smoking in places where people work which was introduced in 2004. What I would like you to do first is to think about your own position on this subject. The purpose of the next activity is to provide you with an opportunity to think about your own attitudes to a particular kind of behaviour which many people feel should be subject to legal control. It is useful to work out what you think about a particular subject before engaging in more detailed study of it because it helps clarify the position from which you are arguing.

Activity 3a Smoking in the workplace

0 hour(s) 20 minutes(s)

Consider the following questions and make a note of your answers:

1. Whether or not you smoke, do you think that people should be allowed to smoke in places where people work?

2. Would you draw a distinction between places where all the people are working there (such as an office), and places where some are and some are not (such as a pub)?
3. Whether or not you would draw a distinction, what are the reasons for your view?
4. Do you think that smoking should be at the discretion of the person in control of the premises (such as the employer in an office or the publican in a pub), or controlled by legislation?

There are no 'right' answers to these questions. Their purpose is to help you clarify your own position before looking at the reasons for the introduction of the rule in Ireland.

Those reasons were set out by the Irish Health Minister, Mr Martin, in the debate on the Bill which introduced the new rule. Please read the extract from his speech in the Irish Parliament in Box 2, and then answer the questions which follow.

Box 2 Public Health (Tobacco) (Amendment) Bill 2003: Second Stage Minister for Health and Children (Mr Martin):

I move: 'That the Bill be now read a Second Time'.

The battle against tobacco is one of the most important public health challenges facing us in the new millennium. I have made this area one of my main priorities as Minister for Health and Children.

The adverse impact of tobacco consumption on human health globally and locally is well documented. Tobacco smoke is the leading preventable cause of death and disability in Ireland. Medical evidence has repeatedly confirmed tobacco as a cause of cardiovascular disease, including heart attack and stroke, common cancers, chronic obstructive pulmonary disease, asthmatic attacks, low birth weight babies and sudden infant death syndrome. About 7,000 deaths in Ireland each year are attributable to tobacco related illness. Smoking tobacco products is one of the unhealthiest things a human being can do.

Life expectancy is lower in Ireland than the EU average and the diseases which contribute primarily to this are heart disease and cancer. Tobacco use is the leading preventable cause of these diseases. Smoking is a major causative factor in about 90% of the 2,000 deaths from lung cancer each year and increases the risk of other cancers such as the mouth and throat. Smoking is also a primary cause of cardiovascular disease, the greatest single cause of mortality in Ireland. Tobacco is a significant burden to individuals, families and society through death, illness and medical costs. Reduction in tobacco use will increase life expectancy in Ireland and result in happier, healthier and better quality lives for many Irish people.

Evidence has accumulated year on year of the enormous world wide threat to human health from consumption of tobacco products. Studies carried out internationally in recent years have also confirmed that there is a significant risk to the health of the non-smoker from inhaling environmental tobacco smoke referred to as passive smoking.

[...]

The tobacco industry and its allies seem determined to try to undermine public health policy in the area of tobacco control. Perhaps we should regard this as testimony to how effective the measures contained in the Bill will be when enacted and commenced. We must not lose

sight of the predatory nature of the tobacco industry. It is a global industry which has long regarded the World Health Organisation as its greatest enemy in preventing the spread of the global tobacco epidemic.

Much has been achieved in reducing the incidence of smoking in our population. By a combination of measures including legislation, regulation, health promotion and education we were able to achieve a level of 27% for 2002 as shown in the SLAN [Survey of Lifestyle, Attitudes and Nutrition] survey published earlier this year. More recent surveys conducted by the Office of Tobacco Control indicate smoking levels dropping to 25%. This is welcome news and the reduction achieved will have many benefits, particularly for future generations who will come to accept non-smoking as the social norm.

Our success in improving the health status of the nation is linked to further reducing the level of tobacco usage and in particular preventing young persons from starting to smoke. If the incidence of tobacco use can be reduced further we can make considerable progress towards a tobacco-free and a healthier society in the years to come. I am not suggesting that legislation alone, no matter how comprehensive, can create and sustain the environment necessary to prevent people from starting to smoke and to assist those who have already started to quit. Our anti-tobacco strategy will be multifaceted, containing as it will strong legislative controls and effective enforcement powers. However, the strategy will also have a fiscal element and the supports required by smokers to quit.

The implementation of this comprehensive strategy will, in time, effect the necessary attitudinal changes in society to tobacco consumption followed by the necessary behavioural changes. We owe it to ourselves, to the younger generation, and, indeed, to future generations to ensure that the war against tobacco is won. We must ensure that the children and young people of today do not become future victims of the tobacco industry, whether through being induced to smoke tobacco products or through exposure to and inhalation of environmental tobacco smoke.

Activity 3b

1. Is Mr Martin's speech *about* smoking, or *against* smoking?
 2. Does Mr Martin make his argument mainly on the basis of a principled objection to smoking, or mainly on the basis of scientific evidence?
 3. Why do you think he mainly uses this argument in his speech?
 4. What benefits does Mr Martin say will result from the control of tobacco use?
 5. Identify those places in the speech where Mr Martin uses military language. Why do you think he does this?
 6. Does Mr Martin believe that law alone can prevent people from smoking?
 7. What wider impact does he believe the introduction of the law will have?
1. The speech is an argument against smoking. He is making the case for the control of tobacco use.
 2. There is a strong emphasis in the speech on scientific evidence, primarily from medical research.
 3. It is often thought effective to justify a policy change using evidence from those with expertise in the particular area, especially if the evidence is strong (as it is in this case). By using arguments grounded in science it is easier for Mr Martin to avoid the criticism that the Bill is designed to limit personal freedom, for example.

4. Mr Martin emphasises the health benefits, to those who smoke, those who inhale other people's smoke, and babies born to smokers. More generally, he emphasises the fact that the change in the law will result in an improved quality of life for many Irish people. In this way he draws attention to the social and communal benefits which will result from the introduction of the rule.
5. Mr Martin uses the following phrases:
 'The battle against tobacco'
 'The tobacco industry and its allies'
 'We must not lose sight of the predatory nature of the tobacco industry'
 'It is a global industry which has long regarded the World Health Organisation as its greatest enemy'
 'We owe it to ourselves, to the younger generation, and, indeed, to future generations to ensure that the war against tobacco is won'
 He uses this military terminology to emphasise that this is a fight which he, the Irish government and the Irish people must win. Politicians introducing new laws often use powerful language like this – rhetoric – to persuade people of their cause.
6. No. He sees it as part of the solution. The battle against smoking has to be fought using fiscal (monetary) incentives and other forms of support.
7. Mr Martin believes that the introduction of the new law will change attitudes towards smoking and that this, in turn, will result in changes in behaviour.

Did you find Mr Martin's argument convincing? Whether or not you agree with the case he made against smoking, I think you can see that he used a number of effective ways of making that case.

The next set of passages I would like you to read and think about – in [Box 3](#) – will give you an idea of the range of reactions to the new law. They are drawn from the editorial section of newspapers, in both Ireland and the UK.

