

Topic 1: Foundations of Law

Nature and Sources of Law

What is law?

→ Law is a set of rules created and recognised by legal institutions. It is a means of ordering society and resolving disputes, combining order with freedom. It helps negotiate conflicting values and social change. The law is separate from politics yet based off political judgements, not morality yet reflects social values and concerns, expands yet limits power and concerned with fairness yet not always just and accessible.

→ Law can be taken many ways; narrative or story (personal, society and values), political issue or legal dispute (role of institutions in administering and creating the law).

The role of classification

→ Legal and non-legal, depending on what response the parties want to pursue. Many don't see their problems as needing a legal response or can't access the law, so don't invoke their legal rights, instead rely on unauthorised information and advice.

→ Branch of law. Civil law regulates relationships between individuals, creating rights and liabilities and imposing consequences of breaches. Criminal law on the other hand regulates acts that are harmful to society by prohibiting acts and punishing failures to act. This distinction emphasises how it is not behaviour that defines status, but the legal processes invoked in response. Public law regulates the functioning of the state and its relationship with individuals. Private law on the other hand regulates relationships between individuals.

→ Dominant subject matter (area of law) which can include constitutional, intellectual property, discrimination, employment, environmental and consumer law.

→ Institutional source required. Parliaments enact statute law and delegate power to non-parliamentary bodies while courts enact common law which tries to distinguish the different institutional sources of law.

→ Influenced by international law (authority through constitution). International treaties must be signed, ratified and implemented to have legal effect. Used by the courts to develop and interpret the law.

→ An important distinction must be made on the meanings of common law. It is a type of legal system (civil law, common law – reflects special role of judges as law makers), a source of law (statute, common law – develop and interpret legislation) and law developed by courts (common law – principles and rules, equity).

Autonomy and legitimacy

→ Autonomy is the idea of law as being a separate body of values, rules, institutions and processes. Although there is not always a consensus about policy matters or what morality entails. The law however tries to provide a means of deciding between competing claims.

→ Positivism is the idea of the law as rules created by institutions with the authority to command. It requires the law to meet a criteria for creation regardless of its moral content as there is a difference between morality (what ought to be) and the law (what is). Natural law though abolished this idea. It developed out of the secularisation of society, was consolidated by the ordered system of laws separated by individual legal categories and concepts and was legitimised through the laws authoritative processes.

→ Legal formalism is the idea of law as a self-contained body of rules, objectively and logically applied by those with specialist knowledge, assuming law has an objective existence; discovered through an apolitical and value free process.

→ The idea of law as a separate body of rules gives our legal system legitimacy.

The focus on procedure

→ Substantive law emphasises rules which make up the substance of a branch of law and the way disputes will be determined by courts. It is known as the legal doctrine or the doctrinal aspects of law. Legal rules are ambiguous (interpreted and applied in more than one way); which requires statute and case law to identify how these rules are to be interpreted and applied.

→ Procedural law emphasises an appropriate course of action. It requires cases to be brought before an appropriate court or tribunal, by particular persons, in a particular manner and in a particular time frame. Civil proceedings are to be commenced by individual parties to a dispute and the standard of proof rests on the plaintiffs to establish a case based on the balance of probabilities. Criminal proceedings however are initiated by the state and the standard of proof rests on the prosecution to prove guilt beyond a reasonable doubt. Procedural law also

dictates rules on the conduct of litigation, the presentation of evidence, what can be litigated and by whom and the remedies available.

∞ The attorney general has a role to take court action to protect the interests of the public. This occurs by the granting a fiat to a relator who takes proceedings under the general's name. Public interest litigation is when individuals assert their private rights when they have a special interest in the matter (giving them standing, locus standi; ability to invoke the law).

The rule of law

→ Traced back to A V Dicey, Introduction to the Study of the Law of the Constitution (Macmillan, 10th ed, 1959) which outlines principles embodied in our legal system.

→ The rule of law states that no one is above the law, everyone is subject to and equal before the law and everyone is treated equally when applying and enforcing the law (although this isn't always the case). It also dictates that power should be exercised according to law. Although our laws are universal (apply to all) and rational (logically explained and justified) not everyone has access to the law due to barriers.

Legal language and conventions

→ Have symbolic and instrumental function.

→ The way cases are referred to signals the adversarial nature of our legal system. V represents against or and. There are also special words referring to parties. The prosecution commences proceedings, the defendant is the one facing criminal charges and the plaintiff initiates proceedings (applicant), the defendant (respondent). References also show decision date and written judgement location.

