

LWSO201 INTRODUCTION TO LEGAL STUDIES

TOPIC 1/2/3

WHAT IS LAW

The Law is a formal set of rules that all residents of the country or society must obey

WHAT IS LIBERALISM

Understanding of other people's behaviour and opinions (different from your own)

Condoning political and economic freedom

Liberalism Vs. Classical conservatism

<i>NATURAL LAW</i>	<i>LEGAL POSITIVISM</i>
<ul style="list-style-type: none"> → derived from biblical stories and society → The “correct” way of doing things can be derived from reason. Helps in search for “virtue” → St, Thomas Aquinas joins human perfectibility with Christian Morality and “God’s Will” → Can also form the basis of big ideas like natural rights, justice, and equality 	<ul style="list-style-type: none"> → Derives from scientific positivism - what we can see, be sure of and measure → The law depends on the facts of its making, and not in its merits → John Austin: “law is the command of the sovereign” → There are no predetermined royals
<i>NATURAL LAW</i>	<i>LEGAL POSITIVISM</i>
<p>Thomas Aquinas: “<i>God will reveal the correct way of living</i>”</p> <ul style="list-style-type: none"> → He generalised law as a “dictate of reason from the ruler for the community he rules” → believes that God is the creator of the world/Earth therefore concludes that <i>God is the ruler and the governor of the world</i>. This is what he calls <i>Eternal Law</i> → Allied prosecution: Crimes against humanity (Nuremberg Trial) -Invoking natural law during the Nuremberg Trial 	<p>John Austin: “<i>law is the command of the sovereign</i>” (1790-1859)</p> <ul style="list-style-type: none"> → He claimed that approach to law should be systematic and coherent → “<i>Province of Jurisprudence Determined</i>” (1832-1833) → Criminal Law Commission → Nazi Defendants: The laws of Germany mandated actions during the war

	“We were only following orders”
--	---------------------------------

King John of England (1199-1216)
 God chooses the sovereign: Natural Law

Universal Declaration of Human Rights (1948)	European Convention on Human Rights (1950)
- basic fundamental human rights to be accepted worldwide, and protected by the rule of law - essential for the peace between nations	Revolution Morality and Scripture Racial inequality: Slaves

US BILL OF RIGHTS (1791)

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances
2. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed
3. No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.
4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized
5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation
6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence
7. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, then according to the rules of the common law

8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
9. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people

****Constitutional Argument: moral difficulty of legal positivism**

THE FEMALE REFUGE ACT

- For women under the age of 35, leading an idle and dissolute life
- Rehabilitation for 2 years at the Andrew Mercer Reformatory (provincial prison)

DR HENRY MORGENTALER 1988**

- One of the few doctors that accepted abortion clients

CHALLENGED Section 7: *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice*

Morgentaler position

- Contradicted the law on Abortion
- Has a direct impact on women's health; she had the right to decide alone
- Interference of this decision *infringed her right to liberty*
- Violation of the security of the person

BILL C-43:

The vote ties between the senate and the legislation.

The abortion legislation defeated undemocratically

Ideological shift

Government vs, individual

LIBERALISM

→ Post 1776-1789 becomes the dominant way of thinking
planning their lives → inherent freedoms (power of the individual)

ENLIGHTENMENT: *individuals are the centre of the society (neoliberalism)*

→ social organization is composed of autonomous individualism

Imposition of the ruler → new thinking of the individual *free to make new decisions

NEW NOTION OF GOVERNMENT → intended to protect individual rights

John Locke challenges the rule of law

Fundamental freedoms → natural law

Declaration of rights: liberty/property/security

Government applied limits on coercion of the ruler

EQUALITY: *every individual counted as much as any other individual*

Government is forced to intervene public matters to achieve EQUALITY

→ legal, economic, subjective barriers

→ Only some people enjoy simple freedom: “everyone is free to eat dinner at the Ritz”

RIGHTS

→ natural law (French and American revolutions)

1. Existing natural → humans exist

2. Rights given → RULE OF LAW

Dominion of priest → Dominion of REASON AND CONSCIENCE

BASIC FUNDAMENTAL PRINCIPLES

How liberalism works

Liberty → *Latin: free*, people are born free *natural right,

Conflict struggle and disagreement: they promote freedom but different view of freedom

