

2020年度大学院博士後期課程入学試験問題

| 研究科名 | 科目名 |
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| 法学研究科 法律学専攻 | 英語(No. 1) |

問題 以下の設問1と設問2の両方に答えなさい。

【設問1】

次の英文を読み、以下の問1から問4に答えなさい。

The disciplines that have related the study of law to the problems of social theory have often been at loggerheads. Looked at more closely, however, many of their disputes turn on a pervasive confusion of terms, which ought to be dispelled at the outset. Thus, some schools of thought see law as a universal phenomenon, common to all societies. They are therefore unable to attach any meaning to the notion that law might appear or disappear. An opposite tendency restricts the concept of law to a particular kind of modern legal system. From this standpoint, it is impossible to use the comparative study of the place of law in a wide range of societies as an occasion to investigate more general issues of social theory. We need a conceptual apparatus that will allow us to distinguish the sense in which law is indeed a universal phenomenon from the ways in which it is distinctive to certain kinds of society. (1)

In the broadest sense, law is simply any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgment by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied. I shall call this customary or interactional law. There are two sides to the concept of law as interaction; each corresponds to an aspect of a traditional notion of custom. One element is factual regularity in behavior. The other dimension is normative: the sentiment of obligation and entitlement, or the tendency to identify established forms of conduct with the idea of a right order in society and in the world at large.

For customary law, the issue of what in fact happens can never be kept clearly separate from the question of what ought to be done. There is a point at which deviations from the rule remake the rule itself. Thus, every act leads a double life: it constitutes conformity or disobedience to custom at the same time that it becomes part of the social process by which custom is defined. Therefore, the distinction between the choice of rules and the making of decisions under the rules, like the contrast between habit and duty, remains ill defined in the world of customary law. (2)

Law as interaction is neither public nor positive. Its nonpublic quality means that it is common to the entire society rather than associated with a centralized government that stands apart from other social groups. It consists of the accepted practices on the basis of which all communication and exchange is carried on.

Custom also lacks the attribute of positiveness: it is made up of implicit standards of conduct rather than of formulated rules. These standards are tacit, though often highly precise, guidelines for how an individual of a certain rank ought to act toward one of different or similar rank in particular situations. Thus, for example, they determine what one should expect from one's kinsmen in a variety of circumstances and what they in turn may and will demand of him.

Customs are characteristically inarticulate rather than expressed. They apply to narrowly defined categories of persons and relationships rather than to very general classes. And they cannot be reduced to a set of rules; to codify them is to change them. It is precisely because custom is nonpositive that it is foreign to the distinctions between regularity and norm, or

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between the choice and the application of rules.

Custom can be found in every form of social life, but there are situations in which its dominion is almost exclusive. The ethnographic description of savage societies has acquainted us with conditions in which law exists only as a set of largely tacit customs. In such circumstances, there are neither formulated general rules nor a separation of government from society that would make it possible to characterize certain rules as state law.

Source : Roberto Mangabeira Unger, *Law in Modern Society* (1976)

問1 下線部(1)を和訳しなさい。

問2 下線部(2)を和訳しなさい。

問3 本文中にある”law as interaction ないし ”Law as interaction” とはどういうことか、著者の説明を日本語で要約しなさい。

問4 Custom(s)に関する著者の見解を日本語で要約しなさい。

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【設問2】

以下の文章を読み、その内容を300字以内に要約せよ。

Every harsh act of British control made the colonists more rebellious. By 1774, they had set up the Continental Congress. It was an illegal political body, but it was also a step toward independent government.

The first military clash between colonists and British troops came at Lexington and Concord in April 1775. Afterward, the Continental Congress decided on separation from Great Britain. Thomas Jefferson wrote a Declaration of Independence. The Congress adopted it on July 2, 1776, and announced it two days later.

Throughout the colonies, there was already a strong feeling for independence. The opening words of the Declaration gave shape to that feeling:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government……

Next, the Declaration listed the unjust or harmful acts of the British king. It described his rule as tyranny, or oppression—that is, rule by force, without fairness. The Declaration called for the people to control their government. It reminded them of the burdens and difficulties British had caused them. This language was well suited to bring various groups of colonists together. It could even make those who were at odds with each other turn against Britain.

But the Declaration did not include Indians, enslaved Blacks, or women. As for the Indians, just twenty years earlier the government of Massachusetts had called them “rebels, enemies and traitors” and offered cash for each Indian scalp.

Black slaves were a problem for the author of the Declaration. At first, Jefferson’s Declaration blamed the king for sending slaves to America, and also for not letting the colonies limit the slave trade. Maybe this statement grew out of moral feelings against slavery. Maybe it came from the fear of slave revolts. But the Continental Congress removed it from the Declaration of Independence because slaveholders in the colonies disagreed among themselves about whether or not to end slavery. So Jefferson’s gesture toward the enslaved black was left out of the Revolution’s statement of freedom.

“All men are created equal”, claimed the Declaration. Jefferson probably didn’t use the word “men” on purpose, to leave out women. He just didn’t think of including them. Women were invisible in politics. They had no political rights and no claim to equality.

By its own language, the Declaration of Independence limited life, liberty, and happiness to white males. But the makers and signers of the Declaration were like other people of their time. Their ideas grew out of the ordinary thinking of their age. We don’t study the Declaration of Independence so that we can point out its moral failures. We study it so we can see how the Declaration drew certain groups of Americans into action while it ignored others. In our time, inspiring words are still used to get large numbers of people to support a

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cause, even while the same language covers up serious conflicts among people or leaves out whole parts of human race.

The reality behind the Declaration of Independence was that a rising class of important people in the colonies needed enough support to defeat England. At the same time, they didn't want to disturb too much of the settled order of wealth and power. In fact, the makers of independence were part of that settled order. More than two-thirds of the men who signed the Declaration had served as colonial officials under the British.

When the fiery Declaration of Independence was read from Boston's town hall, the reader was Thomas Crafts. He was one of the Loyal Nine, who had opposed militant action against the British. Four days later, Boston's Committee of Correspondence ordered the town's men to show up to be drafted into a new patriot army. But the rich, it turned out, could avoid the draft. They could pay someone else to serve in the army for them. The poor had no choice but to serve. This led to rioting and shouting: "Tyranny is tyranny, let it come from whom it may."

Source: Howard Zinn, *A Young People's History of the United States* (2007).