Box 3 Newspaper extracts

Irish Times Editorial, 29 March 2004

The [Irish] Government's ban on smoking in the workplace takes effect today after months of muddle and uncertainty. The hospitality industry campaigned aggressively against its introduction ... [but] the general public is favourably disposed towards the development. And, in future years, the ban ... will probably be regarded as a major advance in the medical and social life of this State ... Already, other European countries are looking to Ireland as an example of what can be done to minimise the lethal effects of nicotine addiction ...

It may take months to ensure that members of the public and certain employers become compliant ... Changing established habits is always difficult. But the pattern of adjustment elsewhere shows what can be done ... [and] some 60% of the public ... approves of the ban.

Irish Examiner Editorial, 30 March 2004

Few could anticipate how this controversial and far-reaching measure would be copper-fastened in the public mind as a positive and long-overdue initiative ... Not surprisingly, however, opponents of the ban remain entrenched. No sooner had bars opened [on Monday] than some publicans were claiming a marked falloff in business, warning of dire repercussions for the hospitality industry and predicting it would be a political time bomb for the local elections in June.

Despite this vociferous reaction, Micheal Martin [the Irish health minister] will be quietly pleased by the positive response of the public at large ... Politically, his long-term prospects as a heavy hitter have been dramatically improved ... On a broader canvas, the [Irish] government will be vastly relieved at the public endorsement of the undeniable health, social and economic benefits of stubbing out cigarettes in the workplace.

Irish Independent Editorial, 29 March 2004

The main question relating to the smoking ban ... is no longer whether it will be introduced, but whether it will work ... There are two dangers. One arises in ... enforcement ... Often the difficulty is that laws are not enforced with sufficient rigour. Here we have almost the opposite difficulty. The ban will be deservedly popular. Its enforcement will come from the good sense of workmates and pub companions. The authorities should refrain from heavy-handed actions.

They should also take an early look at the anomalies in the regulations. Some, like the exemption for psychiatric hospitals, could hardly have been avoided. Others are absurd, like the ban on smoking in company cars. If the [Irish] government does not intend to enforce this, it should scrap it.

Daily Telegraph Editorial, 30 March 2004

What has happened in Ireland is a very serious assault on the civil liberties of a substantial minority of the population ... Nobody is denying that there are many people who dislike the smell of tobacco, or that it is wrong that they should be expected to endure the company of smokers against their will. It may even be true ... that inhaling second-hand tobacco smoke is dangerous to the health of non-smokers.

The answer to that is to ban smoking in bars and restaurants whose staff and customers do not like it, and to allow it in those where they do not mind. But, instead, Irish politicians have chosen to impose a blanket ban on smoking in all places of work, with only a very few exceptions. Other politicians throughout Europe will be watching the Irish experiment closely. You can be sure that if the Irish surrender to the new law without a strong show of resistance, it will not be long before a similar ban is introduced in Britain.

The Scotsman Editorial, 30 March 2004

What lessons are to be learned from the Irish move? ... The bottom line in the Irish experiment is how effectively the ban can be enforced ... Paradoxically, anti-smoking legislation will only work if it is voluntarily accepted by the vast majority of the electorate ... recent polls in Ireland have implied that there is a big majority in favour of the move ...

However, it is likely that the real test ... will primarily be economic. Will Dublin's pubs and restaurants empty? ... Alternatively, will more folk enjoy an evening out in the Irish capital where the craic and the Guinness will be just as good despite the lack of tobacco fug? The evidence from New York, where a similar ban came in last year, is hotly disputed. The Dublin case-study will help resolve the matter. If the public-smoking ban hobbles the Irish tourist industry, legislators in the rest of Europe may be disinclined to follow.

From these excerpts you will see that the introduction of the new law was generally welcomed, even by those newspapers which identified practical and economic problems with the ban. Only the *Daily Telegraph* was critical as a matter of principle, arguing that the law was an assault on civil liberties. The important lesson to draw from these editorials is that the introduction of a new rule, especially one which has a direct impact on existing social customs (such as smoking in a pub), will provoke strong reactions. This is because the introduction of a new law is an integral part of the political process. Although it is sometimes tempting to think of rules, especially legal rules, as somehow neutral, they are more often than not the result of hotly disputed contests about the right way to regulate social life.

3.3 The Irish anti-smoking law

You now know what the Irish Government's arguments for introducing the smoking ban were, and have read some of the reactions to it. We are now going to turn to the law itself. The passage I want you to read is from the Irish Government Public Services website and explains the new law in simple language. Read the passage in Box 4 carefully and answer the questions in the activity which follows. The questions ask you to interpret the rules, something we will be looking at in more detail later in the course. For now, I just want you to use your own everyday knowledge and understanding. The purpose of [Activity 4](#) is to provide you with an opportunity to read a document which attempts to explain a legal rule, and to answer some questions about the way in which the rule operates in practice – an important legal skill.

Box 4 Ban on smoking in the workplace in Ireland

Information

Since 29 March 2004, the Irish Government has implemented a ban [on] smoking in the workplace. This means that with effect from that date (29 March 2004) smoking is forbidden in enclosed places of work. This includes office blocks, various buildings, public houses/bars, restaurants and company vehicles (cars and vans). The ban is being introduced as part of the Public Health (Tobacco) Act, 2002 (Section 47) Regulations 2003.

Just under 25% of the Irish population smoke and the purpose of this ban is to offer protection to employees and the public who are exposed to the harmful and toxic effects of tobacco smoke in the workplace. Smoking has been identified as a major cause of heart disease and a significant contributor to lung cancer in Ireland.

Rules

From 29 March 2004, you are not allowed to smoke in an enclosed place of work in Ireland. While the ban will mean that smoking will be forbidden in many places, there are a few exceptions:

- Prisons
- Police station detention areas
- St. Patrick's Institution [a medium-security place of detention]
- Nursing homes
- Hospices
- Religious order homes

- The Central Mental Hospital
- Psychiatric hospitals
- Maternity homes
- Hotel, guesthouse and B&B bedrooms
- Third-level educational residential facilities.

The Government has stated that even though certain places are exempt from the ban, **all employers** (even those who are exempt) **still have the right to enforce the legislation**. In other words, even though the above organisations and institutions are not obliged to enforce the ban, they are free to do so if they wish. [...] Given that prisons and places of detention are unique, the law does not apply to these institutions. [...]

Outdoor smoking areas

While smoking in an enclosed workplace is forbidden under the law, employers have discretion to provide an outdoor smoking area, subject to the requirements of the law.

The law has defined an outdoor area as:

A place or premises, or part of a place or premises, that is wholly uncovered by any roof, fixed or mobile.

An outdoor place or premises that is covered by a roof, so long as not more than 50% of the perimeter (outside) is covered by a wall, windows, gate or similar. [...]

Does my employer have to give me time off work for smoking breaks?

No. Employees in Ireland are only entitled to time off work for breaks as set down in Section 12 of the Organisation of Working Time Act, 1997. Your employer is **not currently obliged** to provide additional time for smoking breaks for employees **nor will they be obliged** to provide smoking breaks for employees after the implementation of the Smoking Ban in the Workplace.