FREEDOM OF PROPERTY/ASSETS/ECONOMIC FREEDOM

POSITIVE LIBERTY vs NEGATIVE LIBERTY

<i>Negative liberty (classical liberalism=neoconservative)</i>	<i>Positive liberty: The Control/Government of the Country</i>
<p>→ freedom <i>from restraint</i> (classical) to work out our own business</p> <p>→ lack of interference from government</p> <p>→ natural law: French and American Revolutions</p>	<p>→ positive intervention → to include everyone part of society</p> <p>→ Government <i>promotes a range of freedoms</i></p> <p>→ engages intervention in people's lives</p> <p>→ Establish autonomy: increasing choices for the individuals</p> <p>→ minimum wage: what the labour/market economy → capitalist → more money (exploitation)</p> <p>→ intervening private affairs (government should not intrude in a private setting of the home)</p>

<p>→we possess rights because we are born with them →individualism</p>	<p>→ domestic violence (liberalism turned a blind eye from this ideology) the government started to intervene in these problems that arose from freedom from restraint Chastisement → men were allowed to punish the wife, children how he sees fit John Stuart → the government can prevent harm from an individual →positive consequences to give people rights</p>
--	---

Ideological shift → Enlightenment: Power must be limited

<p>JOHN LOCKE <i>Second Treatise of Government</i> Political activist, revolutionary, opposition to authoritarianism → writes about individuals and institutions → natural law philosophy → Aristotle “through reason the perfect way to live” → “spiritual fulfillment of all humanity” → THEMES: Individualism, consent, rule of law, importance of property, religious toleration</p>

CONSERVATISM: RESPONSE TO LIBERALISM

Conservatism vs liberalism →French Revolution: split the way we think

1534: FIRST CONTACT/EXPLORATION
1600: Quebec / Nova Scotia
1663: Louis XIV declares New France → Governor, Intendant, Bishop: TO GOVERN
1763: Royal Proclamation - King George III (New France falls) → English Criminal and Civil Law under an English Governor →Reserves Aboriginal Lands, to be surrendered exclusively to the crown
1774: Quebec Act
Post 1776-1789 Liberalism becomes the dominant way of thinking
1789: non-nobility → the fall of Bastille → declaration of the rights of man → reason and conscience
1790: <i>Conservatism in the modern world</i>
1791: US Bill of Rights
1792: fall of the king
1799: Napoleon

1866: The Civil Code of Lower Canada (repealed 1994)
1938: The Accurate News of Information Act
1948: Universal Declaration of Human Rights
1950: Motivations of Desegregation
1960: Canadian Bill of Rights: Federal Statute
1966: English house of Lords declares it will no longer be bound by previous cases
1867: The British North American Act
1980: Separatist movement
1982: The Constitution Act (Entrenched)
1988: The legalisation of Abortion: Morgentaler

EDMUNDE BURKE: CHURCH & STATE

- Attacks the mothers of all mischief (society)
- *not a supporter of democracy*
- rejects the idea of that man are born with rights
- Political rights (civil rights)* → Authority must be RESPECTED
- says that citizens are citizens because of the king
- he says that the king is great: holding out immunities

ENGLISH COMMON LAW VS. FRENCH CIVIL LAW

BIRTH OF COMMON LAW

HENRY III establishes permanent judges and traveling courts

Creation of English structure → the judiciary is an institution

ENGLISH COMMON LAW	FRENCH CIVIL LAW
“Time Immemorial” The law is established cases by case as judges make rulings → law is unchanging	Codified -the power of government -changed frequently

<p>→ since the creation of the world → The Roman Catholic did not affect the English population (Byzantine) Military Mite, Seven Kingdoms, Judges chooses which cases are brought before them according to precedent lawyers Narrow down the ratios, cautious and reasonable decisions, Precedent determines what the law is and inference Find fault with previous decision (previous judge was wrong), Per Incuriam (ignorance of binding authority)</p> <p>-Judges based their decisions on existing laws → stressed that they didn't create the law -The law reflected the will of the people not of the king or judges -Judges increasingly refer to "precedent" → similar cases that happened in the past (impartiality/consistency) -Substance of the law was based on the judges -Authority of previous decisions made the law seem less arbitrary Gives rise to the <i>lawyer</i>: emerged as a necessary advocate <i>The common law has provided protection: habeas corpus, trial by jury</i> The idea of rights has always been central → common law Judges are committed to protect when the constitution has been rejected - quality control of gvt, ensuring the principles are upheld</p>	<p>-inflexible (does not allow change in individual cases) The law is "unchanging" → a belief - The judge can refuse the case - The government can pass a law, and all cases will be decided based on the law - power of the law from the government ruling → conform to the cultural logic and context of the time period → shaped by Christian morality → NEW FRANCE → promoted respect for the church: enforcing a church standard → the authority of the KING: religious and civil authority → Punishments keep the sinners on the path of righteousness → without the grace of god, people were utterly capable of human nature: evil → legal response: enforce the will of God → through the will of God → "Confession" you may confront the aggressor, → authorities used law to quell social disorder → presumed guilty better to admit to being guilty: trials carried out in secret → capital punishment/ galleys/ flogged</p>
---	--

Declaratory Theory: certainty, based on precedent law,

Legal analysis, legal argument, argue before the law as how you understand them.

