



SPEAKERS' CORNER SEMINARS

Law and Order (Level 2)

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What will we cover

#1

Basic structure of the law and its features

We will go through the basic structure of the law, such as fields of law, the public and private law divide etc.

#2

Core concepts in criminal justice

We will then consider the aims of the criminal justice system and the aims of punishments in the criminal justice system.

#3

Debating topics and common issues

We will look at common debating topics and issues that might arise that are relevant to law and order debates.

Basic structure of the law

What are the fields of law?

There are generally three areas of law:

- **Criminal law:** law regulating ‘crimes’ — that is, legal offences that are considered to carry with them some degree of ‘public harm’
- **Civil law:** law regulating relations between private individuals — contracts, torts (civil wrongs such as defamation), corporations law
- **Public law:** law regulating the functioning of the government — constitutional law (regulating the actions of the legislature), administrative law (regulating the actions of the executive)

Beyond these areas, we have various other areas of law:

- **Procedural law:** the law relating to process in court (such as the order of evidence, or how documents should be filed)
- **Public International law:** laws generated by international organisation, generally based on universal ideas of human rights
- **Private International law:** laws determining cross-border disputes to determine which jurisdiction’s laws should apply (e.g. what happens when an Australian ship collides with a French ship in Chinese waters?)

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Basic structure of the law

The common law legal systems

Principles of the common law legal system (especially criminal) include:

- a. **Adversarial legal system:** the case is decided entirely based on what is said in the court. The judge and jury cannot do their own research, and they can't ask questions. Instead, each party is entitled to the best quality legal representation they can organise.
- b. **Innocent until proven guilty:** you need to prove that someone has done the crime, you can't just sentence them. It is better than 10 guilty people go free, than 1 innocent person go to jail.
- c. **Monopoly on violence:** the government is allowed to be violent, but the public can't be violent back.
- d. **Cab Rank Rule / Principle:** a barrister / criminal defence lawyer cannot refuse someone who approaches them for help, assuming that they can pay the lawyer's rate.
- e. **Right against self-incrimination:** the state can't compel an individual to give evidence that incriminates them
 - o **Rule of law:** all individuals are subject to the law (including government officials — for example, in NSW we have ICAC which ensures government officials are not corrupt).
 - o **Separation of powers:** there should be three branches of government that are independent of one and other. In Australia we don't have a strict separation of powers (e.g. members of the Executive are selected from the Legislature)

Aims of punishments

What are we trying to achieve through the criminal justice system

1. **Protection** (via separation): to protect civilians / innocent people from harm by making it impossible for criminals to interact with them.
2. **Deterrence**: to deter would-be criminals from committing the crime.
 - a. Deterrence is typically thought to be a function of: A. How severe the punishments is, B. How likely it is that they'll be caught (likelihood * severity).
3. **Rehabilitation**: to change the mindset of criminals so they do not commit crimes in the future. (Reducing recidivism).
 - a. Rehabilitation is important because the majority of criminals will be released to mainstream society eventually, and will become our neighbours. So we probably want them to be nice.
4. **Retribution**: to inflict some degree of harm / suffering on the person who has committed the crime. (An 'eye for an eye').
5. **Restitution**: to repair the damage done.

DISCRETION IN THE LAW

Discretion: legal discretion refers to a power conferred onto an individual to exercise their judgment (rather than being bound by stringent rules)

Discretion arises in various areas of law, but understanding the nature of discretionary power and the bases on which it can be challenged, is useful in a wider range of debates

Discretion and Review

What is discretion, and what are its features

1. **Discretion:** discretion refers to a power conferred onto an individual to exercise their judgment (rather than being bound by stringent rules)
2. Discretion does not confer onto individuals ‘carte blanche’ to do whatever they like — instead, we review discretionary power on various grounds:
 - a. **‘Unreasonableness’** — i.e., the person made a manifestly arbitrary decision that was ‘so unreasonable that no reasonable person would have made the decision’
 - b. **Bias** — the person exercised some kind of bias in making their decision
 - c. **Collateral purpose** — the person made a decision to achieve some other ulterior purpose
3. Grounds on which discretions are reviewed are generally directed towards the person’s decision making process rather than the outcome of the decision — did they properly carry out their discretionary decision making power.

