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Class 1

Method of Problem Solving: IRAC
I – Issue: identify issue/s: what areas of law are at issue?
R – Relevant law: research what are the laws that relate, start generally and go more specific as you go deeper
A – Apply: apply law to issue
C – Conclusion: is it black and white? Is there any wiggle room?

Class Discussion Notes
- Commonwealth law always overrides state law. This is set out in the constitution in Section 109.
- The Australian legal system is adversarial and therefore in order for the court to make a decision TWO parties must argue against each other – can’t make a decision if only one party is arguing against no one.
- Wording is vital in law and can often be interpreted differently.
- If a section of a law is ruled invalid it isn’t always scraped and re-written: sometimes laws lie dormant i.e. have been found to be inconsistent but the whole legislation itself has not been scraped.

Class 2

Critical Thinking
Critique against a set of standards and not accepting it at face value.
There are 3 types of critical thinking for law:
1) Consistency with legal authority: is this claim about the law, a doctrine, a case, a rule, a decision and action consistent with the statutory or case law authority governing it. Is it legally correct?
2) Consistency with theoretical, ideological and ethical standards: is this claim, arguments, rule, doctrine ect. consistent with the theoretical, ideological and ethical standards that concern it?
3) Judgment of law according to criteria of equity of outcomes. Judges law in terms of its impact on social and political context i.e. practical impacts on community.

When thinking critically it is important to consider the following:
- Who is the audience of the claim, doctrine ect.
- Who is the speaker?
- How much of the argument is objective and subjective? Most arguments of merit should be objective views are subjective views are often opinion based and can’t be proved. A good argument is based on fact.

In deciding if an argument is valid it is best to separate the different parts of the argument and judge them independently on their own merit, and then make the overall decision.

Class 3

The Law
The law: a system of rules made by the state and enforceable by prosecution and litigation
- A rule is a statement of behavioral expectations; tells people how to behave.
- Source of rule tells if legal or non-legal.
- Sovereign – highest authority in a state
- Parliamentary sovereignty – parliament is sovereign in Australia
- Prosecution: the process of formally accusing one of committing a criminal offence
- Litigation: process of one party suing another for breaching a civil law that harms the first party e.g. negligence
Substantive and Procedural Law
- Substantive law is a system of legal rules that set out the rights and obligations of individuals and the state
- Procedural law is a system of legal rules that regulate the legal process, such as civil litigation or criminal prosecution

Public and Private Law: subsections of substantive law

Public Law
- Concerned with the relationship between the individual and state
- Establishes the rights and obligations of individuals when interacting with the state and the rights and obligations of the state when interacting with individuals
- Public law involves any dispute in which the state is one of the parties involved
- Subcategories:
  - Constitutional law: regulates the relationship between various branches of government and between the government and citizens, grants legal rights to citizens and civil liberties
  - Criminal law: establishes criminal offences and penalties for their infringement. State prosecute for committing a crime
  - Administrative law: regulates administrative activities of the government. This allows citizens to hold administrative bodies accountable for their actions
  - Taxation law: regulates administration and collection of tax

Private Law
- Concerned with the relationships between persons within the community. It is the laws that establish the rights and obligations of individuals when dealing with/interacting with others
- Subcategories:
  - Torts law: remedy for those harmed by acts or omissions of others – a 'tort' is a civil wrong other than a breach of contract e.g. trespass, negligence, defamation
  - Contract law: regulates agreements and promises – a 'contract' is a legally enforceable agreement
  - Property law: regulates property rights in things (personal property) and land (real property). Personal property includes intellectual property, real property includes land, mortgages
  - Company law: regulates establishment, management and dissolution of corporations

Criminal and Civil Law

Criminal Law
- Establishes criminal offences and the penalties for their infringement. Involves a dispute between the STATE and an individual
- Burden of proof is 'beyond reasonable doubt' → harder to prove than civil
- Procedural law involves a prosecution and a defence