Determines which branch of law the case belongs to

1. Identifying the precedent
2. Extracting their ratios (precedent cases), irrelevant information is eliminated
3. Applying ratios to achieve the desired result (the same result of the precedent case)

1534-1600's **THE PARIS COUTUME: New Court System**

→ laws which the French king and the vassals instituted

→ Customary laws of France

→ Based on the Romanic/Germanic tradition

→ The protection of the vulnerable: reflecting in catholic teaching

SEIGNEURS & HABITANTS: landlords of land to develop it and rent them

Colonial Enterprise/ Economic Exchange

→ the majority of the CIVIL CODE OF LOWER CANADA derived from the Paris Coutumes

CIVIL CODE OF LOWER CANADA

- 1866 then repealed in 1994
- Based on the Napoleonic Code replacing the French of English law

CANON LAW → MARRIAGES

ROMAN LAW → OBLIGATIONS : E.G. CONTRACTS & TORTS

CASE STUDY: Punishment and legal culture in France

“The Liturgy of Humiliation, Pain, and Death: The execution of Criminals in New France” -
Peter Moogk

RELIGION SHAPING FRENCH LAW

TRIAL AND EXECUTION: *Guilty until proven innocent*

→ Trials/Interrogations are held privately → punishments held in public

→ Offence against god to commit suicide “Self Murder”

→ Accused are denied burial rights

Effigy: symbolic punishment

Punishment → legal affair

- This public showing is to deter others from doing the same crime
- Public execution to reinforce morality: terror the centre of the *French Criminal Justice System*
- Hanging, torture, beheading, drawn and quartered, severing your limbs and attach you to horse
- Breaking an offender on the wheel,
- Suicide and dueling offenses were an act of crime punishable by death (offenses against the Church/State) continued into the modern era
- results in perpetual infamy - accused are denied burial rights → body tried for trial
- Jan 1698 → duel of soldiers: that was examined by surgeon and witnesses had recounted the situation
- Body was dragged in the streets, and left to rot

AMENDE HONORABLE: RITUAL

- Physical punishment → purge sin through bodily pain
- Bears witness to offense against God, King and Justice
- white shirt: penitence and renewal: admit to guilt: offending the king and God (begging for mercy)
- The offender would be beaten, executed in the public square
- social and religious reparation: Bears witness to offense against God, King and Justice

RELIGION AND PUNISHMENT

- Penitence ritual/ repentance of your sins
- Religious contrition and repentance a major part of execution ceremonial
- Physical punishment (celebration) designed to purge sin through bodily pain
- Cultural context of New France → the authority of the state would be tested
- whether the people would reject this notion of punishment → they were expected to make sure that these punishments were followed through (The hangman wore a mask to be anonymous if he botched a punishment)

Why would offenders participate in these rituals?

Part One: Instituted English criminal and Civil Law under an English Governor

ROYAL PROCLAMATION 1763

Issued by King George III

France is flourishing → new France falls 1763 to the British Army: The Conquest → colonialism

King George III → *The royal proclamation*

1. *Established a different political order: reestablishment of British America*

- *New leadership: appointed the new governor:*
- *English Criminal/ common law instituted (land/contracts)*
- *Prohibited roman Catholics to hold government positions*

2) *Aboriginal lands* → reserved for the first nations people (exclusive use) → surrendered to the crown

- Conditional concept of giving land to the aboriginals: surrendered the land when it was convenient
- Prohibited the Americans to expand west-ward
- Assimilation of the French people
- Change of language: imposing English → misaddress the French people

Quebec Act 1774

The oppression of the British Colony → lead to the compromise

- Restored the *French Civil Law (in combination with English criminal law)*
- Expansion of territory
- Guaranteed free religious practice: limiting the Catholics from power
- Hesitant to give it up the position of clergy and the seigneurs:
- Allowed the Catholics to hold public office
- Protected the use of the French language

