

# 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

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## 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.

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#### 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

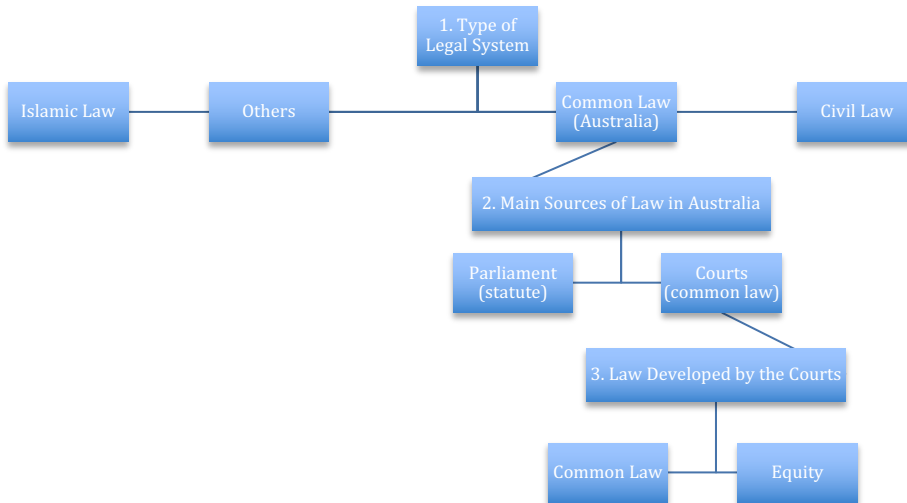
- A law made by Parliament is an **act, statute** or legislation
- Law is also made by judges in the superior courts in the process of deciding cases – called **common law**, case law or judge-made law
  - Created in the UK

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

# SEMINAR 2: LEGAL CLASSIFICATION AND CATEGORIES; CRITICAL THINKING SKILLS

## 1.30 AUTONOMY AND LEGITIMACY

The idea of law as a separate discipline with its own values, rules, institutions and processes is referred to as the autonomy of law → completely independent

Characteristics that distinguish law in the western legal tradition:

1. Autonomy of law
2. Centrality and pervasiveness of law as a means of social ordering
3. Law's moral authority

The notion of the law as autonomous does not exclude the influence of morality or politics but it does presuppose that law and these other matters are conceptually and procedurally distinct

- Law provides a means of deciding between competing claims → regarding policy matters, or what morality entails

## 1.31 POSITIVISM

There is a distinction between morality (what ought to be) and law (what is) → this formal separation of law and morality is not a feature of all social orders e.g. Aboriginal

Law is what the law maker sets forth → by reference to process, not what the law is about

- The development of positivism was consistent historically with the increasing secularism of society and the growth of philosophical scepticism, which accompanied the rise of modern scientific thought
- 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

## 1.32 FORMALISM

The idea of law as a self-contained body of rules, objectively and logically applied by those with specialist knowledge is known as legal formalism → Looking at law in terms of legal disputes rather than its socio-political context etc.

- It is assumed that law has an objective existence and can be “discovered” through a process that is apolitical and value-free

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## NATURAL LAW THEORY

- Premised by the idea that laws have been handed down by an absolute power
- Some things are inherently right and some things are inherently wrong
- Traditionally a religious notion

- Every person has certain rights that the government is unable to take away → absolute universal human rights
- It is the role of judges and the role of lawyers to look at any situation independent of social and religious beliefs and make a decision that results in the correct outcome

### Realism:

- Takes into account the judges social, political, religious views and recognises that it can influence the decision made in regards to legal perspective

## 1.4 THE FOCUS ON PROCEDURE

- Despite the challenges to formalism, the idea of process continues to play an important role, both in the operation of law and its legitimacy
- Procedural emphasis reflects the idea of the rule of law as a central tenet of our legal system

### 1.41 SUBSTANTIVE AND PROCEDURAL LAW

**Substantive:** concerned with those rules which make up the substance of the particular branch of law, that is, the rules that govern directly the way in which a dispute will be determined by the courts → Concerned with outcomes (e.g. A person convicted of murder will be sentenced)

**Procedural:** The processes an individual goes through within the legal system (e.g. A person convicted of murder will be taken to court, have evidence presented against them, etc.)

Procedural law is concerned with how one reaches a substantive outcome

- These rules are also referred to as legal doctrine or the doctrinal aspects of law
- Legal rules can be ambiguous, that is, they can be interpreted and applied in more than one way → There are also rules about how to interpret and apply the substantive rules found in statutes and cases
- Knowledge of legal procedure is very important → A recognised cause of action must not only exist but must be brought before the appropriate court or tribunal by particular persons, in a particular manner and generally within a limited timeframe
- Everyone has to go through the same procedures to get to the outcome → Transparency – Everyone can see that they are treated the same way as everyone else and that fair treatment will continue

In criminal cases, the prosecution must prove the accused person's guilt *beyond reasonable doubt*; in civil cases, the plaintiff is only required to establish their case *on the balance of probabilities*

Standing: People must have legal connection to a particular topic before bringing it up in court. The requirement at common law has been maintained, although the test has been relaxed to the extent that an ordinary person may have standing in public interest litigation where they have a “special interest” in the matter over and above the general public

- Ensures only people seeking rectification of specific legal interests can go to court

### 1.42 LEGAL PROCEDURE AND THE CHALLENGE TO MCBAIN

An **amicus curiae** is allowed to put material and arguments before the court in support of a legal or factual matter which might otherwise be overlooked → amicus curiae appears when an individual, organisation has no standing

Applications decided on procedural grounds:

1. Whether there is a justiciable “matter” for the court to determine

2. Given the discretionary nature of the remedy sought, whether there were grounds for its refusal

Judicial independence is also crucial to the idea of government according to law, not arbitrary government or the rule of men

## 1.5 THE RULE OF LAW

The rule of law → A V Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, Macmillan, 1959):

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”
- Power should be exercised according to law, not arbitrarily or on the basis of personal whim
  - The rule of law requires that all persons are subject to the law and that, before the law, all persons are equal
  - Law should treat everyone equally and law should follow transparent procedures

Liberalism (Aus.) → Individuals ought to have the autonomy to make the choices they see fit

- Liberalism affects how we view the public/private divide → Acknowledges that individuals should have autonomy in their private lives, the only limit to autonomy is when decisions begin to impact upon other people
- Moral ideology
- A person can have their own individual choices but has to accept that people have different choices → Law shouldn't impose individual choices on others

## 1.6 LEGAL LANGUAGE AND CONVENTIONS

Legal language and conventions have both an instrumental and a symbolic function

- The way cases are referred to (*McBain v Victoria*) signals the adversarial nature of our court processes, that is, the idea that litigation is a contest between two or more persons who are “parties” to a dispute

### Criminal Cases

- Prosecution: Party who commences proceedings
- Defendant: The person against whom the allegation of criminal conduct has been made

### Non-Criminal Cases

- Plaintiff: Person who initiates the proceedings
- Defendant: Same as above

Statute: Act of Parliament

## 1.61 LEGAL CULTURE

- The impersonal nature of our legal processes has complex and paradoxical consequences

- Abstraction suggests impartiality; it embodies the notions that all people should be treated equally by the law, the law should not be arbitrary, and that known principles should determine the outcome of disputes
- The law's impersonality can be alienating for those caught up in its processes and this may impact upon decisions as to whether the law should be invoked

## 1.7 LEGAL EDUCATION

### 1.71 THEORY AND PRACTICE

1. Those cases that reach the higher courts, particularly those which establish new legal rules, are not necessarily typical of disputes
2. Much of law's function is the prevention of disputes; indeed, most legal matters do not involve formal adjudication

Many activities governed by the law do not operate routinely by reference to formal legal rules → e.g. consumer transactions often involve standard form contracts and bear little resemblance to the principles, which underpin classical contract law

### 1.72 AUSTRALIA'S LEGAL FRAMEWORK THROUGH THE LENS OF MCBAIN

- Legislation is the most predominant source of law in Australia today
- Australia is a federal system where power is divided between a central or national authority (the Commonwealth) and regional or local authorities (the States)
- When presented with inconsistency between Commonwealth and State law, the case can be resolved with reference to the *Constitution*, a fundamental law that creates the framework for government within our nation

### 1.73 THE ROLE OF INTERNATIONAL LAW

- The constitutional question also illustrates how international law can play a complex role in the affairs of a sovereign nation
- The power of the Commonwealth to enact anti-discrimination legislation derives from the High Court's interpretation of the treaty-implementation aspect of the external affairs power in the *Constitution*

International law can be used to resolve ambiguity in regards to what a statute really means

Sex Discrimination Act was created due to international relations → Signatory to the convention of elimination of discrimination against women → Australia had to create laws to comply to its international obligations to which it has agreed to (treaty)

- Can be a way for the federal parliament getting the power to make laws

# SEMINAR 3: DEVELOPMENT OF ANGLO-AUSTRALIAN LAW 1: COLONISATION TO FEDERATION

## 2.10 BRITISH COLONISATION

- Ownership of land is relative to culture
- British conception of land → their culture was based around this concept (how they used land was essential to legal ownership – this limited their ability to see other ways in which different cultures could use land)
  - o Individual ownership
  - o Means of determining hierarchy
- Indigenous concept of land
  - o Customary → Based on traditional practices, reception of traditions
  - o Spiritual relationship with the land

## 2.11 TERRA NULLIUS

Public international law in the 18<sup>th</sup> century was not concerned with human rights but the right of colonial powers to acquire new territory

- Sovereignty could be acquired over land in three ways:
  - o Conquest → Taking land by force
    - Some local laws must remain for conquest and cession
  - o Cession → Surrender of land by treaty (signing over rights to land)
  - o Discovery and occupation → land was “terra nullius” meaning “land of no-one”
    - This included not only uninhabited land but land that was populated by peoples considered too primitive to have a system of law, at least in terms recognised by Europeans

Terra nullius provided a legal justification for settlement (but was wrong on two counts):

1. Aboriginal people had already inhabited Australia for tens of thousands of years (Aboriginal population in 1788 ranging from 300,000 to 1.5 million)
  2. Now accepted that Australia’s Indigenous population had a sophisticated social organisation and system of laws
- First case to deal directly with the issue of Aboriginal rights to land at common law (*Milirrpum v Nabalco Pty Ltd* (1971 17 FLR 141), Blackburn J concluded that there existed:
    - o Subtle and elaborate system → provided a stable order of society → free from personal whim or influence
    - o “Government of laws and not men”

## 2.12 THE RECEPTION OF ENGLISH LAW

- The British recognised their legal system as the only plausible way of creating and implementing law (because the land was “terra nullius”)
- Rights in land were synonymous with property rights recognised by the English system of law
- Same ethnocentric thinking had informed the expanded notion of terra nullius 200 years before → significant consequences for development of Australian law
- William Blackstone: important difference between colonies acquired by conquest or cession and those by settlement
  - o Conquered or ceded: had existing laws which Britain gained the right to alter with the acquisition of sovereignty (pre-existing laws remained until new laws were created)