Enforcement of the smoking ban

Inspections to ensure that the ban on smoking in the workplace is being implemented will be undertaken by Environmental Health Officers employed by the health boards. In addition, inspections will be carried out by Inspectors from the Health and Safety Authority. The traditional workplace locations visited by the Health and Safety Authority will have to comply with the new smoke-free measures requirements, as part of their general compliance with health and safety requirements.

Officers from health boards and the Office of Tobacco Control will ensure that smoke-free measures are undertaken in workplaces connected with the food and hospitality sector.

Offences

Any person found guilty of breaching the ban on smoking in the workplace may be subject to a fine of 3,000 euro. The owner, manager or person in charge of the workplace is legally responsible for ensuring that the ban on smoking in the workplace is complied with.

(Source: [Citizens Information](#) [Accessed 30 May 2007])

Activity 4 Analysing rules

0 hour(s) 40 minutes(s)

Based only on the information provided in [Box 4](#), answer the questions below. Some of the answers merely expect you to identify the relevant factual information. Others require you to think a little more creatively!

1. When did the ban on smoking in the workplace start?
2. What legislation provided the basis for the ban?
3. Does the ban extend to smoking in any car or vehicle?
4. What was the justification for the ban?
5. Does the ban extend to convents?
6. Does the owner of a hotel have to allow people to smoke in hotel bedrooms?
7. Does the ban apply to the dining area of a guesthouse?
8. Can the rules be used to prevent a prisoner smoking?
9. Must an employer provide an outdoor smoking area for employees?
10. Would the premises in [Figure 1](#) below be classified as an outdoor area? Assume that the open space depicted is the only open space.
11. Do the new rules create an obligation on employers to provide breaks so that employees who wish to smoke may do so?
12. Which different agents and agencies are involved in ensuring that the smoking ban is enforced?
13. Could the landlord of a pub in which customers smoked on the premises avoid legal liability?

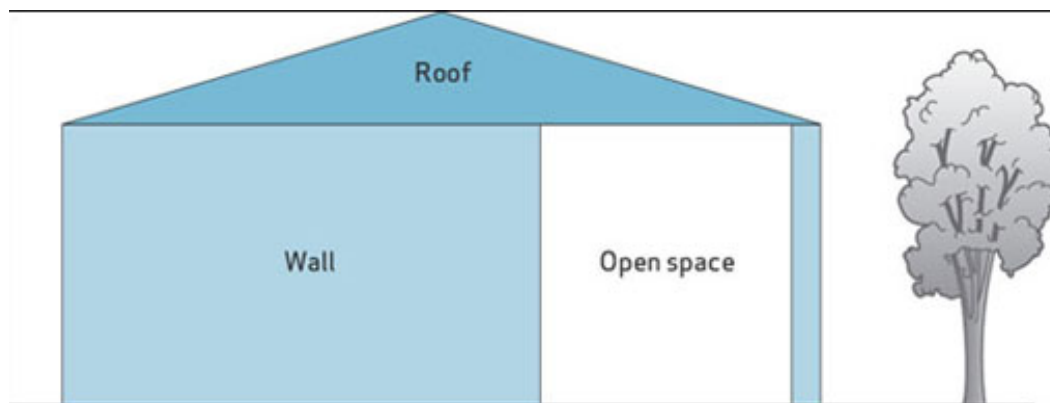


Figure 1 Outline of premises

1. 29 March 2004.
2. The Public Health (Tobacco) Act, 2002 (Section 47) Regulations 2003.
3. No – only company cars and vans (i.e. vehicles owned by the company).
4. The purpose of the ban is stated to be the protection of people in the workplace from the harmful effects of tobacco smoke. These effects include heart disease and lung cancer.
5. The rules do not specify convents, but they do not extend to religious order homes (which would include convents and monasteries); so the answer is no.

6. Hotel bedrooms are exempt from the ban, but the owner (if they are the employer) may choose to enforce it if they wish; so the answer is no.
7. Yes. The exception (subject to what I have said in the answer to question 6) only applies to bedrooms.
8. It would seem not. Prisons are said to be 'unique institutions', and so the rules do not apply.
9. There is no requirement to do so, though an employer may provide one at their discretion. If they do so, the outdoor area must be one which the rules define as outdoor.
10. No. The rules explain that a premises with a roof is 'outdoor' if 50% or less of the perimeter is covered by a wall or similar. In [Figure 1](#), much more than 50% of the building is walled.
11. No. The rules do not alter the existing situation (which is that employers do not need to provide smoking breaks for their employees).
12. Environmental Health Officers (employed by the health boards); Inspectors from the Health and Safety Authority; officers from the Office of Tobacco Control.
13. No. The pub would be a workplace, and the landlord of a pub would, as 'the owner, manager or person in charge', be legally responsible for ensuring that people did not smoke there.

When you answered these questions, which of them did you have to think about a bit more carefully? My guess is that questions 5, 6, 7, 8, 9 and 10 required a little more thought than the others. Even if you answered these questions correctly, it is worth thinking about the thought process you were engaged in when you did so and being aware that they involved certain key comprehension and reading skills.

Question 5 is a typical legal question in that the answer depends on your interpretation of another term, for example, 'Religious orders' is a general category which could cover a number of more specific workplaces. It might very well be that there are some workplaces less obvious than convents (or monasteries) where deciding if they fell into the general category of 'religious orders' would be for a court to determine. We will look in more detail at the problems of interpretation later in the course but for now, the important thing to note is that if you answered the question correctly, you have demonstrated a very important skill. You have recognised that it is possible to answer a question about a rule by using everyday reasoning. If you did not answer the question correctly, take a little time to think about why you did not.

Question 6 required the use of another skill useful for those studying the way the law operates. At first glance, the answer would appear to be found in the list of exceptions. Hotel bedrooms are not subject to the mandatory ban. *However, the answer to the question depended on reading beyond the list to the paragraph below and realising that there was a discretion to enforce the ban which could be exercised by the employer.* This in turn meant qualifying the answer by saying that the hotel owner could exercise the discretion but only if they were the employer. You will frequently be asked questions like this, where the answer depends on connecting different parts of a text, and working out how one affects the other. You will also discover that you are only able to give a partial or conditional answer on the basis of the information you are given. (It would be incorrect simply to say that the hotel owner could enforce the ban without explaining that this would only be so if they were also the employer.)

Question 7 also requires careful reading. Because the list of exceptions includes hotel bedrooms, it might be tempting to assume that the ban does not apply to hotels. This would be wrong because, unlike the answer to Question 5, the particular does not include the general. 'Religious order' includes 'convent', but 'hotel bedroom' does not include 'hotel'. It is very important that you use only the information at your disposal to answer the question asked and to assume that the information is accurate. Do not be tempted to think 'They must mean hotel premises generally', if that is not what you are told.