ANGLO-SAXON LAW

→ social stability:

Composition: compensation should be paid to the King → injury or death (fee according to severity)

→ prevented revenge and blood feuds

→ “Breach of the King’s Peace”: offending the crown, for which compensation would be forcibly extracted: execution/ fines/torture

COMPOSITION <i>Tort Law vs. Criminal Law</i>	
<p>TORT LAW</p> <p>→ <i>the victim brings action against the “tortfeasor” who pays damages if found liable</i></p> <p>→ <i>Looks after the victim (compensation of their losses/ restore the social order)</i></p>	<p>CRIMINAL LAW</p> <p>→ <i>The government brings the charges</i></p>

<p>THE NORMAN CONQUEST - 1066</p> <p>→ <i>William the Bastard</i> defeats Harold Godwinson in the <i>Battle of Hastings</i> in Southern England. He then confiscates the land from the elite who then fled into exile</p> <p>→ Land was granted to his followers and build castles</p> <p>ENFEOFFMENT: land was given by the King in exchange for a pledge or service</p>

<p>THE FEUDAL SYSTEM</p> <ol style="list-style-type: none"> 1) strong enough to repel all offenders 2) King assumes all ownership of England 3) Creating the basic elements of the modern <i>Legal System</i> <p>Tenants in Chief → chose and selected the English Nobility → Go to the King</p>
--

LEGAL CODE VS. FEUDAL SYSTEM

LEGAL CODE	FEUDAL SYSTEM
<p>→ Differs from English Common Law and French Civil Law</p> <p>→ Codification</p> <p>→ In Common Law, the code replaces the particular common law → operative only when its repealed</p> <p>→ In Civil Law → the Code embodies the law in whole (criminal and civil law)</p>	<p>→ the servant/citizen receives land given by the Lord (seigneurs) or the King to carry out duties based on the fief or land</p> <p>→ colonial enterprise (exploitation of the land)</p> <p>→ economic exchange (scarce resources being exchanged)</p>

THREE ROYAL COURTS

Exchequer: revenue and taxation	Common Pleas: hearing complaints	King's Bench: Criminal Cases and Appeals of other cases
---------------------------------	----------------------------------	---

1189-1216: KING JOHN → rejected the idea of precedent

As the king gained power the courts diminished in power

The pageantry of the court → important feature (live entertainment/the arrival of the Royal Court) → *The majesty of the Law: powers of light and darkness summoned into the court with the black cap which was donned to pronounce sentence of the death*

MAGNA CARTA: 1215 → alienates the pope

Stating all individuals are subject to the law

- Marks the change from “Rule of Kings” to the “Rule of Law”
- King was subject *legal terrae* (referring to all the laws in force within a country or region, including common law)
- *Due process*
- *The king could no longer impose new taxes as he pleases*
- *Cabinet before parliament: consistent system of measure*
- *Capitalism: financial regularity*
- *Imposed for 9 weeks until the king and the pope had made amends*
- *Finally solidified* → noble classes gain more power and influence
- Creation of Parliament
- 39th clause stating that all “free men” have the right to a justice and fair trial

House of Lords (senate)	House of commons → passed laws, poaching laws, timber cutting laws → helped to protect civilians for their financial means
-------------------------	--

ENGLISH CIVIL WAR

→ Execution of Charles I

→ begins to test the limits of authority

→ parliament decide to retaliate → execute Charles I

→ Bill of rights restricts the power of monarchs

→ Leads into the Glorious Revolution and the overthrow of King James II

→ Establishment of a protestant Monarchy (William and Mary of Orange) who agree to the terms of parliamentary supremacy

Powers of the court limited prior to 1982 *Constitutional Act

E.g. William Aberhart's

1938: The Accurate News of Information Act

- gave gvt the power to print official retractions and corrections to news stories
- SCC → judicial review
- Restricting the freedom of the press → undermines the principles of democracy
- Inappropriate and wrong → decision making of the judge
- "Framers Intent"

Justifications of judicial review → democratic dialogue

→ Entrenchment of constitutional rights is consistent with the fundamental principles of democracy

→ Protection of democracy

→ *Formal Perspective*: the charter was imposed on the judges by the democracy

1982 "the Charter is the supreme law of Canada, and any law that is consistent is, to the extent of the inconsistency, of no force and effect" *you can't go back once the decision is made

THE CANADIAN CONSTITUTION

The constitution is the system of laws and fundamental principles that a state a country or organization is governed by.

Federal Government

The system of three powers (the executive, legislative, judicial) within a state.