Civil Law
- Involves a dispute between 2 or more individuals
- Burden of proof is on the basis of probability – if likelihood that the defendant is guilty of the accusation is more than 50% then judge will likely rule in favour of the plaintiff
- Both civil and criminal law CAN be enacted for the same reason e.g. OJ Simpson case

International Law and Domestic Law
- Domestic law: law that regulates persons within a particular jurisdiction e.g. a nation or a State
- International law is a set of rules that span beyond borders. Can be both private and public
- Public international law is a set of rules regulating the relationships between states. Sources – as no international government exists – include customs and treaties and conventions between states. These are technically not legally enforceable in Australia unless they are passed into legislation by the Parliament
- Public international law is administered by the UN, WTO and International Labour Front and more organisations
- Private international law is a set of rules that determine which states laws should be applied to resolve a dispute between people in different states

6 Purposes of Law

Resolving Disputes
- Law provides dispute resolution methods → legal rules are referred to in order to resolve disputes between parties, legal advice sought to aid this and litigation undertaken if dispute still unresolved

Maintaining Order
- Law keeps the peace, preventing social chaos and anarchy by establishing a clear set of standards with which everyone must comply

Reinforcing community values
- Law ensures that community values are preserved and applied equitably. It reinforces community values such as fairness and ensures they are respected by all members of the community

Helping the disadvantaged
- To ensure that resources and opportunities are fairly distributed within a community. It ensures that those who are unable to fend for themselves are not disadvantaged. It does this with tax brackets, welfare laws, anti-discrimination laws. Ensures justice.

Stabilising the economy
- Used by government to maintain growth and stability in the economy and ensure that the economy functions properly e.g. tax law impacts the amount of spending in the economy

Preventing misuse of power
- Seeks to protect the state from oppressing citizens by being consistent and transparent. Does so by complying with the rule of law.
- **Rule of law:** the principle that government authority must only be exercised in accordance with written, publicly disclosed laws that are made and enforced in accordance with established procedure. In this principle government should not be able to exercise power arbitrarily.

5 Reasons for Changing Law

Political Change
- Change of government i.e. from one political party to another.

Correcting Errors
- Laws are amended or varied to remedy any defects in incorrect interpretation from original intended effects of the law

Changing Values
- Laws reflect community values which change over time e.g. gender discrimination laws changed to allow women basic rights

Lobby groups
- Certain groups in a community can exert pressure on the government to change laws – these are called lobby groups and include unions, students, churches etc.

Changing technology
- Changing technologies – development of – can result in changes to the law in response to increasing complexity of technology e.g. traffic laws, internet laws
Standards of Law
- Law is expected to be certain – clear and concise rather than vague or ambiguous
- Law should be flexible and respond to changes
- Law should be accessible i.e. legal advice should be easily accessible
- Law is expected to be fair and good – there are extrinsic standards
- Jurisprudence: a branch of philosophy concerned with the nature of law and the branch of legal theory concerned with the philosophy of law. It is an effort to better understand the concept of law.
- Most recent debate in jurisprudence concerns the consistency of law with extrinsic standards like morality and justice. This debate is between natural law theorists and legal positivists

Natural Law Theory
- Natural law theory is the belief that there is an intimate and necessary relationship between the law and a set of objective standards external to the law itself.
- Standards include: laws of god and nature, principles of justice, moral values etc.
- Natural law theory philosophers believe that some things are universally and objectively fair and good and others are universally and objectively unfair or bad. They believe governments should create and administer laws that only correspond to these universal, unchanging standards
- If the laws are not consistent with these external standards then they are invalid and can be ignored.