Question 8 is a tricky one. On the basis of the information given, it would seem that prisons are not 'workplaces' to which the ban could ever apply, even if an employer wanted to ban smoking. The reason it is difficult to be sure of the answer is the way the information is set out. Prisons are listed among the exceptions. There then follows an apparently general statement which purports to provide a discretion in respect of all exempted workplaces (which would mean that prison employers could impose a ban under the rules); but there then follows a brief statement explaining that prisons and places of detention are unique and that the law does not apply to them. Assuming that 'the law' includes the discretion to impose a ban, then the answer is no, but the explanation is not as clear as it could be. Generally, it is not good practice to answer a question with 'it seems not' or 'possibly', because this gives the impression that you do not know the answer and are hedging your bets! However, if the information is not clear, and you give an explanation of why your answer is circumspect then this will be adequate. It is better to say, therefore, 'it could be argued' (or words to this effect).

Question 10 is tricky for two reasons. One is the fact that you have to apply the meaning of a text in written form to a visual image. The other is the explanation given in the text. Even though the passage you read was provided as a lay-person's guide to the new rules, you may very well have found the explanation of what constituted outdoor places and premises a bit mind-boggling. This is in part because the sentence which includes '50%' has two clauses, the first of which is general and the second of which qualifies the first using 'so long as' (creating the exception). The meaning is not made any clearer by the odd use of 'cover'. Have you ever thought of a wall 'covering' the perimeter of a space with a roof on? No, neither have I. This kind of language in a rule does not make it easy to answer questions about the meaning of the rule, but it is unfortunately very common in legal texts. You will have further opportunities to think about the language of rules later in the course. For now, do not be too concerned if you got the answer wrong, or found the language difficult.

3.4 Summary of Part B

After studying Part B you should be able to:

- describe the relevance of policy for rule making;
- recognise differing reactions to Ireland's ban on smoking in the workplace;
- demonstrate/explain the implications of the rules governing Ireland's ban on smoking in the workplace.

4 Part C How to make rules work

4.1 Introduction

We have looked at the way in which policy informs the development of rules, and you have had an opportunity to develop your reasoning skills by applying your understanding of a set of rules to some factual situations. One of the issues which came out of Part B was that sometimes in applying rules the language in which the rules are written makes it difficult to know exactly what is meant. In Part C we will be looking at this problem in a little more detail. In particular, we will be looking at some of the issues that arise when making ('formulating') rules, and the difficulties that arise when rules are too specific or too general.

4.2 Formulating rules

Activity 4 should have shown you that the language used for making rules can sometimes make them difficult to understand. Given that we can only comply with a rule if we know what it means, this is a big problem! In this part of the course we are going to look at the process of making rules in more detail – and you are going to have the opportunity to make a rule that can be understood and which is effective in achieving what it sets out to do.

It is worth restating that rules are made for a reason – to achieve a specific purpose or outcome. They are designed to ensure that their target audience acts, or refrains from acting, in a certain way. That audience could be sovereign states (bound by treaties to which they are signatories), members of the general public (bound by Acts of Parliament, local by-laws, etc.), children at school (bound by rules of attendance and discipline), players of a sport (bound by the rules of that sport's governing body), participants in a court trial (bound by the rules of evidence and procedure), or smokers in an Irish pub. There are many other examples.

Whoever their audience is, rules should, ideally, be formulated in such a way that members of that audience understand exactly what is expected of them. If they are unclear, the audience may be at a loss as to how it should behave, and the rules will not achieve their purpose. There are issues with this idealistic goal. While there is an infinite number and range of real-life events, there can only ever be a finite number and range of rules to deal with them. Rules therefore have to be drafted in such a way that they cover the conduct they are meant to regulate, but not so that they regulate other conduct, and so have unintended effects.

To explore these issues, I would like you to read the account in Box 5 of Mrs Biggs, and the difficulties she has in controlling visitors to her garden.

Box 5 In an English country garden

Mrs Biggs is the owner of a house which has a beautiful garden. Once a year she takes part in a scheme which allows members of the public to visit gardens in her area, so that they can appreciate the flowerbeds, trees and shrubs that gardeners like her have spent many

years growing and cultivating. The scheme allows Mrs Biggs, as the gardener, to decide what rules should apply to those wishing to visit her garden. Three years ago, when she first took part in the scheme, she was advised by a neighbour that visitors had a nasty habit of picking flowers, so Mrs Biggs made the following rule:

Do not pick flowers.

Mrs Biggs was satisfied with the rule, and opened up her garden. However, she was horrified to see one person taking cuttings from some shrubs, and another picking raspberries off the plants she was growing outside the back door. 'You can't do that', she said, to which the visitors replied 'Why not? There's no rule about taking cuttings, or picking raspberries; and we weren't picking flowers. We complied with the rule.'

The following year, Mrs Biggs decided to deal with the problem by changing the one rule into two. The amended list read as follows:

Do not pick flowers or raspberries.
Do not take cuttings from any of the shrubs.

She was pleased with these rules, which dealt with the problems that had arisen, and the following year she opened her garden again. However, on the first day she was once more horrified to see someone picking plums and another taking cuttings from her prize apple tree. 'You can't do that', she said, to which the visitors replied 'Why not? There's no rule about taking cuttings from trees, or picking fruit other than raspberries.'

Last year Mrs Biggs decided to change the rules one last time. The new rules were:

Do not pick flowers or fruit.
Do not take cuttings.

She opened up her garden this time with some trepidation, but none of the flowers or fruit were picked, and no cuttings were taken.

Although this is a very simple story, it illustrates two difficulties with rules. One is that they must be sufficiently *specific* for their intended audience to know what they are supposed to do (or not do). The other is that they must be sufficiently general that they will cover unanticipated behaviour or conduct. When Mrs Biggs made her first rule, she made it clear that she did not want flowers picked; but she had not given any thought to the fact that things other than flowers can also be picked. She had also not covered the possibility that people reading the rule might assume that this was the only aspect of their behaviour that Mrs Biggs intended to regulate, and that it was therefore permissible to take cuttings (or, for that matter, to do anything else).

Mrs Biggs's second set of rules was an improvement, but not much of one. She realised that the rule about picking would need to cover the picking of raspberries, but (as she subsequently realised) this did not cover the picking of other fruit. Similarly, she introduced a rule about taking cuttings, but the rule was too specific. She had not anticipated that other kinds of cutting can be taken. Her final set of rules is better. What she did was to make them more general – more inclusive. She realised that if she did not want raspberries or plums picked she needed to draft the rule using a term which would include both of these: fruit. And she realised that if she did not want any cuttings taken, she needed to draft the rule more generally and not refer specifically to shrubs.

These points are illustrated in Activity 5. The purpose of this activity is to provide you with an opportunity to explore the ways in which different formulations of a rule can have different (and sometimes unintended or unanticipated) effects. The activity will also help you understand why the choice of language is so important when deciding how to formulate a rule.

Activity 5.1 Helping Mrs Biggs

1 hour(s) 0 minutes(s)

Imagine that you are Mrs Biggs and that you have opened up your garden once again. You have, you will remember, two rules now:

Do not pick flowers or fruit.
Do not take cuttings.