Executive

The executive branch includes a president, vice president and its gvt. departments and agencies.

The president allows or rejects the laws presented by the Congress, appoints officials in the gvt.

The Government of Canada (Her Majesty's Government)

The federal administration of Canada is a system of a set of institutions or the Queen-in-Council.

Legislative (CAN)

The monarch (Governor General), the Senate (appointed by the Governor General advised by the Prime minister), and the House of Commons (members are elected by voters).

WHAT THE CONSTITUTION ACT CREATED

- Created the dominion of Canada, It's parliament, and the structure of national government
- Created provincial governments and legislatures
- Established the relationship b/w these two levels of gvt
- Protection of minority languages * Quebec Act 1774

COMMON LAW WRITTEN/UNWRITTEN	
<p>UNWRITTEN</p> <p>1) Basic principles</p> <p>2) Judicial Decisions: importance and precedent of power</p> <p>3) Convention: not the law, cannot be enforced, followed politically</p>	<p>WRITTEN</p> <p>1) Dominion of Canada. Its parliament, and the structure of national gvt</p> <p>2) provincial governments and legislatures</p> <p>3) relationship b/w two levels of gvt</p> <p>4) Protection for minority languages</p>

THE CANADIAN CONSTITUTION 1867 (originally the British North America Act) (ENTRENCHED)	
Parliamentary Supremacy	Federalism
Based on the principles of British Parliamentary Democracy	Creates the federal structure that binds the provinces together into a confederation

DIVISION OF POWERS	
PROS	<i>CONS</i>
<ul style="list-style-type: none"> ● To create a strong central gvt ● Breaks down in the 20th century ● Allows for it to be changed 	<ul style="list-style-type: none"> ● Quebec (1700) ● 1960's anti-colonial agitation in Quebec ● 1980: separatist movement ● 1995 referendum ● Breaks down in the 20th century

Problems with Rights and Protection

- Little intervention in cases → individual equality
 - Provided no justification for individual equality: those of different cultures/society
- 1899: legal challenge → passed the law that the best paying jobs are reserved to the “white”
 (e.g. 19th century: BC restricting the rights of naturalized Chinese Citizens)
 Challenged the electoral law → infringing on the civilian right (Japanese Individual)

<i>Formal Charters to Protect Rights</i>	<i>Universal Declaration of Human Rights (1948)</i>	<i>Canadian Bill of Rights: Federal Statute (1969)</i>
20th Century: changing attitudes → worldwide about race, human rights, civil rights → 1982 “the Charter is the supreme law of Canada, and any law that is consistent is, to the extent of the inconsistency, of no force and effect” *you can’t go back once the decision is made	1950’s → motivation of desegregation	→Less powerful, promised rights →“Like must be treated alike” - Aristotle → These rights should not be derived unless by due process → Discrimination was acceptable when all members of the group are discriminated equally CHARTER

COURTS UNDER THE CONSTITUTION

- Rights and liberties → common law v
- Trial by jury
-

Lower courts do not create precedent case
Superior courts are binding on its judges
Supreme courts are binding on all courts 1949
Appeal goes up the court chart

1966: English house of Lords declares it will no longer be bound by previous cases → change dramatically much like the Canadian parliament
 → demolishes the view that judges make the law

→ increased the law making powers of judges, contradict the democratic system
→ Declaratory theory falls on this ruling

JUDGES IN THE POST-CHARTER ERA

- Increase of power
- Answered questions of value or moral issue, less constrained of legal principle

LEFT	RIGHT
<ul style="list-style-type: none">● Judicial decisions will favour the liberal values● Too individualistic	<ul style="list-style-type: none">● Conservative responses● Charter gives the courts too much freedom

Special interest groups → skeptical

Certain groups of people → unearned rights

EXAM FORMAT

Topics 1, 2 and 3

10 short answers - 12 choices (5 marks each, 50 marks total, 2 to 3 sentences, significance, make connections)

E.g. *The Paris Coutume*

Legal Positivism

1 Essay question (choice of 2 or 3)

SAMPLE QUESTIONS

Imagine you are teaching a course in Law and Society. A student complains that she does not want to learn about history because she cannot see how it is relevant to understanding the law. Using what you have learned about legal history in both England and Canada (French and English), write an essay that responds to this student and outlines the historical development of the law in Canada.

The Constitution Act (1867)

Preamble states that Canada should have a constitution “similar in principle to that of the United Kingdom.” What is the significance or meaning of this phrase?