

# SEMINAR 1: LEGAL DISPUTE ANALYSIS AND INTRODUCTION TO RESEARCH

## NATURE AND SOURCES OF LAW

### 1.10 WHAT IS LAW

Law is a means of ordering society and resolving disputes

“Law equals the rules created and recognised by the legal institutions of the state”

Paradox → Our law is separate from politics yet is inherently political, different from morality yet broadly reflective of social concerns, a constraint on power yet an exercise of power, concerned with fair procedures yet often inaccessible and not always just.

- Law in theory vs. Law in practice
- Justice: Appropriate distribution of social goods
- Law informs societal expectations of morality and in turn morality informs law (should there be a distinction?)

What we think the law is, is informed by our upbringing and broader perceptions of what is just and how society is arranged

There are some instances in which obeying the law has much worse consequences than disobeying the law. (Example: Self-defense → Person has to harm another individual in order to ensure their safety/survival)

#### Citation of Cases

- Reported Citation

FCR → Federal Court Report

ALR → Australian Law Report

# Before acronym → refers to volume number

# After acronym → page number

E.g. ***McBain v Victoria or Re McBain* (2000) 99 FCR 116; 177 ALR 320**

- Medium Neutral Citation

E.g. *McBain v The State of Victoria and Others* [2000] FCA 1009

Amicus Curiae → someone who is not a party to the case and is not solicited by a party, but who assist in court by offering information that bears on the case

- Cannot be admissible in court unless you are a party to the case or an amicus curiae

#### CASE STUDY – MCBAIN V VICTORIA (2000) 99 FCR 116; ALR 320

- Single female (Lisa Meldrum) was unable to have a child through IVF as she was NOT in a defacto relationship
  - o ***Infertility Treatment Act 1995 (Vic)***
- ***Infertility Treatment Act*** contradicts the ***Sex Discrimination Act 1984 (Cth)***
  - o “It is unlawful for a person who provides goods or services, or makes facilities available, to discriminate against another person on the ground of, inter alia, the other person’s marital status” (***Sex Discrimination Act 1984***)
- When a Commonwealth and State law are inconsistent, the Commonwealth law prevails and the State law is invalid to the extent of the inconsistency

#### 1.11 DIFFERENT PERSPECTIVES OF MCBAIN

1. Personal → Ms Meldrum wanted a child; Dr. McBain wanted to be able to practice on single women, increasing his cliental
  - a. Our own knowledge, experience, and beliefs inform our view of the event
2. Chronicle of conflicting values and social change, that is, a broader narrative about society → Whether it is socially acceptable to raise a child who will never know their father, etc.
3. Legal dispute → Involves law and legal institutions, such as the inconsistency between state and commonwealth laws

#### 1.20 THE ROLE OF CLASSIFICATION

##### 1.21 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 and so on → Categories are NOT mutually exclusive

- Problem may not be experienced as legal even if it is governed by the law

##### 1.22 BRANCHES OF LAW

Once a set of events is classified as legal, they are further categorised as a legal dispute of a particular kind. In other words, law is divided into recognised types of branches, depending upon the purpose of the classification.

##### 1.23 CIVIL LAW AND CRIMINAL LAW

**Criminal law:** concerned with conduct that is harmful to society in some way → Prohibits certain acts and, more rarely, certain failures to act, and prescribes procedures for the trial and punishment of those accused.

**Civil law:** concerned with regulating relations between individuals, the creation of rights and liabilities in particular situations and the consequences of their breach → E.g. law of contracts and law of torts

- A behaviour may give rise to BOTH criminal and civil proceedings
  - o E.g. Someone who assaults another person may be charged and convicted of a criminal offence and/or be required to pay compensation to that person as a result of civil proceedings

- In other words, it is not the behaviour itself that defines its status but the kind of legal response invoked in the response
- Criminal law reflects some generally accepted notions of moral fault → There is not always consensus about what constitutes conduct deserving of punishment by the state

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## 1.24 PUBLIC LAW AND PRIVATE LAW

**Public law:** primarily concerned with the functioning of the state as an entity and the relationship between the state and its citizens → E.g. criminal law, constitutional law, and administrative law

**Private law:** relationship between individuals in those spheres of life in which there is a less obvious or direct state interest