Everything is going well, and you are receiving lots of compliments from the visitors. However, just as you are about to close up, you notice that your herb bed has been all but destroyed – branches of rosemary have been snapped off, the sage bushes have hardly any leaves on them, and the basil has gone altogether. You say to yourself ‘That’s it. It’s no good – I’ve tried my best. I’m never going to open my garden again.’

A visitor to your garden hears you and asks you what the problem is, and you tell them about the herb bed. You explain that you have tried to deal with the conduct of visitors by using rules, but that they never seem to work exactly as you had hoped. The visitor is more optimistic than you are, and suggests that you both sit down and think of a way of regulating the behaviour of people in the garden so that you will feel confident about opening it to visitors next year. The visitor tells you that this will be possible if you think about some simple questions and note your answers:

1 Why do you think your rule about picking flowers or fruit did not stop people picking herbs?

Herbs are neither fruit nor flowers. The rule did not therefore deal with the picking of herbs. It was too specific.

Activity 5.2

What would you need to do to the rule as it is currently formulated (i.e. without changing the form of it) to stop people picking herbs?

You could add herbs to the list of things which can’t be picked.

Activity 5.3

Now redraft the rule, using its existing formulation.

Your rule might read ‘Do not pick flowers, fruit or herbs’.

Activity 5.4

Would this new rule stop people picking seed pods, or picking the bark off trees?

No, it wouldn’t!

Assuming you do not want people picking either seed pods or bark, we need to find a way of making the rule even more general. The trouble with specifying the different things you don’t want picked is that there are so many. If you specified them all, the list would be incredibly long and unwieldy, and there’s always the possibility that you would leave something important off the list. We could have a rule which said ‘Do not pick any of the plants’, but that wouldn’t cover the case of the seed pods or the bark because, strictly speaking, these are not plants. There is, however, a way round this

problem. It involves changing the verb 'pick' to something else, and using a phrase which would include fruit, flowers, herbs, seed pods and bark (and other things you might not want people to damage).

Activity 5.5

Can you think of a way of redrafting the rule in a more general way, one which would achieve your objective?

The following are some possible answers. Think about each possible rule and identify:

- the extent to which it would address your problem
- the potential difficulties which it would create for you and for visitors to your garden.

Possible rule 1:

Do not touch anything in the garden.

Your observations

This would certainly make it clear that none of the plants should be touched, and would also deal with the problem of the seed pods and the bark. But it would also mean that visitors would not be allowed to touch things other than plants – fences, bird feeders, and rocks would all be out of bounds, and (taken literally) it would mean that visitors would not be allowed to touch the gate, so getting in and out would be problematic!

Possible rule 2:

Do not touch anything which has been grown in the garden.

Your observations

This would allow visitors to touch the gate, but what about standing or walking on the grass? Grass is grown in the garden, and it may be that you are quite happy for people to walk on the lawn. Indeed, they may have to in order to get around. This problem could be addressed by:

Possible rule 3:

Do not handle anything which has been grown in the garden.

Your observations

This would deal with the problem of walking on the grass – you don't handle grass when you walk on it, and the rule covers the (unlikely) possibility of someone picking it. However, neither this, nor any of the other rules would deal with the person who came along with a spade and started digging things up. In ordinary language, a person who digs is not handling, nor are they touching. A pedant with a shovel might argue that, according to the ordinary meaning of the rule, they are not doing anything which has been prohibited. This difficulty could be addressed by the following:

Possible rule 4:

Do not interfere with anything which has been grown in the garden.

Your observations

This rule uses a word – interfere – which arguably covers picking, handling, touching and digging, and serves your purpose. It uses a more comprehensive verb, easily understood, and which would therefore be more effective in preventing all the kinds of conduct which Mrs Biggs wants to stop.

We have now seen some of the problems involved in formulating a rule which does what we want. In Part D we continue looking at some of the same issues, but this time concentrating on the question of interpretation.

4.3 Summary of Part C

After studying Part C you should be able to:

- explain the problems associated with formulating rules;
- identify whether a rule is too specific;
- identify whether a rule is too general;
- identify solutions to a problem of rule formulation.

5 Part D Interpreting rules

5.1 Introduction

We have seen some of the difficulties that Mrs Biggs has faced when formulating a sufficiently general and sufficiently specific rule to deal with the conduct of the visitors to her garden. In Part D we take things a step further by looking at some of the difficulties which may arise when it comes to interpreting rules such as the one developed (with your help) by Mrs Biggs. In particular, we will be exploring the way in which our understanding of the language used in rules affects our interpretation of them – the way in which indeterminacy (the capacity of words and phrases to carry multiple meanings) creates difficulties – the problems of adopting a literal approach to rule interpretation, and the kinds of interpretive strategies we can adopt so as to avoid absurd interpretations and give effect to the intentions of the rule-maker.

Anybody who wants to apply a rule must first interpret it. Just as the job of an interpreter is to translate one language into another, so the job of those applying rules is to determine the meaning of a rule in order to see whether it applies to a given situation, and, if so, in what way and to what extent.

One of the problems those applying rules face when confronted with a written rule is that the emphasis intended by the rule-maker is not always clear. This is because rules are expressed in language, and language has an indeterminate quality to it. We all know what we mean by the word 'cat' or 'kettle' or 'tree', but things are not always so simple. An example of what I mean would be the following comment by a fictional visitor to Mrs Biggs's garden:

That plant is quite nice.

The meaning of this apparently simple sentence depends on the emphasis we give each word. Suppose the visitor said it like this:

That plant is quite nice.

This emphasis suggests that the visitor has been comparing one plant with another, and has decided that the plant she is indicating is a particularly nice specimen.

But the visitor could instead say the sentence like this:

That plant is quite nice.

This emphasis suggests that the visitor has been comparing the plant with things other than plants.

Or she could say it like this:

That plant is quite nice.

This suggests that although the visitor originally thought differently, she has now decided that the plant is quite nice after all.

Or she could put the emphasis here:

That plant is quite nice.

This suggests that the visitor thinks the plant is quite, but not very, nice.

The meaning of the sentence 'That plant is quite nice' therefore depends entirely on the emphasis placed on the individual words. While there is rarely a problem when somebody is speaking a sentence out loud, or where the emphasis is made clear on the page (as it

has been here), it can be a problem when the sentence, or rule, is written down without any obvious emphasis.

In order to deal with these, and other, difficulties of rule interpretation, it is therefore necessary to adopt what may be called interpretive strategies.

5.2 Interpretive strategies

5.2.1 A literal approach

One way in which we can interpret a rule is by treating it literally. Very simply this means looking at the words which comprise the rule, and at the way in which they are put together, and applying the rule 'as is' to a factual situation to which it applies. An example would be: 'Dog owners are not permitted to let their dogs off the lead in the park'. If this is applied literally, it would mean that a person who did not own a dog, but who took a friend's dog to the park, would not be bound by the rule. Similarly, a dog owner would not be bound by the rule if they let their dog off the lead *before* entering the park (if the rule is read literally to mean that dogs must not be let off the lead *while* in the park).