Discretion and the criminal law

How does discretion feature in the criminal law?

1. There are various areas of the criminal law in which discretions are conferred onto decision makers:
 - a. **Police officers:** police officers are usually granted a discretion to decide whether to charge a person with certain kinds of low level offences (such as drug charges)
 - b. **Prosecutors:** prosecutors are granted a discretion to determine the merits of a criminal case and whether it is worth dedicating public resources to the prosecution of the crime
 - c. **Judges:** judges are granted discretion as to whether an alleged criminal should be granted bail, the extent of sentencing/appropriate punishment, whether a case has the merits to go to trial, or whether a person should be given a criminal record
2. The issue of discretion arises in various debates: e.g., should we allow AI to make decisions that humans ordinarily make as a matter of discretion — such as bail decisions, sentencing etc.

Retroactive Effect of Laws

Retroactive laws: laws that are enacted after an event has occurred but have the effect of making that past event illegal or changing the legal consequences of that event.

Retroactive laws

What are the issues with retroactive laws

1. Problem with retroactive laws: generally considered to be a violation of the principle that individuals should be aware of the legal consequences of their actions at the time they occur.
2. Examples of retroactive laws: war crimes during World War II, used to punish Japanese/German officials
3. Justifications:
 - a. Notwithstanding formalisation of laws, the offending party is aware that they are violating social/moral norms through their conduct
 - b. Laws may already exist, but the operation is circumvented through technicalities. Example of this is tax laws, where wording of statute is manipulated, despite general awareness of Parliamentary intention.
4. Some topics include:
 - a. That we should retroactively punish corporations that engaged in modern environmental crimes

Separate Legal Personality

The role of the corporate entity in the law

Separate Legal Personality

What is it, and what do we use it for?

1. **Principle:** company is treated as a separate person that is distinct from its owners and managers. The company is capable of being sued and suing others in its own name. Generally, the owners cannot be sued for the conduct of the company
1. **Purpose:** the company allows people who want to run a commercial enterprise to ‘asset partition’ — they can take a pool of assets and dedicate it to running the business (for example, offering those assets in support of taking on loans). They can ensure that the rest of their assets are not put at risk. So any assets that belong to the owners, instead of the company cannot be reached in satisfaction of claims against the company.

Harms and benefits of SLP

What are the effects?

- **Benefits** of separate legal personality:
 - De-risks commercial enterprise for individuals - their personal assets are no longer at risk (e.g. if you want to get a loan, you can get it in the company's name)
 - Simplification of commerce – all the contracts that need to be formed to engage in commerce can be centralised through a single corporate vehicle
- **Harms** of separate legal personality:
 - People can use companies to avoid personal responsibility for their actions
 - May increase unnecessary risk taking behaviour
 - Can be used for tax evasion
- **Example topics**
 - That we should actively prosecute the shareholders of a company for environmental crimes it engages in

Litigation Funding

The role of private investment in the legal justice system

Litigation Funding

What is it, and why is it used?

- **What is it:** Litigation funding is where an investor provides funding to a party to run litigation in exchange for a share of the ‘damages’ or compensation they are awarded if successful.
 - E.g., Litigation funder provides \$100 to a litigant bringing a \$1,000 claim against a defendant. If they win, the litigation funder gets 30% of the damages. So, if the litigant wins, the litigation funder receives \$300 (on the back of a \$100 investment).
- **Why is it used:** for the litigation funder, it provides an investment product — for small upfront capital, they can take home significant returns. For the litigant, it means they can pursue litigation without needing to put up their own money for legal costs that may have otherwise priced them out.

Litigation Funding

What is it, and why is it used?

- Litigation funding is primarily used to fund class actions brought by a group against a large company:
 - A class action is a 'representative' lawsuits, where a group of people with a similar claim get together and bring a claim against a company.
 - A common example is a shareholder class action. A company misrepresents its revenue figures. The shareholders get together to bring a common action against the company, each alleging that the company lied about its revenue and therefore caused them loss.
 - Ordinarily, the shareholders would not be as economically powerful as the company. However, with litigation funding, they can meet the costs associated with bringing a large lawsuit against a public company.
- Principle issue: should litigation be treated as an investment product?
- Practical issues: what does this do to the quality of litigation? What about the autonomy of the litigants?