

12/1 - Readings and Presentations 2 - The Australian Legal System & The Rule of Law

What are the distinguishing features of the 'Western' Legal Tradition?

- The shared heritage of the modern, Common and Civil legal systems
- There are 3 noteworthy characteristics of the western legal tradition
 - ↳ Autonomy of law
 - Conceptually distinct from custom, morality, religion or politics
 - The content of law is, however, shaped by the above social forces
 - This autonomy is reflected in the fact that it has its own institutions, profession, university discipline, literature, language and etiquette
 - ↳ Centrality in social ordering
 - Law pervades every aspect of modern society, and is a primary means of social control - it is omnipresent
 - Law is seen as the primary means of social change
 - Political powers campaign for legislative and executive control
 - ↳ Moral authority
 - Law commands a high level of respect in western society
 - This is independent of ideas on the merits of the laws and the respect shown to lawmakers
 - Idea that the law ought be obeyed, not only from fear of punishment, but from a feeling of positive obligation
 - Law generally reflects not only legal obligations, but moral obligations too
 - Law ultimately depends on a person's sense of belonging to society

What other legal traditions are there?

- Aboriginal legal tradition - inseparable from Aboriginal custom and religion
 - ↳ There is no distinctive hierarchy to uphold the laws, nor is there a distinctive "profession" associated with them
- Roman legal tradition - where a monarch exercises absolute power, there will be no distinction between law and political power
- Islamic tradition calls for certain behaviour for reasons other than adherence to legal rules
- Chinese law - traditionally, Chinese recognised the rules prescribed by an earthly ruler
 - ↳ Historically, law was primarily used to maintain peace and stability, and reinforce the power of the government
 - ↳ Law was not used to protect individual rights (as in western law)
- Confucian tradition - better for preservation of harmony and order if social relations were governed by ethics, taboos, ceremonies and customs
- Japanese law - honour and good faith were traditionally important factors

What do you understand by the 'rule of law'?

- Albert Venn Dicey believed the rule of law had at least 3 meanings
 1. That individuals ought not be subjected to the power of officials wielding wide discretionary powers
 - Places importance on the notion that all power must be authorised
 2. The law should incorporate equality of all classes to one law administered by the ordinary courts
 - Importance of equal subjection
 3. That constitutional law is the result of judicial decisions, not from a separate written constitutional code
- The rule of law is said to be a general principle of how power should be deployed by government in a democracy
- The rule of law has various values that underlie it
 - ↳ Legality
 - Rule of law requires obedience to law, which contains 2 features
 - The law must be followed
 - Public officials must act within the powers that have been conferred upon them - decisions and acts must be legally authorised
 - ↳ Certainty
 - The law should be certain and predictable
 - Allows individuals to plan in advance as they know the consequences
 - The value of legal certainty is based around the idea of fairness
 - Unfair to punish someone for action that was lawful when enacted
 - ↳ Consistency
 - Application of law should be “even-handed”, like cases be treated alike
 - ↳ Accountability
 - Rules should provide a published standard that the legality of official actions be measured against
 - The process of making and publicising rules generates public assessment
 - ↳ Efficiency
 - Rules allow decisions to be taken more quickly than a general standard that requires reappraisal of each case based on its merits
 - ↳ Due process and access to justice
 - There should be no punishment without a trial - people need access to courts
 - The decision-maker should be independent and impartial
 - Almost impossible to achieve, but requirement of justification in adjudication minimises impact of predetermined/arbitrary decisions
 - Individuals should not have decisions made about them without an opportunity to influence the outcome of those decisions

- Thomas Bingham believed that the rule of law means “that all persons and authorities within the state, whether public or private, should be bound by, and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts”

Is the ‘rule of law’ culturally biased or a neutral set of principles?

- The rule of law is a neutral set of principles that, in application, become culturally biased
- Positivist ideas are that there is a distinct separation between law and morality
- Natural law theory tend to the idea that law and morals are intertwined
- Dicey’s Rule of Law seeks to promote an individualistic political theory, in part due to its inaccurate description of historical systems of governance
- Neutral set of principles relates to Bingham’s 8 principles

Should the key elements of the Western rule of law be exported to legal systems that have traditionally been less familiar with them?

- Westerners tend to want to export their rule of law and aid to other legal systems from a feeling of obligation to do so
 - ↳ If the West stopped trying to implement their “better” system, then the idea of helping to further global equality would be lost in younger generations
 - ↳ Westerners are not interested specifically in spreading a culture, but simply in decreasing human suffering - the spread of culture is incidental
 - Even if the West didn’t want to spread its culture, it wouldn’t be possible due to the globalised economy and modern communications
- But some cultures may not want the imposition of Western ideals
 - ↳ Western rules of law are imperfect, and cultures may not want their society plagued by such imperfections
 - ↳ The societies may run more efficiently and produce higher satisfaction with their own set of rules - cultures are a means for the happiness of individuals rather than ends in themselves
- The value of free discussion of possible changes by participants in a culture should always take precedence over the value of preserving cultural identity
- Rorty believes that the West does not have a duty to interfere with foreign cultures, but once the West has made itself known in a region, they have a duty to the weak within that region
 - ↳ Has duty to see that benefits of exposure to the West are spread through population
 - ↳ Non-Western elite who enjoys benefits of Western culture cannot use preservation of cultural identity as an excuse for keeping democracy out of reach of the masses

12/3 - Lecture 2 - The Rule of Laws & History of English Law

- Joseph Raz defined the essence of the rule of law as relating to 2 features:
 - ↳ That all people (including the government) should be ruled by the law and obey it
 - ↳ That the law should be such that people should be able to be guided by it
- There are 3 key features of the rule of law
 - ↳ Certainty
 - The laws should be certain and predictable
 - ↳ Generality
 - The law is broad and is general, and applies across all categories of people
 - There are not particular sets of laws for particular people
 - ↳ Equality
 - That all people are treated with consideration of equality
 - All citizens have the same rights and responsibilities
- The rule of law is underscored by the values of reciprocity
 - ↳ The law should be made to impact others in the same way that the law makers themselves wish to be impacted
- Two contrasting ideas about how the law should be applied
 - ↳ Rule book conceptions (Fuller) - relies on the internal morality of law
 - ↳ Rights-based conceptions (Dworkin) - law as integrity
- Greek and Roman civilisations had important notions around law
 - ↳ In Greek tradition, the laws are called the Nomos
 - ↳ A good set of laws is classified as Eunomia
 - ↳ A lack of laws, or a set of bad laws, is classified as Isonomia
 - ↳ They applied systems of Nomocracy - government in accordance with the law
 - ↳ Plato believed in the Republic determining the laws
 - Everyone should be subject to the law, even the law makers
 - ↳ Aristotle believed that the laws should govern actions
 - ↳ Cicero thought that everyone is a servant of the laws so that they can be free
- Dicey
 - ↳ Believed that regular law is supreme over arbitrary and discretionary powers, and that all classes are equally subject to the ordinary law as administered by the courts
 - ↳ Believed that the rule of law and the rights it protects come from the traditions and customs of the ordinary law, not from a written constitutional document
 - ↳ He also believed in the fundamental ideas of Parliamentary Sovereignty
 - That the parliament has the capacity to rule as it likes
 - This conflicts with some core ideas of the rule of law
 - This conflict is resolved by the self-correcting democracy (if the people disagree enough with the parliament, they will elect new representatives)