There are two main consequences to interpreting rules literally. First, it ensures certainty and consistency in the application of the rule. If every rule-applier interprets a particular rule literally, then it means that every case or factual situation to which that rule applies will be decided in the same way. (This assumes, of course, that each rule-applier has the same understanding of the words which comprise the rule as every other rule-applier. We will assume this for the moment.) In any system of rules, whether that be the law, arithmetic, the rules of grammar, or the rules of a game or sport, it is important that there is consistency in the application of those rules. Without some degree of certainty or consistency it would be impossible to enter into a contract, to be sure that $1 + 1 = 2$, to communicate with each other, or to play football or chess.

Second, a literal approach to interpretation acknowledges the authority of the rule-creator. It recognises that the person who has formulated a rule has chosen to express it in a particular way for a particular reason. By taking a literal approach, the rule-applier may avoid the possibility of subverting the intentions of the rule-maker. One example is the concept of the Sovereignty of Parliament. Among other things, this means that, under the UK constitution, it is the job of Parliament, not the judiciary (the judges), to make laws. A literal approach to interpretation ensures that the separate and distinct functions of Parliament and the judiciary are maintained. In the context of this course, you should simply note that a literal approach has the effect of distinguishing clearly the roles of rule-maker and rule-applier, and of according a significant degree of respect and authority to the rule-maker. Judges have traditionally preferred the literal approach to interpretation because it enabled them to affirm their positions as appliers of law, rather than as creators of it.

These consequences of a literal approach may be thought of as advantages. However, the literal approach is not without its problems. These can be illustrated by the following example. Suppose there is a sign inside a shop which reads as follows:

Breakages must be paid for by the customer.

Read literally, this rule means that any breakage, whether or not caused by the customer, must be paid for by him. This would clearly be a ridiculous interpretation, and the rule-applier, in order to avoid this, must resort to another interpretive strategy.

5.2.2 Avoiding absurdity

One such strategy is to be as true to the literal meaning as is possible but to ensure, so far as the words allow, an interpretation which avoids absurdity. In the case of the rule I have just set out, this would mean an interpretation which ensured that only those customers who had caused breakages were obliged to pay for them.

This approach works well in most cases, but not always. Take, for example, another rule posted up in a shop selling china and glass:

Customers must handle glasses with care in case of breakage.

Read literally, this rule suggests:

- (a) that a person must take care when putting on or taking off their spectacles (another meaning of 'glasses') in the shop because there is the possibility that the spectacles have smashed in their case, or in the person's pocket; or
- (b) that a person must handle (drinking) glasses on display with care if they are already broken; or
- (c) that a person must handle the unbroken (drinking) glasses on display with care because otherwise they may end up being broken.

Here, it is not possible simply to avoid an absurd result by excluding interpretation (a) because this would still leave both (b) and (c) as possible interpretations. It is conceivable that the rule-maker intended both (b) and (c) when formulating the rule, but the rule-applier cannot be sure. For example, would the rule-applier be able to say that a person who carelessly picked up and dropped a cracked glass had broken the rule? If interpretation (b) is adopted, then the answer is yes; but if interpretation (c) is adopted, then the answer is no.

In this case, using the literal rule would result in absurdity, but interpreting the rule simply to avoid the absurdity merely leads to other problems.

5.2.3 Looking at the intention of the rule-maker

To resolve these problems, a rule-applier may adopt a yet broader interpretive strategy. This involves attempting to work out what the intention of the rule-maker was when the rule was formulated. In other words, it means going beyond or outside the language of the rule itself. In the context of a **statute** (i.e. an Act of Parliament), this may involve the rule-applier (the judge) looking at the law that existed before the statute was enacted and working out what the problem with that law was that the new rule was intended to resolve. The judge may also, in very limited circumstances, look for evidence of the purpose of the rule in the language of the government minister when the rule was introduced for debate in Parliament. The judge may then interpret the new rule so that it does resolve the problem as was intended.

The purpose of the next activity is to provide you with an opportunity to think about how we can establish the meaning of a rule that is ambiguous.

Activity 6 Finding the rule-maker's intention

0 hour(s) 5 minutes(s)

Taking the example of the rule set out above ('Customers must handle glasses with care in case of breakage'), how would you try to determine the intention of the rule-maker?

You might have thought of the following:

- Ask the rule-maker to explain what the rule meant, using different language.
- Ask the rule-maker why this particular language was used.
- Give the rule-maker a range of hypothetical situations, such as those set out above, and ask which ones were supposed to be covered by the rule.
- Use your own experience and common sense to work out what the rule must mean.
- Find out whether there was a previous rule, and see how this one differs from that.

All these are perfectly reasonable solutions, and you may have thought of others. However, it is rarely possible to do these things, since we often only have the language of the rule itself to go on. It is also potentially problematic, especially if we use our own experience and common sense, since this experience and common sense may differ from other people's. This, in turn, might lead to each person who had to apply the rule coming to a different interpretation from every one else, and those who were subject to these different interpretations (the potential rule-breakers) believing that they had been treated inconsistently and unfairly.

5.3 Summary of Part D

After studying Part D you should be able to:

- explain the difficulties of interpreting written statements;
- explain what is meant by indeterminacy;
- explain what is meant by interpretive strategies;
- describe the literal approach to interpretation;
- describe the approach to interpretation which seeks to avoid absurdity;
- describe the approach to interpretation which looks to the intention of the rule-maker.

6 Part E Applying rules

6.1 Introduction

We have now looked at how formal rules are formulated, and at some of the strategies that may be deployed when interpreting them. In this part we will take this one step further and explore in more detail something that we have already touched on and thought about – the application of rules. This is a really important thing to understand, since rules are designed to regulate conduct, and have to be applied to instances of the conduct with which they are concerned.

6.2 Applying other people's rules

The process of interpretation is very closely related to that of application. The reason is simple – before applying a rule, the person applying it must interpret it to see whether the conduct in question is one to which the rule applies. Sometimes this will be straightforward, and sometimes not, as will be seen in [Activity 7](#). The purpose of this activity is to provide you with an opportunity to explore the different ways in which rules formulated by others might be interpreted by those to whom they apply.

We are returning to Mrs Biggs's garden. Let's suppose that Mrs Biggs has given up on making her own rules. Instead, she adopts a set of rules devised and made available by her local gardening association. She assumes that they will be more effective because they have been formulated by people with greater experience of the problems associated with visitors, and reflect a well thought-through policy. In order to take advantage of these rules, Mrs Biggs is required to ensure that they are enforced. This means that she has to apply them. As the Chair of the gardening association explains to her: 'We want to ensure that visitors to each garden are treated equally. It would never do if some garden owners were too lax and others too strict.' The association's rules are shown in Box 6.