Natural Law and Positive Law
- Natural Law is discovered by human reason and therefore positive law (laws made by government) must be reasonable
- Positive Law must be made in accordance with natural law
- Natural Law consists of 2 theories:
  1) extrinsic standards theory – standards against which law can be judges e.g. human rights – have ‘objective standing’ i.e. can be objectively true or false, such as murder which is objectively wrong
  2) natural theory of law – no division exists between law and extrinsic standards, the validity of legal rules relies on its compliance with extrinsic standards

Influences on Natural Law Theory
- Greek and Roman Philosophy
  - The Greeks recognized the existence of natural law and ‘natural justice and rights’, which could override positive law justice.
  - They saw natural law as existing everywhere and providing a standard against which legal justice could be judged
  - Romans saw positive law that was inconsistent with natural law as invalid
- Christian philosophy
  - Believed – Aquines – that all law comes from ‘eternal law’ – God’s law. Plan of the universe and known only to God
  - Eternal law understood by humans is natural law - necessity for good to be followed over evil
  - ‘Human law’ is natural law codified by government and must be consistent with natural law to be valid – all positive laws ultimately derived from natural law
  - Natural law discovered by human reason and all must comply with it
  - However even invalid positive laws must still be obeyed (unless inconsistent with the Bible) to preserve order
- Hobbes and Locke
  - Hobbes - natural law - set of rules according to which people who wish to survive and prosper must act to preserve their lives. It is discoverable by reason
  - Natural law can only prevail if everyone submits to the sovereign, but this results in sovereign becoming source of law, and morality can be lost in the sovereigns decisions need not be moral → beginnings of legal positivism
  - Locke argued - if the sovereign breached natural laws he could be overthrown
Finnis

- Problem with natural law is difficulty identifying exact extrinsic standards that are universal and objective
- To do so identified 7 intrinsically valuable basic goods and believed all were entitled to pursue those goods as long as in doing so they did not infringe on anyone else's ability to pursue them
- Positive law that is inconsistent with extrinsic standards is still valid but may be ignored by an individual if oppressive

Criticisms of Natural Law Theory

- If law has to be justified by naturals standards it can have different interpretations, universal objective truths aren't easy to find as everyone has different views on what is natural and what is not
- What is universally felt in one society may not be in another

Legal Positivism

- Legal Positivism is the belief that no necessary relationship exists between law and extrinsic standards – law needs to comply only with the intrinsic (legal) standards
- Focuses on what law is and not what it should be – law made by human institutions
- Validity of law dependent on legal source and if its been made in accordance with the sovereign power’s rules i.e. in Australia the constitution
- Acknowledges that extrinsic standards exist but laws do not have to be consistent with those standards to exist or to be valid

Views of Legal Positivists

- John Austin
  - Founder of legal positivism
  - Believed law was a command issued by a sovereign
  - Law has nothing to do with moral rules – law is commands by sovereign backed by a threat of sanctions
  - Sovereign still acting legally if not acting morally
- Hans Kelsen
  - Developed theory 'purified' of political and moral ideology
  - Law is a relation of condition and consequence: consequence follows act
  - The legal system - hierarchy of norms (what out to be): each norm is valid due to consistency with a superior norm e.g. speed limit sign is a norm dependant on consistency with traffic laws, which are only valid if are passed by state
  - Ultimate norm upon which all norms depend for validity is the Grund-norm which is assured as an initial hypothesis and provides validity for the legal system
- HLA Hart
  - Argued- no logical connection between law and coercion or law and morality
  - Austin and natural law oversimplified law – laws aren’t uniform and have different social functions
  - Distinctive features of law are its general application to ALL and the fact that it can also apply to the authority making the demand
  - Law cant be a command backed by threat of a sanction as not all commands backed by threat of sanction are laws – like robbery with gun
  - Laws aren’t always commands e.g. common law isn’t a command but usually sourced from custom
  - Sovereign doesn't have unlimited power – limited by constitution and court
  - Primary rules: rules of conduct, what one is obliged to do and consequences of breaches
  - Secondary rules allow for creation, extinction and alteration of primary rules
  - Foundations of legal system rely on adherence by legal officials to ultimate rule of recognition which provides criteria to test validity of primary and secondary
rules e.g. in Australia rule of recognition is compliance with laws made by parliaments and courts in accordance with the constitution

