LEGAL STUDIES: CHALLENGES FOR THE RULE OF LAW IN AUSTRALIA TODAY

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Preliminary Course: Core Parts I & II

- **Core Part I: The legal system**
  - Basic legal concepts
  - Sources of contemporary Australian law
  - Classification of law
  - Law reform
  - Law reform in action
- **Core Part II: The individual and the law**
  - Your rights and responsibilities
  - Resolving disputes
  - Contemporary issue: the individual and technology
Focus today

• **Core Part I:**
  • Legal Concepts - Rule of Law
  • Canonical Instruments
  • Practical Conclusions
  • Law Reform
  • Agencies: Royal Commissions & Commissions of Inquiry
  • Law Reform in Action: Animal Welfare

• **Core Part II:**
  • Resolving Disputes
  • Access to Justice
  • Alternative Dispute Resolution
The rule of law does not mean rule by lawyers. As an idea about government, the essence of the rule of law is that all authority is subject to, and constrained by, law. Does not require all possible disputes to be justiciable, or for them to be determined by litigation. Depends upon public confidence in lawfully constituted authority. See more [Rule of Law Institute of Australia](https://www.ruleoflaw.org.au/) for resources.
Canonical instruments

- Magna Carta 1215
- *Habeas corpus ad subjiciendum*
- The Petition of Rights 1628
- Habeas Corpus Amendment Act 1679
- Bill of Rights 1689 and Act of Settlement 1701
- American Bill of Rights
- French Declaration of Rights of Man and the Citizen 1789
- Universal Declaration of Human Rights 1948
- International Covenant on Social and Cultural Rights 1966
- International Covenant on Civil and Political Rights 1966
Rule of law issues

- Independence of judiciary and judicial “activism”
- Independence of legal profession
- Independence of prosecutor and exercise of prosecutorial discretion
- Judicial review of administrative action
- Preventative detention
- Criminal organization and control orders
- Placing people beyond the reach of domestic jurisdiction
- Access to justice arrangements
- Access to legislation
- Bribery and corruption
Practical conclusions of rule of law

- Judicial decisions to be made according to legal standards rather than undirected considerations of fairness
  - *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 60

- Separation between executive and judicial functions
Practical conclusions of rule of law

- Courts may not grant the executive dispensation from criminal law
  - *A v Hayden* (1984) 156 CLR 532 at 595

- Must be some minimum capacity for judicial review of administrative action
Practical conclusions of rule of law

• Citizens have a right to a fair trial
  • *Kingswell v The Queen* (1985) 159 CLR 264 at 300
  • *Krakouer v The Queen* (1998) 194 CLR 202 at 224

• Citizens have a right to privileged communications with legal advisers
  • *Baker v Campbell* (1983) 153 CLR 52 at 71
Practical conclusions of rule of law

- Content of the law should be accessible to the public

- Access to the courts should be available to citizens who seek to prevent the law from being ignored or violated, subject to reasonable requirements as to standing
Practical conclusions of rule of law

• Citizens are equal before the law
  • *R v Shrestha* (1991) 173 CLR 48 at 60.

• Criminal law should operate uniformly in circumstances which are not materially different

• Courts have a duty to exercise a jurisdiction which is regularly invoked
  • *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 239
  • *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76.
Core Part I: The Legal System
- Law reform - agencies of reform

• Syllabus:
  • Law reform commissions
  • Parliamentary committees
  • Media
  • Non-government organisations

• Other examples
  • Royal Commissions
  • Special Commissions of Inquiry
Other Agencies of Reform

- List of Commonwealth Royal Commissions:
  - Aboriginal Deaths in Custody
  - Collapse of HIH Insurance Ltd
  - Building and Construction Industry
  - Home Insulation Program
  - Trade Union Governance and Corruption
  - Institutional Responses to Child Sexual Abuse
Other Agencies of Reform

- Medical Research & Compensation Foundation (James Hardie Inquiry)
- Acute Care Services in NSW Public Hospitals
- Matters Relating to Police Investigation of Certain Child Sexual Abuse Allegations in the Catholic Diocese of Maitland-Newcastle
Core Part I: Law Reform in Action - Animal Welfare

• **Equine Influenza Inquiry** (2008)
  • Chair: the Hon. Justice Ian Callinan AC QC
  • Recommendations included:
    • Quarantine improvements
    • Appoint Inspector General of Horse Importation
    • Risk analysis of biosecurity in horse importation and quarantine
Law Reform in Action: Animal Welfare

• Special Commission of Inquiry into the Greyhound Racing Industry in NSW (2015)
  • Chair: the Hon. Michael McHugh AC QC (TOR)
    • Identify issues relating to governance, integrity and animal welfare standards of greyhound racing industry
    • Evaluate legislation, policy & practices in place in relation to breeding and animal welfare standards
    • Evaluate key NSW government agencies’ powers and capability to properly investigate alleged incidents of animal cruelty and effectively prosecute where appropriate
Law Reform in Action: Animal Welfare

- **Identify** contemporary **best practice** for adoption:
  - **overarching principles** to be considered when any industry body makes decisions affecting the welfare of animals
  - **standards** to be adopted when an industry body makes a decision affecting the welfare of animals
  - appropriately **robust** industry **supervision** procedures; and
  - the **powers**, **capability** and **resourcing** necessary to:
    - provide **governance** to greyhound racing industry;
    - ensure the **integrity** of industry; and
    - **detect**, investigate and respond to **suspected unlawful activity** in industry including (without limitation) **animal cruelty** and the practice of **live baiting**.
Core Part II: The Individual and the Law - Resolving Disputes

• Rise of the “new” in dispute resolution
  • Federal Magistrates Court -> Federal Circuit Court
      - Migration
  • NSW Civil and Administrative Tribunal
    • consolidates 22 former tribunals into single point of access
    • Administrative and Equal Opportunity Division - Consumer and Commercial Division - Guardianship Division - Occupational Division
Resolving Disputes: Access to Justice

- Productivity Commission Inquiry into Access to Justice Arrangements (2014)
  - Volume 1
    - accessibility of the justice system
    - the use of alternative forms of dispute resolution
    - regulation of legal profession
    - structure and operations of ombudsmen, tribunals and courts.
  - Volume 2
    - private funding of litigation
    - provision of legal aid, broadly & specifically to ATSI people
Resolving Disputes – Effectiveness of Alternative Dispute Resolution?

• **Mediation**
  - in/voluntariness of parties
  - power imbalances – family disputes & DV issues

• **Arbitration**
  - Secrecy/confidentiality – challenges to principles of open justice
  - Costly but speedy – privatized, elite system of justice?
About the Presenter

Dominique Hogan-Doran SC is an Australian Barrister, Mediator and Arbitrator based in Sydney. Dominique specialises in complex commercial disputes, corporate and financial regulatory investigations and enforcement, and public inquiries. Dominique appears in superior courts and tribunals throughout Australia, as well as Royal Commissions and corruption inquiries when complex financial matters arise before those bodies.

Dominique is a former President of Australian Women Lawyers and is the Australian Bar Association’s representative to the Law Council’s *Future of the Australian Legal Profession* initiative. She is also the proud mum of 3 teenagers.

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