LLB 100 FOUNDATIONS OF LAW
SUBJECT SUMMARY

CONTENTS

TOPIC ONE: FOUNDATIONS OF LAW
1 NATURE AND SOURCES OF LAW

What is law?

- Law is a means of ordering society and solving disputes.

Different perspectives of McBain

- It may be regarded as a story about individual problems and private lives. First and foremost, it appears to be a story about a single woman who wanted a child. Clearly at some level it was also a significant event in Dr McBain's life.
- Another way of thinking about it is as a chronicle of conflicting values and social change.
- The dispute is also a political story about the kind of society we inhabit and the values which prevail.
- It is also a legal dispute because it involves the law and legal institutions.

Classification

Legal and non-legal disputes

- A set of events may be conceived in different ways: as a personal problem, a political issue, a legal matter, a clash of values, etc.
- These categories are not mutually exclusive nor do they always remain the same.
- In some instances, a very private matter can become a legal dispute.

Branches of law

  - Civil law and criminal law
- Criminal law is concerned with conduct that is harmful to society in some way.
- Civil law is concerned with regulating relations between individuals, the creation of rights and liabilities in particular situations, and the consequences of their breach.
  - Private law and public law
- Public law is primarily concerned with the functioning of the state as an entity and the relationship between the state and its citizens.
- Private law focuses on the relationships between individuals in those spheres of life in which there is no obvious or direct state interest.
  - Classification by subject matter
- Here, law is simply described in terms of its dominant subject matter, eg constitutional law, discrimination law, consumer protection law.
- These areas of law may often incorporate aspects of other classifications.
  - Classification by source
- This is the division of law according to its institutional source.
- These sources are:
    - Parliament – laws made by parliament are Acts. Parliaments can also delegate their law making power in particular areas to non-parliamentary persons or bodies.

- The courts – law can be made by judges in the superior courts in the process of deciding cases. This is called common law.

Meanings of common law

- In its broadest sense, common law refers to a type of legal system. Eg, civil law and common law.
- Australia has a common law system of law. Within this, there are two principles, statute (made by Parliament) and common law (made by judges).
- The body of law made by the courts is further divided according to different principles and rules called common law and equity.

Autonomy and legitimacy

- The idea of law as a separate discipline with its own values, rules, institutions and processes is referred to as autonomy of law.
- The notion of law as autonomous does not exclude the influence of morality or politics but it does presuppose that the law and these other matters are conceptually and procedurally distinct.

Positivism

- The existence of competing claims illustrates the problematic nature of legal adjudication. On what basis does the law assert its authority to resolve the dispute? This question has received different answers over time. Theories of natural law dominant before the modern era traced law's authority to God or nature or reason – that is, to a fundamental or higher law against which laws made by human agency could be judged. These theories were challenged in the 18th and 19th centuries by the idea of legal positivism.
- According to a positivist conception, law is simply those rules "posited" by a person or body with authority to command.
- There is a distinction between morality and law. While the morality of a rile might be important, it is quite a different issue to its legal status.
- Legal positivism dominates western society today.
- The development of positivism was consistent historically with the increasing secularisation of society and the growth of philosophical scepticism which accompanied the rise of modern scientific though. Its consolidation in the 19th century wernt hand in hand with the systemisation of English common law, which turned a "chaotic body of specific legal rules into an ordered system of law expounded according to various legal categories and concepts". This development of law as science helped fill the voud left by the rejection of natural law theories.

Formalism

- Law is authoritative because of the process by which it is pronounced; if cases and statutes can be analysed according to legal logic, they are capable of yielding the "correct" answer to any dispute.

- This idea of law as a self-contained body of rules, objectively and logically applied by those with specialist knowledge, is known as formalism.
- In this case, it is assumed that law and an objective existence and can be "discovered" through a process that is apolitical and value-free.
- While these theories incorporate diverse views about law, in broad terms they reject the notion of law and objective, neutral and wholly autonomous.

The focus on procedure

- Despite the challenges to formalism, the idea of process continues to play an important role, both in operation of law and in its legitimacy. This is reflected in the focus on procedure; and in turn, the procedural emphasis reflects the idea of the rule of law and a central tenet of our legal system.

Substantive and procedural law

- Substantive law is concerned with those rules which make up the substance of the particular branch of law, that is, the rules that directly govern the way in which a dispute will be determined by the courts.
- As its name suggests, procedural law is more concerned with the process of litigation.

Legal procedure and the challenge to McBain

- The importance of legal procedure and its relationship to broader questions about the nature of law can be illustrated by the postscript to *McBain*, which involved the Catholic Church in a High Court challenge.
- When the matter was heard in the Federal Court, Sundberg J granted an application by the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church to be heard as amici curiae ("friend of the court").
- According to Subdberg J, he agreed to this application by the Catholic Church in view of the stance of the various respondents. The first respondent, the State of Victoria, and the second respondent, the Minister responsible for the State Act, adopted a neutral position on the alleged inconsistency between the State and Commonwealth laws. The third respondent the agency responsible for the administration of the State Act simply advised the court that it would submit to any order the court might make. The fourth respondent, Ms Meldrum, agreed with the submissions made by the applicant. In other words, none of the respondents planned to counter the applicant's claim.

The rule of law

- The "rule of law" incorporates the following principles:
  1. "No man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land"
  2. "Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals"

3. "The general principles of the constitution … are … the result of judicial decisions determining the rights of private persons in particular cases brought before the courts".

- These principles can be traced to A V Dicey's 19th century work on the British Constitution, *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, 1959).
- They contain two political ideals of contemporary relevance. The first is that power should be exercised according to law. Not arbitrarily on the basis of personal whim. Secondly, the rule of law requires that all persons are subject to the law, and that, before the law, all persons are equal.

Legal language and conventions

- The formal and procedural nature of our law requires specialist legal language and conventions. These have both an instrumental and symbolic function.
- The way cases are referred two signals the adversarial nature of our court processes and the idea that litigation is a contest between two or more persons who are "parties" to a dispute.
- The "v" is an abbreviation of "versus". In civil cases, the "v" is usually referred to as "and", while in criminal matters it is spoken as "against".
- There are special words to refer to the parties to a case and rules about the procedure that these rules attract. Eg, "prosecution", "defendant", "plaintiff", "appellant", "respondent".
- Technical words apply to legislation as well as cases.

Legal culture

- The impersonal nature of our legal processes has complex and paradoxical consequences. One the one hand, abstraction suggests impartiality; it embodies the notion that all people should be treated equally by the law and that the law should not be arbitrary. In this sense, abstraction reflects the values of the rule of law.
- On the other hand, laws impersonality can be alienating fro those caught up in its processes and this p=may impact upon decisions as to whether the law should be invoked.
- The argument that the apparently neutral language and processed of the law privilege particular interests returns us to the importance of theoretical perspectives. It also stands as a warning not to take the law at face value.