**Criticisms of Legal Positivism**
- May allow immoral laws to be created
- Can be disempowering to the people as puts trust in the procedure of law making and the law makers
- Legal positivism works well in a country that is moral and in a peaceful state \( \rightarrow \) law is law as long as it follows the correct procedure in being made and this process is clear, as is enforcement of these laws and legal system is transparent and clear
- Legal positivism breaks down when clarity and transparency are non existent. If there's a lack of transparency in the system and difficulty in challenging the system then legal positivism falls apart

**Relationship between Natural Law Theory and Legal Positivism**
1) Natural law theorists see this relationship as fluid: law is valid if it complies with extrinsic standards. Positive laws are only laws if they comply with natural law, otherwise invalid
2) Other natural law theorists believe: laws that don’t comply with natural law are still laws but natural law ought to be implemented. Though no obligatory relationship between positive law and extrinsic standards exists, devotion to natural law is recommended. Natural law is seen as superior and should be used to improve positive laws
3) Legal positivist reject existence of natural law or believe it can provide a useful guide for content of positive law- no role in determining validity of positive laws. THIS IS THE VIEW HELD BY MOST IN MODERN DAYS
   - In history natural law justified, particularly divine law.
   - Enlightenment came, thus shift to legal positivism occurred. Reason and objective truth became the focus of law making. Natural law fell out of favour
   - Natural law came back in 20th Century due to WW2 and Holocaust. German laws were used as defence for atrocities. Nuremberg Trials referenced natural law as reason why positive laws shouldn’t be followed due to human rights.
   - Since then natural law has had a greater influence

**Class Discussion Notes**
- Minorities: Unfair by laws but privileged minority make the laws for the majority
  - Democracy: majority chooses ruler - hence majority making decisions, but those chosen are a privileged minority that make laws that benefit their views
  - Media influences legal and political system by informing public and influencing their views
  - Most laws, even if their loopholes allow immoral acts e.g. tax avoidance, are made from a moral standpoint \( \rightarrow \) moral perspective and intention behind all laws.
  - Substantive quality \( \rightarrow \) different for every person, minorities have specific laws as they are in a different position to the majority and laws are to advantage them.
  - Circle sentencing – ATSI are sentenced by their community for crimes for which they have been found/pled guilty. Includes elders and those involved in the crime.

**Class 4**

**Sources of Law in Australia**
- 2 primary sources of law: legislation and case law
- Legislation most important: it overrides case law i.e. if there is inconsistency between statute and precedent, statue prevails. Can also amend or abolish precedent by passing legislation to do so.
- Legislation governs community life and courts refer to it more than precedent due to large number of statues passed
- Case law created when a court makes a decision on the basis of a novel legal rule principle; this rule must be followed by other courts
- Common law vital when there is no relevant statutory rule or when limits or interpretation unclear
- Courts decide whether legislation is constitutional i.e. whether parliament that passed the legislation had the authority to do so

