



Astana EUDC 2020

Legal Principles

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Overview of presentation

- ▶ Criminal justice system
- ▶ Comparison of different legal systems
- ▶ Intellectual property
- ▶ Child protection

I won't cover international law – see Jason's lecture 😊

Caveats

- ▶ I have a law degree and have experience developing legislation working for government, however I am not a lawyer
- ▶ This presentation covers a lot of things at a high-level but nothing in major detail – if you already have a good grasp of legal issues, this presentation may not be for you
- ▶ This will mostly be focused on western legal systems, being the area I know most about, but there of course great insights to be drawn from other systems

Aims of the criminal justice system (CJS)

Deterrence

- ▶ To disincentivise people from committing crimes, by having them think about the punishment
- ▶ Can be general or specific, e.g. 3-warning system for civil wrongs like speeding
- ▶ Why can it be ineffective?
 - ▶ People are not rational
 - ▶ Heat of the moment
 - ▶ People don't think they will get caught

Rehabilitation

- ▶ To change the likelihood of a person committing a crime again in the future
- ▶ Is often oppositional to notions of 'punishment'
- ▶ Recidivism is very high in a number of countries

Incarceration

- ▶ Protecting society by removing the offender

Aims of the criminal justice system (CJS)

Things to prove in debates:

- ▶ What aims are you trying to achieve?
- ▶ Can this aim in fact be achieved? (e.g. deterrence)
- ▶ Why is this aim/s the most important?
- ▶ Why are other aim's less important?

Why do people commit crimes?

- ▶ Need
 - ▶ e.g. stealing to feed oneself
- ▶ Want
 - ▶ e.g. wanting to take something
- ▶ Circumstantial
 - ▶ e.g. murder as a response to something that happened unexpectedly
- ▶ *How do different punishments effect these factors?*

Types of 'punishments'

- ▶ Jail/prison
- ▶ House arrest
- ▶ Fines
- ▶ Community service
- ▶ Rehabilitation program
- ▶ Probation
- ▶ Suspended sentence

Jail/prison

Noting the varied types of prison systems –

Pros

- ▶ Can be a strong deterrent
- ▶ Removes people from situation that may have resulted in their offending
- ▶ Can make rehabilitation programs compulsory
- ▶ Allows for introspection

Cons

- ▶ Exposed to ‘other criminals’
- ▶ May be removed from positive influences
- ▶ ‘Treated like a criminal, will act like a criminal’
- ▶ Often poorly funded and managed
- ▶ *Plus: Inherently immoral?*

CJS discretion

- ▶ Often exercised by judges, as well as police and prosecutors
- ▶ However, still limits:
 - ▶ e.g. minimum and maximum sentences
 - ▶ e.g. guidelines for behaviour
- ▶ **Pros:** Accounts for different levels of culpability and flexibility given the circumstances
- ▶ **Cons:** Can be applied unfairly

- ▶ Mandatory sentences are sometimes enacted by governments
- ▶ **Pros:** Will of people, judges can be out of touch and are often not accountable
- ▶ **Cons:** Can't look at case specifics, no separation of power, can get caught up in popularism
- ▶ **Q: Why do certain crimes have expiration dates?**

Plea bargains

- ▶ In **charge bargaining**, the defendant agrees to plead guilty to reduced charges (e.g. aggravated assault rather than attempted murder)
- ▶ **Sentence bargaining** involves assurances of lighter or alternative sentences in return for a defendant's pleading guilty
- ▶ **Pros:** Lighter sentence, no often-traumatising court case
- ▶ **Cons:** No possibility of not-guilty verdict, sometimes coercive
 - ▶ Impact on minority groups
- ▶ Often comes down to characterisation of how prosecutors are likely to behave

Different legal systems

Common law

- ▶ Case law (published judicial opinions) are of primary importance
- ▶ System is ‘adversarial’
 - ▶ Judge is primarily a ‘referee’
 - ▶ Lawyers have an active role (e.g. presenting arguments to the court)
 - ▶ Greater emphasis on licensed professionals
- ▶ 80+ common law countries
 - ▶ E.g. USA, UK, Australia, Canada, India
- ▶ **Pros:** ability to evolve
- ▶ **Cons:** adversarial nature; cost

Civil law

- ▶ Codified statutes (legislation) are of primary importance
- ▶ System is ‘inquisitorial’

Judges

Context: extent of role depends on legal system (see previous slide)

Pros

- ▶ Extensive technical training
- ▶ Top of their profession
- ▶ Trained to overlook bias / racism
- ▶ Increasingly more diverse

Cons

- ▶ Not representative – many still ‘old, rich, white and male’
- ▶ Not always ‘in touch’ with broader society
- ▶ Many tied to a rigid application of the law
- ▶ Are still human – i.e. don’t want to be appealed, so play it safe

Juries

Context: often not deciding sentence/compensation, but guilt/innocence (criminal cases) or if liability exists (civil cases); extent of role can also depend on type of legal system

Pros

- ▶ Diverse / representative of community
- ▶ Studies show they take role incredibly seriously
- ▶ Encourages engagement with legal system

