

# PART I — WESTERN LIBERAL CONCEPTION OF LAW

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## 1.1 Liberalism

There are several types of liberalism:

- Laissez faire and libertarianism
  - concerned with the protection of the individual against the state
  - state is the main threat to freedom and autonomy
  - originates in European monarchies with a concentration of power in the upper classes
  - as middle classes struggled for political power, individualistic concepts of democracy rather than status-based assumptions about individual worth prevailed
  - state is a necessary evil that provides a minimum level of social infrastructure (eg roads, order, law/crime, property rights, enforcing contracts)
  - place strong emphasis on property rights (property a means to oppose oppression by the state)
  - concerned with negative liberty (eg freedom *from* state interference)
  - argue that a better life for 'all' is more likely to be achieved in a free market than by the redistributive efforts of a welfare state
  - Robert Nizick: individuals cannot be deprived by the state of anything which they have justly acquire – wrong for state to finance public services by taxing private earnings
- Utilitarian liberalism
  - began in the late 18<sup>th</sup> century, major proponent the English philosopher Jeremy Bentham
  - concerned with the maximisation of happiness: the 'felicific calculus'
  - an action is evaluated in terms of the effects which its consequences have on happiness – the 'best' action is the one which produces the greatest overall happiness
  - problems:
    - purely aggregative, no direct concern with the *distribution* of happiness
    - gross inequalities are unlikely to occur, but they *may* occur
    - the calculus itself is fiction – happiness cannot accommodate the array of criteria which may be relevant to a decision (eg justice, tolerance, efficiency, order)
    - treats individuals instrumentally: can it really justify the death of one individual to increase the happiness of ten (or two) others?
- Rights-based liberalism
  - certain individual rights and basic principles of justice are essential
  - John Rawls, a rights-based liberalist, argues that were people able to decide how society is ordered, they would opt for the most extensive basic liberty compatible with a similar liberty for others
  - socioeconomic inequalities are to be managed so that they at least provide some advantage to the least well off, and attached to positions and offices open to all
  - Rawls: basic liberties at PM2, civil and political rights
- Welfare liberalism
  - goes further than rights-based liberalism in its concern for the least well off
  - seeks to reduce social and economic inequality rather than accepting them as unavoidable
  - criticises the negative liberty of laissez faire liberalism, which ignores those who lack sufficient resources to lead meaningful and satisfying lives and accepts existing distributions

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- of property as given (so ignoring the need for redistribution by taxation, social security, equal opportunity, or even affirmative action legislation)
- o aims for a more egalitarian society
- o is concerned by concentrations of power in the private sector (corporations)
- o takes a less suspicious attitude towards state interference than laissez faire liberalism, recognising that while the state has the capacity to oppress individuals, it can also be an instrument of social justice since it has the means to redistribute wealth to important areas
- o views the state as a concentration of power which can be used to protect individuals against exercises of power within the private sphere of civil society

**Example:** Australian Capital Television Pty Ltd v The Commonwealth

- Case concerns the validity of legislation regulating the use of electronic media for political broadcasts, which sought to limit most forms of political advertising during an election period
- Mason CJ: a freedom of expression in relation to political affairs is ‘so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision’, supported by Brennan, Deane, Toohey, Gaudron, and McHugh JJ
- The majority uses the concept of individual rights to prevent Parliament from restricting advertising
- Dissenting: Dawson J – to disallow the legislation is to derogate from the fundamental principle of parliamentary sovereignty: the constitution ‘preferred to place [its] trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers’. ‘Constitutional guarantees of freedom [exhibit] distrust of the democratic process.’
- Paradox: majority relies of freedom of communication, but in reality this communication is controlled by the limited numbers of individuals or political parties with resources to buy advertising space or television stations. A libertarian would approve of the decision, but a welfare liberal might be more concerned about the distribution of media ownership and funding for political parties

## 1.2 The Rule of Law

The term ‘rule of law’ (as opposed to ‘rule of men’) is meant to signify the stable, impartial, general, measured, and ordered nature of a society governed by law, as opposed to the idiosyncratic, arbitrary, and capricious society which is governed purely by people.

The rule of law entails three things:

1. Law and order
  - order as opposed to anarchy
  - proponents would argue that it is better for police to be given sufficient power to efficiently fight crime than having their investigations hampered by rules concerning rights/procedure
2. ‘Inner morality’ of law
  - Lon Fuller: rule of law is about *obligations* of law makers and enforcers, not their *powers*
  - Fuller argues: if law is to adequately subject human behaviour to universal rules of governance it must necessarily adhere to a certain ‘inner morality of law’
  - these principles state that law must be
    - o addressed to the population at large
    - o ascertainable
    - o prospective (not retrospective)
    - o free from contradiction
    - o reasonably consistent
    - o enforced as it is promulgated
  - Fuller saw these as moral requirements for the just operation of the legal order

- Not essential to fulfil these requirements, but distinction between a ‘system of government’ and a ‘system of law’
- HLA Hart: questioned that Fuller’s ‘morality’ of law was actually a ‘morality’ – a tyrant could still enact evil laws within the confines of a system of law
- Finnis: a tyranny has no *reason* to submit itself to the discipline of law so long as the tyrant holds that discipline in contempt – adherence to the rule of law will reduce the efficiency for evil of an evil government – this is the morality of law
- Another objection: the principles do not go far enough (eg don’t guarantee equal access to the law, or that like cases are treated alike)

### 3. Formal equality before the law

- Derives from the liberal ideal that individuals are of equal value
- Requires that decisions are neutral, made after a fair hearing, no arbitrary, like cases treated alike, and that there are rights of appeal to correct errors in applying these principles
- Excludes laws which discriminate against particular groups (eg slavery, apartheid); but it also rules out special measures designed to assist disadvantaged groups (affirmative action)
- Benign discrimination in favour of disadvantaged groups is contrary to notion of legal equality
- Consistent with libertarian liberalism, which holds that any form of discrimination derogates from the rights of individuals adversely affecting by it
- Welfare liberals, in contrast, would positively require special measures to assist disadvantaged groups (eg helping apartheid victims find employment, university admissions), especially where the consequences of past inequality continues
- ‘The same principle of equality which justifies equal treatment in the standard case justifies unequal treatment or special measures in exceptional cases.’
- Tension within liberalism between liberty and equality: libertarian desire to maximise liberty may involve sacrificing some equality, while welfare liberal ideal of equality may result in the sacrifice of some liberty
- A minimum agreed standard of equality – it is only sufficient to secure substantive equality where there is background social equality
- Difficult to discuss the question of equality until one directs attention to the social and economic context in which law is applied
- Eg, famous aphorism about French law prohibiting both the rich and poor from sleeping under the bridges of the Seine, and the English courts being open to all, like the Ritz Hotel

### 1.3 Relationship between law and morality

### 1.9 Summary

Characteristics of the western legal tradition:

- Rationality
- The separation of law and politics
- The rule of law
- The separation of powers
- Individual rights
- Liberty and privacy
- Equality before the law
- Individualism
- Fairness

Major theories of law:

- Natural law theory
- Positivism
- Common law/declaratory theory