- Classical liberalism privileges the individual over the state → except where absolutely necessary for the protection of the community of the community, individuals should be free to pursue their own idea of the good life unfettered by legal regulation

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## 1.25 CLASSIFICATION BY SUBJECT MATTER

More straightforward

- Described by dominant subject matter
  - E.g. Constitutional law, discrimination law, consumer protection law, employment law, intellectual property law, environmental law
- May incorporate different aspects of other classifications

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## 1.26 CLASSIFICATION BY SOURCE

Division of law according to its institutional source – that is Parliament or the courts

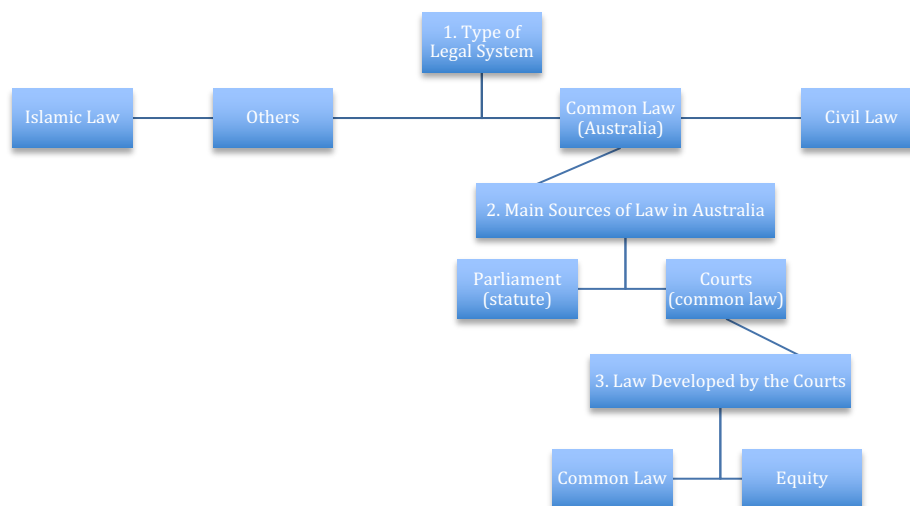
- A law made by Parliament is an **act, statute** or legislation
- Law is also made by judges in the superior courts in the process of deciding cases – called **common law**, case law or judge-made law
  - Created in the UK

Adversarial nature (common law) → Role of the judge is to decide between two separate versions of the truth as given to them by the lawyers

Inquisitorial nature (civil law) → Judge has a much more active role and lawyers are passive – Judge decides how witnesses are questioned etc., lawyers are there to assist the judge

- Inquisitorial: Takes longer as judge has to look into every possible occurrence, can be influenced by bias
  - Australian legal system is primarily adversarial, except for cases dealing with refugees, which in that case more civil law ideas are used
- Civil law legal systems derive greatly from Roman Law (e.g. France, Germany, Central and South America)
  - Judicial precedence
  - Acts passed by parliaments → Parliaments create codes which must be acted upon by judges

There has been a convergence between the two major types of legal systems due to lawyers travelling internationally etc.



### 1.27 MEANINGS OF 'COMMON LAW'

1. Refers to a type of legal system (broadest definition)
  - Australia has a common law legal system because it was colonized by Britain
2. Within Australia's common law legal system there are two principal sources of law:
  - Common law (the courts)
  - Statute (parliament)
    - i. Parliaments are the major source of law today but courts still have an important role in developing the common law
3. Body of law made by courts is further grouped according to different principles and rules:
  - Common law
  - Equity
    - i. Difference relates to historical development of the English court system

### 1.28 INTERNATIONAL LAW

- Australian Parliaments and courts derive their formal legal authority ultimately from the *Constitution*
  - o Constitution: statute which creates the framework for government for the nation as a whole
- International law only operates as a direct source of law in Australia where it has been incorporated into domestic law by Commonwealth or State legislation
  - o International law may have an indirect effect on Australian law

### 1.29 APPLICATION OF CLASSIFICATIONS TO A REAL DISPUTE

#### ***McBain v Victoria (2000)***

- Parliament
- Public law → Concerns the relationship between state and federal legislation
  - o Even though the nature of the initial matter was extremely private