Class 5

Common Law and Equity

- Common law and equity are the 2 important categories of case law
- Common law developed in England when royal judges administered the kings law, to create consistency from previous decisions in accordance with the doctrine of precedent in all of England localities. Led to a nationally consistent and authoritative set of rules being developed by the 14th century ➔ common law
- The courts that administered these rules were the common law courts
- Though at first proceedings in these courts could only commence by a writ of command by the king, soon standard writs were developed that did not require the authority of the king
- Courts were rigid and highly bureaucratic: often refused to hear cases due to small inconsistencies with compliance with the standard writ, and judges feared recognizing new forms of action that could be considered lawmaking - the role of the monarch, not the courts
- This led to the development of equity, which was much more flexible
- If unsuccessful in common law courts, went to the king, who delegated the responsibility of hearing claims to the Lord Chancellor, his chief advisor.
- The Chancellor- hear disputes and make decisions based on his own ideas of fairness and justice
- He soon established his own court that made decisions based on 'equity and good conscience' ➔ The Court of Chancery
- Judges in this court took into consideration their own past decisions in accordance with doctrine of precedent resulting in the development of a complex body of legal rules known as equity
- Equity had its disadvantages: no consistency of decisions, arbitrary, followed no precedent, decisions based on Chancellors judgment and no written law so the Chancellor could decide as he liked
- Developed equity principles that still hold today: equity follows common law, one who seeks equity must do equity, one who comes into equity must do so with clean hands, equity aids the vigilant and equity does not assist a volunteer
- Equity existed not independently but to supplement the common law but in the event of a conflict between equity and common law, equity would prevail
- Existence of 2 separate court systems in England caused confusion. Judicature Act of 1873 created- abolishes separate court systems and established a High Court of Justice which was to administer both common law and equity
- Today both common law and equity continue to exist in Australia as separate branches of case law and judges can choose to apply either common law or equity in particular situations
- Equity rules have to follow equitable maxims (specific equitable principles) that common law does not that are based on morality
- 2 main things equity contributed to the law:
  1) equitable remedies – final solutions to issues, mainly injunctions as common law can only compensate for a loss in monetary terms, equity can give an injunction i.e. a more flexible solution
  2) trusts – has a trustee and beneficiary, a trust is a creation of equity that gives the beneficiary an equitable right to property or money. Trustees have obligations to ensure fairness
- Equity, does not apply to all civil disputes and does not apply to criminal disputes
- Common law and equity differ in remedies they offer to litigants: only remedy available in common law is damages i.e. monetary compensation but in equity there are a range of alternatives when damages is not appropriate, such as injunctions. These remedies are discretionary - only granted if court considers common law remedies inadequate
- Common law courts set up first but due to writ system they became too rigid and technical, so people kept complaining to the king about them

The Doctrine of Precedent
- Each time judges make decisions they contribute to the growth of case law
- According to **doctrine of separation of powers** only legislature makes law, the judiciary only interprets the law and applies it to particular cases
- However, judges frequently encounter cases where there is no relevant legislation and must make a decision → consistency of these decisions is vital
- Doctrine of precedent (stare decisis) requires that a judge who has to decide a question of law and who knows that the question has already been considered by an earlier court must decide the question in the same was as was done previously.
- This ensures consistency and makes the law relatively predictable
- Based on notion that justice requires similar decisions be made in similar situations, and similar problems should have similar outcomes

Binding and Persuasive Precedents
- **Binding precedent**: a previous decision about a question of law that a judge must follow made by judges in superior courts and within the same court hierarchy e.g. District Court of Victoria must follow precedent of Victorian Court of Appeal but not Supreme Court of New South Wales
- All Australian judges, must follow the decisions made by the HCA
- Courts not obliged to follow their own earlier decisions, but often do so for the sake of consistency and fairness
- However, in a case heard by a single judge the judge must follow the decisions made by that court so long as the decision was made by a Full Court. A Full Court, however, does not have to follow a decision made by a single judge nor itself.
- **Persuasive precedent**: a previous decision about a question of law that a judge may follow but does not have to follow
- A decision by a Full Court is more persuasive than one by a single judge
- Joint judgment more persuasive than individual judgment, majority judgments more persuasive then a dissenting judgment and unanimous judgment most persuasive of all

Distinguishing and Rejecting Precedent
- Judge obliged to follow precedent only if material facts of earlier case are the same or similar to the material facts of the case before the court
- Must determine whether the differences between the present and previous case are sufficient to justify deviating from the precedent
- If judge decides to deviate from the precedent this is known as **distinguishing the precedent** → during a trial each party presents arguments as to which precedents (binding or persuasive) are most appropriate to follow in the case
- It is this ability of a judge to distinguish a precedent that enables the common law to grow and change → rules that find favour with the courts can be applied to an expanding range of situations and those no longer relevant to contemporary circumstances can be limited to particular situations through distinguishing
- Judges also have ability to **overrule or reject** a previous decision about a question of law, provided the precedent was established by a court at the same level or lower within the relevant court hierarchy
- If earlier decision overruled it is still binding on the parties of that particular dispute but it is no longer a precedent that must be followed by other courts