→ Legal culture is often seen as impersonal. Language forms and conventions of legal culture reflect values and impact interpretation. Abstraction suggests impartiality, embodies notion that all should be treated equally by the law, that law shouldn't be arbitrary, known principles should determine the outcome of disputes, rule of law should be reflected but it can be alienating, impacting decisions on invoking the law and it can fail to address complex issues which started the case (removed from a real life setting).

Legal education

→ Know the law, how to interpret it, how to classify it and how to support arguments.

→ Cases that reach higher courts are often quite different, most matters do not involve formal adjudication and many activities governed by law do not operate routinely by reference to formal legal rules.

→ The constitution illustrates how international law can play a complex role in the affairs of a sovereign nation; through treaty implementation.

McBain v Victoria (2000) 99 FCR 116; 177 ALR 320

Lisa Meldrum (single) wanted a child, Dr McBain (gynaecologist, reproductive technology and IVF techniques specialist) decided IVF was appropriate though lawfully couldn't carry out the procedure; Infertility Treatment Act 1995 (Vic) s 8(1) only allowed women who were married or in defacto relationship to access IVF (480 penalty units or 4 years prison), McBain stated he could not follow law as well as Sex Discrimination Act 1984 (Cth) s 22 (unlawful to discriminate against another on the grounds of marital status in providing goods, services or facilities), the court held that due to Constitution s 109 s 8(1) is inoperative due to inconsistency. This is a personal story (individual problem, private life), political/societal narrative (conflicting values, social change) and legal dispute (courts, institutions). It involves parliament, public law, private law, criminal law, civil law and more than one area of law. It involved the Catholic Bishops Conference and Australian Episcopate Conference of the Roman Catholic Church being granted a partial fiat to put arguments before the court (not a service, against HR UNCROC, only for one sex and therefore an exemption to discrimination, its reasonable therefore allowable). The court disagreed with every argument (is a service, ICESCR discrimination more important, available to both, direct discrimination therefore not reasonable).

Access to Law

Access to justice

→ Justice combines fairness, equality, ethics and morals to deliver a fair, simple, affordable, stable, accessible, clear, protective law. It is an essential element of the rule of law, democracy and human rights. It tries to balance collective and individual rights although it cannot provide for everyone. Justice changes all the time with circumstance, values and social assumptions.

→ There are many aspects of justice including retributive (justified punishment), distributive (just most of the time, allocate resources equally), substantive (merits of situations, whether law and outcome are right and just), equality (everyone equal) and procedural (focus on rules, procedure, characteristics of law, impartially apply law according to agreed rules, positivist legal tradition (autonomy, objectivity, rationality), equality, judicial independence).

→ Access to justice requires equal access to formal institutions, processes of law and equality before the law (ALRC). The Access to Justice Advisory Committee 1993 submitted a 1994 report highlighting this same definition and assumed that access to the legal system meant access to formally constructed and politically impartial courts and administrative agencies.

→ Rights and access to justice can be problematic though as they mean nothing without the ability to assert them. The legal system though provides the means to assert rights and obligations, holding accountable those exercising executive power.

→ Society see rights as protecting those with power and marginalising the rest of society and that the capacity to influence the law making processes is unequally shared. There are many obstacles to asserting legal rights and the enforcement of law presents many challenges. The law requires those who wish to invoke a legal process to have interest in the matter, giving them standing. It appears to protect interests, achieving this objective is problematic though.

→ The law must be invoked by those whose interests it serves, though there is unreliable data on the needs, interests and experiences of communities. Surveys have found;

- ∞ 33% experienced legal problems in last 5 years, 9% didn't seek legal advice due to cost; 3% lack of knowledge, 88% too complicated, 83% only wealthy able to protect rights (Australian Institute 2009).

- ∞ Disadvantaged people vulnerable to legal problems, no legal action receives poorer results, advice from non-legal sources, resolve issues outside formal justice system (Law and Justice Foundation 2012).

→ Legal advice can be sought from solicitors, family, friends, legal aid, community (justice) centres, police, internet, workplace, government, tribunals, education, courts, counselling, libraries, magistrates, student legal clinics, health care providers.

Barriers to access

→ Courts are the traditional means of invoking legal rights and enforcing obligations. Many don't take legal action though due to lack of knowledge, information, understanding, time, resources, cost, complexities, stress, location, demographic, attitude and values.

→ Cost

- ∞ The legal process can be expensive. The public provide the court system but individuals must pay for advice and representation. Lawyers though are now required to disclose all cost information at the earliest stage. The government have also deregulated costs, provided non-legal options and restricted advertising (Competition Policy 1990s). Costs based on condition of success is regularly practiced however fees cannot be based off the claim won.