Box 6 Standard Rules for Visitors to Gardens Participating in the Open Garden Scheme

1. These Rules apply to visitors to gardens participating in the Open Garden Scheme.
2. Visitors to gardens participating in the Open Garden Scheme should remember that they are the guests of those who make their gardens available and treat those gardens with appropriate respect.
3. No visitor to a garden is permitted to do anything in the garden which may be construed as interference with the enjoyment of the garden either by
 - (a) the owner of the garden; or
 - (b) other visitors to the gardenand the meaning of 'interference' shall be interpreted in accordance with the meaning set out in Clause 5 of these Rules.

4. Interference with the enjoyment of the garden by a visitor shall result in that visitor being required to leave the garden.
5. In these Rules 'interference' includes, but shall not be limited to, any of the following activities:
 - picking flowers, fruit, vegetables, herbs or any other plant in the garden;
 - taking cuttings from any plant in the garden;
 - playing music;
 - eating food;
 - dropping litter.

The first thing you may notice about these rules is how much more formal they are. In contrast to Mrs Biggs's own rules, they are written in much more 'legalistic' language. Some people use the term 'legalistic' to describe language which is specific and certain, while others – perhaps you! – use it disparagingly to describe language that is unnecessarily complicated. This activity is designed to establish how clear the rules actually are.

Activity 7 Standard rules

Based only on your understanding of them, answer the questions below. Remember that Mrs Biggs has a number of different interpretive strategies at her disposal. For the purposes of this activity I would like you to state, in respect of each of your answers, whether adopting a literal strategy to interpretation would result in a different outcome from adopting an approach which avoids absurdity. (You may wish to remind yourself of the meanings of these terms, which are discussed above in Part D.)

1. To whom do the rules apply?
 2. David, the postal worker, arrives to deliver a letter to Mrs Biggs. Do the rules apply to him?
 3. Ali wants to visit the garden the day after the Open Garden Scheme finishes. Mrs Biggs lets him in as a favour. Do the rules apply to him?
 4. Mrs Biggs is annoyed by a visiting family having a very loud argument. Can she require them to leave the garden?
 5. Mr Smith, Mrs Biggs's neighbour, is annoyed by the same argument. Can he demand that Mrs Biggs require them to leave the garden?
 6. Sarah, a visitor, plants some bulbs in one of Mrs Biggs's flowerbeds. Can Mrs Biggs require her to leave?
 7. James, an accomplished violinist, starts playing some very beautiful music, which Mrs Biggs thinks is a wonderful addition to the visitor experience. Must she require him to leave the garden?
1. Visitors to the gardens participating in the Open Garden Scheme
 2. The key question is: is David a visitor? On a literal interpretation of the rule it could be argued that he is 'a visitor to a garden participating in the Open Garden Scheme'. He is visiting such a garden, though not to visit the garden as such. To draw the opposite conclusion you would have to argue that it would be absurd if everyone who came through Mrs Biggs's gate was subject to the rules.

3. The rules only apply to visitors to gardens participating in the Open Garden Scheme. On a literal interpretation you could argue that gardens 'participating in' the Open Garden Scheme include those that have participated; but that would be a strained, and possibly absurd, interpretation.
4. Yes, on any interpretation. Although Clause 5 does not include having an argument or making a loud noise in the list of things which constitute interference, it specifically says that the list is not limited to these things. Furthermore, they may be said to have broken Clause 2 by not showing respect, and Clause 3, because their conduct could be construed as interfering with the enjoyment of the garden both by Mrs Biggs and the other visitors.
5. No. The rules on expulsion only apply if Mrs Biggs or the other visitors have their enjoyment of the garden interfered with. It would be different if Clause 3 had been more widely drafted to include those in neighbouring gardens.
6. This depends on whether planting bulbs amounts to interference with enjoyment of the garden. We have seen that Clause 5 allows for some latitude in this matter, so if Mrs Biggs thinks that planting bulbs amounts to interference she can require Sarah to leave.
7. If the rules are read literally, yes. Mrs Biggs is required to ask someone to leave the garden who is playing music, even though she likes it. This is because the list in Clause 5 specifically states that music amounts to interference. To avoid this absurdity, the rules would have to be interpreted in such a way that interference was only interference if it was experienced as interference!

6.3 The relationship between making, interpreting and applying rules

Although the processes of making, interpreting and applying rules can be explored separately, as we have done in this course, it is important to realise that they are all part of one larger process. A new rule is often made because the interpretation and application of an existing rule does not solve the problems which that rule now has to confront. In turn, that new rule may be drafted in such a way that its interpretation leads to consequences that were unintended by the rule-maker, and the process has to start all over again.

To remind ourselves of the relationship between making, interpreting and applying rules, the last activity in this course brings all these processes together. Think about what you have learned from the course as a whole as you read the passage which forms the basis for the activity, and try to answer the questions on it without referring back to the material you have read. The purpose of this activity is to provide you with an opportunity to explore the ways in which the meaning of a rule develops, from its initial formulation through to its application and interpretation.

Box 7 The Smoking in a Public Place (Prohibition) Act

The Government's Department of Health wants to introduce a law which makes it a criminal offence to smoke in a public place. It formulates a simple policy:

STAGE A The Government believes that, in the interests of public health, smoking in public places should be a criminal offence. It believes that the term ‘public places’ should be understood as restrictively as possible, so as to ensure that people are not turned into criminals unless there is good reason.

This policy is then translated into legislative drafting instructions by lawyers in the Department. These instructions read as follows:

STAGE B Instructions to Counsel

1. Draft a new offence which makes it a criminal offence to smoke in a public place.
2. Draft the offence so that it is clear that ‘smoking’ includes the smoking of cigarettes, cigars and pipes.
3. Draft the offence so that the term ‘public place’ will be interpreted restrictively.

Those instructions are then sent to Parliamentary Counsel, whose job it is to translate them into a Bill. They come up with the following:

STAGE C The Smoking in Public Places (Prohibition) Act

1. It shall be a criminal offence to smoke in a public place.
2. In this Act ‘smoking’ shall include, but not be limited to, the smoking of
 - (a) cigarettes;
 - (b) cigars;
 - (c) pipes.
3. In this Act ‘public place’ means a place to which the public have access as of right.

STAGE D When the Bill is introduced in the House of Commons the

Secretary of State for Health sets out the purpose of the Bill in the following terms:

... Mr Speaker, this Government is committed to improving the health of the nation. To that end, we have brought forward a Bill which will go a long way to achieving this most important of objectives. The Bill is a simple one. It makes it a criminal offence to smoke in a public place – any public place. It will not be possible for a person to claim, as some Honourable and Right Honourable Members opposite have asserted, that he or she was not in a public place if people are in that place as of right, as members of the general public ...

There follow a number of stages, during which MPs and Peers debate the Bill. Some of them object to, and some support, the new offence. During one of the debates, an MP who opposes the Bill asks the following question, and receives a reply from the Minister for Public Health (Note that the Secretary of State for Health and the Minister for Public Health are different people):

STAGE E The Hon. John Pereira MP: Mr Speaker, when the Secretary of State introduced this rotten Bill he made it clear that only those smoking in a place to which the public have access as of right will commit an offence. Will the Minister confirm that this is his understanding too?