Cons

- ▶ Incapable of understanding legal intricacies and complex evidence (e.g. science)
 - ▶ Ability to 'get out' of jury duty
 - ▶ Those with understanding of case (e.g. lawyers, those who watch news frequently) often vetted off
- ▶ Prone to bias
- ▶ Emotive
- ▶ Easily swayed by lawyers / groupthink

Standards of proof

- ▶ **Criminal standard** – Beyond all reasonable doubt
 - ▶ Very typically does not have a single definition
 - ▶ Intended to be a high threshold
- ▶ **Civil standard** – Balance of probabilities
 - ▶ More likely than not to have occurred
 - ▶ ‘More than 50%’
- ▶ **Others**
 - ▶ Reasonable likelihood or plausibility – for a number of ‘redress schemes’
 - ▶ Probable cause – e.g. to arrest someone
 - ▶ Reasonable suspicion – e.g. to frisk someone

Types of dispute resolution

Mediation: Parties come to a consensus on their own with the assistance of a neutral third party – who works with the parties to explore their respective positions. Often required before litigation is allowed.

- ▶ Pros: Lower cost, frees up the court system, allows parties to vent their feelings, doesn't pit sides against one another, explores interests in more detail
- ▶ Cons: nothing to force parties to agree, power imbalances can sometimes distort outcomes

Litigation: Parties (supported by lawyers) bring their case before a court, make arguments and a judge/jury decides the outcome – often on the public record. Decisions can be appealed.

- ▶ Pros: completely independent, often the last stage/resort in the dispute resolution process, increasingly more efficient and sensitive to needs
- ▶ Cons: costly, adversarial by nature, less discretion for parties

Arbitration: Somewhat of a middle ground between above. A neutral third party is responsible for resolving the dispute. Decisions are binding and can't be appealed, but proceedings – including the judge/panel and extent to which lawyers are used - are more flexible.

Constitutions, rights and legislative interpretation

- ▶ A constitution is an aggregate of fundamental principles/precedents that constitute the legal basis of a polity, organisation or other entity
- ▶ Constitutions can feature/result in:
 - ▶ express rights – e.g. right to freedom of religion, speech, press, assembly, and petition (US Bill of Rights)
 - ▶ implied rights – e.g. right to political communication in Australia, being necessary to vote
- ▶ There are different methods of constitutional & legislative interpretation
 - ▶ e.g. originalism/textual, purposive
- ▶ **Q: Should there be open standing to challenge laws?**

Interesting social justice related legal issues that we don't have time for....

- ▶ Do **family law systems** disproportionately favour women; should they be reformed?
- ▶ Should **indigenous populations** have separate legal systems?
- ▶ Should **animals and the environment** have legal standing?
- ▶ What helps and what hurts with respect to increasing **system engagement**?
 - ▶ Reforming legal aid?
 - ▶ Televising criminal trials?
 - ▶ 'Plain English' legislation?
 - ▶ 'True crime' docos?

Intellectual property

Types include:

- ▶ **Patent:** Protects inventive ideas or processes – things that are new, useful and nonobvious. Types include: utility, design, plant, etc.
- ▶ **Trademark:** Protects words, phrases, symbols, sounds, colour schemes, etc.
- ▶ **Copyright:** Does not protect ideas, but rather the manner in which ideas are expressed - written works, art, music, code for software, etc.
- ▶ **Trade Secret:** proprietary procedures, systems, formulas, strategies or other information that is confidential and exclusive to the company using them.

Intellectual property

Key features:

- ▶ Affords particular rights to the holder, e.g.
 - ▶ Control reproduction
 - ▶ Charge fees
- ▶ Different processes apply, e.g.
 - ▶ Copyright often automatic
 - ▶ Patent via application
- ▶ Often limited in time, e.g.
 - ▶ Copyright is often 70 years from author's death (USA)
 - ▶ Patent is often 20 years from application (depends on type)
- ▶ Different per country, but international law (e.g. Berne Convention) and organisations (e.g. World Intellectual Property Organisation (WIPO)) seek to unify

Child protection/care

There are various approaches to child care/protection, including:

- ▶ Universal early intervention and support
 - ▶ E.g. parenting programs
- ▶ Targeted and intensive intervention and support
 - ▶ E.g. social worker programs
- ▶ Removal to:
 - ▶ Group homes/orphanages
 - ▶ Kinship/community care
 - ▶ Often of significant importance in indigenous communities
 - ▶ Foster care
 - ▶ Adoption
- ▶ Redress for harm already caused

Child protection and COVID-19

- ▶ Many countries have reported an increase in:
 - ▶ Child abuse
 - ▶ Family violence
- ▶ Understood causes include:
 - ▶ Forced being at home
 - ▶ Financial stress and increased mental health burden
 - ▶ Less people to call attention – e.g. friends, teachers

Further reading

https://www.griffith.edu.au/_data/assets/pdf_file/0018/234324/2012-Daly-Aims-of-the-CJ-system-pr-e-print.pdf

https://www.diffen.com/difference/Civil_Law_vs_Common_Law

<https://hbr.org/1990/01/five-ways-to-keep-disputes-out-of-court>

https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf

<https://www.childabuseroyalcommission.gov.au/final-report>