- ∞ The high cost of litigation and the scarcity of legal aid funding has seen a growth in private litigation funding (investment companies provide funds in return for proportion of amount covered); *Fostif Pty Ltd v Campbell's Cash & Carry Pty Ltd* (2005) held that this offers access to justice and therefore favoured.

- ∞ Court expenses including evidence, preparing and running a case, obtaining documentation, expert witness fees and court usage (filing fees and daily hearing charges). The courts can though provide a fee reduction or exemption for limited proceedings. It is also often seen that costs go with the successful party.

- ∞ These costs cause court avoidance (matters frequently negotiated prior to hearings), turn to family and friends (who know little or nothing) or the internet (lacking in quality).

→ Delay

- ∞ From filing to finalisation it has been known to take up to 18 months or longer, the average being 6 months. A case must pass through numerous stages before a full hearing. Delays could be due to substantive or procedural law, technology or social change. The flow of a case influences cost and duration.

- ∞ Lengthy delays in criminal trials have led to changes in court administration, including the involvement of judges managing cases. Studies have shown that this has increased delays; local court delay for those held in custody with charges dismissed being 80 days, while district court delay for those refused bail but acquitted of charges being 196 days.

→ Legal aid

- ∞ Feature of the justice system since 1970, received funding in 1973, were restricted with funding in 1997 but received additional funding in 2010 (insufficiency a major issue though).

- ∞ They provide initial free advice for a range of legal matters but the scarcity of funds limit availability for court representation (eligibility requirements therefore introduced; child, plead guilty, pass means – extremely poor and merit test – prospect of success). They do fund a duty solicitor schemes though which gets solicitors to attend courts and assist the unrepresented, limited time for understanding though.

- ∞ Legal assistance can also be sought through pro bono work from private practitioners (free representation; work for the interests of the client and community) or NGO's (providing for the disadvantaged through advocacy and law reform). Community legal centres also assist those with access difficulties (free legal advice, information and representation (those in defined geographic areas or in particular fields), educate).

- Self-represented litigants (also known as litigants in person) resulting from costs and difficulties obtaining legal aid. Most commonly seen in lower courts but can also appear in higher levels. Self-representation is seen as unfair, unjust and cause many to abandon their legal rights. There is a significant relationship between representation and success as lawyers can explain processes, proceedings and outcomes.

- Adversarial culture highlights equality and dictates that judges play a passive role while parties shape the conduct of proceedings. It is difficult for judges to remain impartial though, especially when one party is unrepresented (must ensure all evidence is heard, relevant questions are asked and parties know and enforce their procedural rights). Even when both parties are represented, equality cannot be assumed. The adversarial system is capable of delivering fair, just and efficient outcomes although complexities can cause exploitation, powerlessness, stress and alienation for clients.

- Courts are arranged in hierarchy, their position being significance for their jurisdiction and role. Inferior courts (for example) lack status yet receive the largest volume of disputes. Society rarely view proceedings and it is therefore left to the media to convey understanding. TV, films and the media tend to focus on extreme, serious or controversial matters (generally in higher courts) which society use to base their understanding of the law on. Ideas of court tend to be formal, ritualistic and dramatic. In reality most cases are speedy and less formal. Non-trial practices are also rarely mentioned although take up majority of the time.

- ∞ Magistrates courts are more accessible and a practical response to court demands but there may be less emphasis on procedural rights and often parties are unrepresented. Time, resources and costs affect what remedies are available and how far the legal process can go.

- Australian magistrates are mainly middle aged, Australian/Anglo ancestry, grew up in capital cities, married, children. Younger, female and new magistrates though are less likely to identify with a religion and attended state schools. A magistrate involves a wide range of tasks, requiring specific attributes.

Alternative institutions and processes

- Tribunals (e.g. Federal Administrative Appeals Tribunal)

- ∞ Provides an avenue for adjudicating disputes while improving access to justice by eliminating many inequalities. It's less formal and adversarial, disputes are determined quickly and cheaply, decision maker may have specialist knowledge and provides mediation and alternative processes to resolve disputes. Lawyers are prohibited in some tribunals, lowering adversarial nature and costs while providing equality.

- ∞ Expenses and delays of courts resulted in small claim divisions in magistrate courts (up to \$10,000) though this has fewer formal procedural rules and cost recovery is limited.

- ∞ Executive arm; lack formal independence of judicial arm under constitution. Brandy illustrated that discrimination complaints fall under federal law, they are not resolved by conciliation, must be determined by federal or magistrates courts, the separation of powers not formally in constitutions and the enforcements by tribunals less problematic.