The Minister for Public Health: Yes, Mr Speaker, I can confirm that those smoking in places to which the public ordinarily have access will commit a criminal offence.

STAGE F The Bill completes all its legislative stages, receives Royal Assent and becomes an Act of Parliament. The wording of the Act is identical to that of the Bill. On the day it comes into force, the Act becomes law which can be enforced. It is now up to the

police to enforce the law. Let us suppose that a week after the rule comes into force, the police are called to the Roxy cinema. There has been a complaint by the cinema owner about Fred, who has been smoking in the foyer. The police are satisfied that Fred has committed the offence, charge him and pass the file to the Crown Prosecution Service (CPS). They review the case, are satisfied that the offence has been committed, and draw up the indictment against Fred.

STAGE G Fred appears at the Crown Court, where he pleads Not Guilty. Although he admits to smoking, he says that there were no notices saying that smoking was prohibited and, more importantly, he contends that the cinema foyer was not a public place within the meaning of the Act. He did not therefore commit any offence. The prosecuting lawyer puts the opposite case. He says that the phrase 'public place' must be given its ordinary meaning, and that a cinema foyer is such a place. After receiving directions on the law from the judge, the jury retire to consider their verdict. They find that the offence has been proved and return a verdict of Guilty.

STAGE H Fred seeks leave to appeal, on the basis that the judge misdirected the jury about the law. Leave to appeal is granted. Eventually, after one unsuccessful appeal in the Court of Appeal, his appeal is heard by the Judicial Committee of the House of Lords. The members of that Committee (the Lords of Appeal in Ordinary, or 'the Law Lords') listen to arguments on both sides and agree with those put forward by Fred's barrister. In the leading judgment, Lord Smith explains the decision as follows:

'The meaning of the term 'public place' is at the heart of this appeal. Although we were impressed by the arguments put forward by counsel for the Crown, we cannot accept that the meaning of 'public place' is one which includes a cinema foyer. A cinema is private property, access to which is subject to the permission of the cinema owner. That owner is at liberty to prevent a person from entering the cinema, or to require a person to leave. Even if a person is permitted to enter, it is clear that he remains there subject to any conditions which the owner wishes to impose. All this leads me to conclude that a cinema, and – as a matter of inexorable logic – its foyer, is not a place to which the public have access as of right within the meaning of the Act. A street would be, as would open countryside. But the Roxy cinema is neither of these. The appeal is therefore allowed.'

As the result of Fred's appeal, his conviction is overturned.

Activity 8 The Smoking in a Public Place (Prohibition) Act

0 hour(s) 45 minutes(s)

Read the piece in [Box 7](#) about the making, interpretation and application of a fictional rule, similar to the one introduced in Ireland which we looked at earlier in the course.

1. What values would you associate with the government's policy on smoking? (Stage A)
2. Do you think that the instructions to counsel to ensure that the meaning of 'public place' is interpreted restrictively (Stage B) have been taken on board in the draft Bill? (Stage C) Give reasons for your answer.
3. Do you think that the Secretary of State for Health accurately describes the meaning of 'public place' when he introduces the Bill? (Stage D) Give reasons for your answer.
4. Does John Pereira MP get a straight answer to his question from the Minister for Public Health? (Stage E)

5. On what basis do you think the police are satisfied that Fred has committed an offence? (Stage F)
6. On the basis of the wording of the Act, do you think it would be relevant for the court to consider the fact that there is no notice in the cinema prohibiting smoking? (Stage Gv)
7. Do you think that Lord Smith has given effect (a) to the meaning of the Act; and (b) to the Government's intentions in introducing the Act? (Stage H)
8. Do you think Lord Smith has adopted a literal interpretation of the Act, or one which tries to avoid absurdity? (Stage H)
9. Can you think how changing the wording of section 3 of the Act would have enabled Lord Smith to reach the opposite conclusion, and what that change might be? (Hint: there is a clue elsewhere in the Act) (Stage C)
10. Throughout the passage you have just read, a number of people and institutions have been involved in making, interpreting and applying the rule. Fill in the table (attached as a pdf below) by marking the different processes they are engaged in:

Table 1 (PDF, 1 page, 0.4MB).

Click [here](#) to view document

1. The policy could be said to express the value of security, insofar as that concerns the physical safety of the community. It could also be said to restrict the liberty of people who smoke, because it limits where they may smoke, and their autonomy (the right to make their own decisions about the way they behave).
2. Arguably not. The draft Bill defines a 'public place' as a place to which the public have access as of right. This is not a restrictive definition – on the contrary, it would appear to be a very broad one.
3. Arguably not. The Secretary of State's reply is contradictory. He explains first that 'public place' means 'any public place', whereas the language of the Bill qualifies the term as one meaning a place to which the public have access as of right (which might be thought to limit the meaning in some way). The Minister makes this point towards the end of his speech, but it is impossible to say – given the contradiction – what he actually understands by the term.
4. No. The Minister introduces a new definition of 'public place' as one to which the public 'ordinarily have access'. This may not be the same thing as a place to which the public have access 'as of right'.
5. They are presumably satisfied (a) that Fred was smoking and (b) that he was smoking in a public place (on the basis that the foyer of the cinema is a place to which the public have access as of right).
6. No. The Act does not provide a defence of any kind on this basis. If Fred was smoking, and if he was smoking in a public place, then the absence of a notice makes no difference to whether the offence is committed.
7. As to (a), arguably yes. Lord Smith has given reasons why, in his opinion, a cinema foyer is not a place to which the public have 'access as of right', and so cannot be treated as a public place for the purposes of the Act. As to (b), arguably no. We saw that the Government, through the Secretary of State and the Minister, had rather different understandings of what 'public place' meant. The Secretary of State suggested that 'public place' meant any public place (which might be interpreted to include a cinema foyer since that is somewhere in which the public

congregate), and the Minister suggested that it meant a place 'to which the public ordinarily have access', which could be interpreted in the same way.

8. Lord Smith has adopted a literal approach – he has looked at the plain meaning of the words in the Act.
9. If the 'means' were changed to 'shall include, but not be limited to' (as in Clause 2), then it would have been possible for Lord Smith to conclude that the range of places which should be treated as public places could include a cinema foyer. The use of the word 'means' limits the meaning, whereas the change in wording would have expanded it.
10. Your complete table should look like this:

Table 2 (PDF, 1 page, 0.4MB).

Click [here](#) to view document

If you thought that the Department lawyers and Parliamentary Counsel had also interpreted the rule, that would be wrong because you cannot interpret a rule which has not yet become one! (They are involved in interpreting the policy.)

6.4 Summary of Part E

After studying Part E you should be able to:

- explain what is meant by the application of rules;
- read and make sense of a set of rules;
- explain how and why different interpretive strategies may lead to different interpretations of a rule;
- apply a set of rules to a set of facts.

Conclusion

This free course provided an introduction to studying Law. It took you through a series of exercises designed to develop your approach to study and learning at a distance and helped to improve your confidence as an independent learner.

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Box 2, page 6: Copyright Houses of the Oireachtas 2003

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