- ∞ Not necessarily fairest outcome, hard plead case without lawyers, dependant on skills and resources of adjudicator and there are less procedural safeguards; though parties do bear their own costs.

- Alternative dispute resolution (increasingly used by courts as a prerequisite)

- ∞ It tries to resolve disputes outside the traditional model by focusing on negotiation and consensus rather than confrontation and imposed outcomes. Mediation is highlighted where a neutral 3rd party assists parties to find mutual solutions. They also help clarify issues and identify options. Agreements can be made enforceable if approved by a court or tribunal giving it force and effect. It enhance access to justice by being less formal, confrontational, quick, cheap, providing mutual satisfaction, less alienating and encouraging contribution and participation.

∞ It is unlikely to reach a mutually satisfied outcome if one party is unrepresented, while representation is inappropriate in some cases. Justice may also demand an outcome upholding one party's rights at the expense of another. Often also classed as second hand justice.

∞ ADR can be accessed through community justice centres who have trained volunteers to mediate the settlement of minor disputes for free, decisions though are not enforceable unless it's agreed in writing (Community Justice Centre Act 1983 (NSW) s 23(3)), Australian Commercial Disputes Centre 1986 and ombudsmen reviewing government decisions, making recommendations and solving disputes.

∞ Administrative reviews of decisions by courts are expensive, complex, formal and slow. Courts can only review legality of decisions not merits (fair and lawful, not best decision in all circumstances).

Inequality

→ Difficulties accessing law magnified groups, social and economic changes to improve access to justice

→ Access to justice an action plan 1994 identify barrier groups

∞ Law defines the rights and obligations of individuals and the procedures and authority to resolve disputes. The law should seek justice and protect rights and interests. Barriers cause rights from not being protected and inequality. The law can be inaccessible and unfair.

∞ Race (Aboriginal and Torres Strait Islander): disempowered through dispossession, brutality, governmental control, culture and lifestyle destruction, stolen generation, deprived of culture land and independence, and deprived opportunity to make decisions. Racist assumptions exist of inferiority and the criminal justice system draws disproportionate attention on their control and punishment, with high rates of death in custody. They have a lack of understanding and culture barriers.

∞ Gender (women): bias against them in the legal system, sexist laws (excluded from equal participation; vote, property, occupation, pay), less access to positions of power and privilege, under-represented in legal institutions (make, uphold law). 1873-1914 courts held women weren't persons for various acts. Today there is a heightened awareness of unequal participation and disadvantages when faced with the legal system.

∞ Language (non-English speaking backgrounds): require information and communication with institutions in language they understand. Culture barriers affect understanding of legal rights and processes leading to non-cooperation causing further troubles with police. They must receive appropriate and accessible information and the legal system must respect diverse cultures

∞ Disability: difficulties understanding current laws, receiving appropriate representation and physical access to courts.

∞ Socio-economic status: difficulties accessing legal services and have a lack of resources.

∞ Geographic location: isolated rural communities and financial hardships.

→ Bought about reforms to administrative justice; improve case management, plain language forms and information, online information and court support schemes; reducing inequality and promoting access.

→ Homeless, mentally ill, uneducated, past offenders and youth experience disadvantage.

→ Legal system fails to provide justice. It has various weaknesses and reforms need to be implemented to rectify. Institutions must commit to provide a strong, viable, cost effective, appropriate legal system for all.

→ Both legal and non-legal remedies and assistance must be sought to achieve best outcome (most reliance on the former). The disadvantaged require connected (multifaceted and integrated) services, education and support. NGO's though are affected by resource availability and government funding restricting policy and law reform work.

Lawyers: education and ethics

→ Communication skills, understanding, empathy, active listening, clear explainer, fair, ensure client satisfaction, help access justice, protect vulnerable, professionalism, ethical, experienced, creative, time management, negotiate, patient, supportive, passionate, honest, persistent, inspiring.

→ Pro bono publico – for the public good; providing free service for 35hrs/year.

→ Legal Profession Act 2004 (NSW) s 25 fit and proper person, s 9 suitable, s 1(a) good frame and character, s 496(1) unsatisfactory professional conduct, s 497(1) professional misconduct.

→ Technology, globalisation, corporatisation, growth of large firm's impact legal profession.

→ Law Society of NSW statement of ethics: serve community, administer and serve justice, protect rights and freedoms, high standards of conduct and behaviour, act competently and diligently, put clients' needs above own, confidentiality, avoid conflicts of interest, duty to court, integrity, honesty, fairness, charge fairly.

→ Common complaints include cost, negligence and communication (Law Society and Bar Council).