

# Legal prelim course study notes essay



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Customs Customs are established patterns of behavior among people in a society group.

Customary law refers to established patterns of behavior that are accepted within a particular social or commercial setting and that are of sufficient importance to be enforced. Rules Generally refer to prescribed directions of conduct. (What is allowed and what is prohibited). Example: There may not be a law about wearing school uniform, but there is often a rule.

Laws There are several reasons why we need laws: Laws regulate society by telling us what we can do and when we can do it. 3. Pm sock out of pubs and clubs in the CB) Enforce values that society considers to be important. (Laws to protect private property) Provides a venue for finding a resolution.

When rights have been violated, the law provides a means of enforcing rights and gaining compensation. Values & Ethics The values that society holds are a reflection of the things that are considered important. These values are often reflected in the law. For example, our society values the concept of private property and for this reason there are many laws designed to protect property.

Ethics are defined as those things that a society considers to be right or wrong.

For example, If we find a wallet in the park with \$200 in it and take the wallet to the police station, you are acting ethically. Just Law It is equal. A just law is one that treats everyone the same. Applying the law equally, however, does not mean that the outcome of the law will necessarily be

equal. ' John is a pensioner living on \$180 a week and Sarah is an executive who earns \$2200 a week.

Both Sarah and John are fined \$180 for speeding. The fine is the same but the impact will be very different for both John and Sarah' Based on widely held values.

It is utilitarian, meaning it ensures that the actions achieve the greatest good for the greatest number of people. It aims to redress inequalities.

Resolve disputes as soon as possible and practical. It must not be retrospective. The law must be made for the future or now. Retrospective means laws that are backward-looking. Laws must be known before they can be enforced.

Changes to laws are also advertised through media, especially School zones  
Double Demerits No mobile phone while driving Nature of Justice: Equality  
Justice requires laws that do not discriminate and that are applied equally to all people.

The enforcement of the law must also be equal. Fairness Fairness is another feature of Justice. Key factors associated with fairness include ensuring the law does not have a particular harsh effect on an individual. Access  
Individuals must have an ability to access the law in order for Justice to be achieved.

They should have access to legal information and assistance and be able to understand the law. Physical access: That is where the courts and legal aid

offices are located Procedural Fairness (Principles of Nature) Refers to the idea that there must be fairness in the processes that resolve disputes.

It is closely linked to the concept of natural Justice. Two main principals of Natural Justice the right to be heard he right to have a decision made by an unbiased decision maker Rule of Law (Key Features) The principal that no one is above the law.

An independent Judiciary. The court should not be influenced by the parliament. Controls placed on enforcement agencies, such as the police, to ensure that they don't abuse power The accused should not be forced to incriminate themselves The legal defense for the accused must be free to operate without interference from the prosecution.

The accused must be informed of the allegations made against them

Criminal laws must never be retrospective(based on precedence)

Governments re bound by a constitution Human rights, particularly those relegating freedom of association, speech and religion are protected Anarchy Means not having laws to control and regulate the behavior of members of society Tyranny Means, ruled by a single leader holding absolute power in a state. (Sadder Hussein's rule in Iraq prior to 2003) 1788 Britain brought its laws to Australia, Known as common law.

Australian law has evolved from both common law and statue law.

Court made law Common law: law made by courts. Decisions made by Judges. (Law common to England) Statute law: law made by parliament

Adversarial System A system of resolving legal conflicts used in common law

countries such as England and Australia, which relies on the skill of representatives for each side who presents their cases to an impartial (fair) decision maker.

An impartial Judge (and sometimes a jury) will listen to the evidence presented by both parties and make a decision as to which side has proved their case, and thus disproved the other side's case. Inquisitorial System A legal system where the court or a part of the court (e. . The Judges) is actively involved in conducting the trial and determining what questions to ask.

It is used in some countries with civil legal systems as opposed to common law systems. Equity The body of law that supplements the common law and corrects injustices by Judging each case on its merits and applying principals of fairness. (The quality of being fair and impartial) Courts of Equity Decide what should be done in a particular situation by moral principles. Precedent and Persuasive A Judgment that is authority for a legal principal, and serves to provide guidance for deciding cases that have similar facts.

Persuasive precedent may influence a decision, but a court is not bound to follow it.

For example, a decision made by the House of Lords in Britain may be quoted in a case but is not legally binding. Stare Decides A Latin term meaning the decision stands'. This decision must be followed by all lower courts. Making and following precedent When there had been no previous decision to provide guidance for deciding a case, a court must use principles

of the existing common law and statute law to make its decisions. The Judges will also pay attention to social developments and common sense.

This new decision creates precedent.

When a Judge gives a decision in a case, it usually is made up of two parts 1. Ratio decidendi – the essential legal reason why a judge came to a particular decision 2. Obiter dicta – other statements made by judges, such as their personal opinions. These create no immediate precedent, but can be used much later to justify a precedent. Jurisdiction The powers of a court, depending on its geographic area, the type of matters that it can decide, and the type of remedy that it can award.

Court hierarchy Australia has two overlapping jurisdictions of law: state and federal All courts have the power to hear a case for the first time.

Some courts can hear appeals from lower courts In criminal cases, minor offences such as loitering and obstructing traffic are called summary offences (dealt with the lower courts e. G. The local court) More serious criminal offences, such as assault and murder are called indictable offences (dealt with higher courts e. G. District or high court) Lower Courts (inferior courts) Local court and magistrate's court (both the same) In this court a magistrate will hear and decide the case, and will set the punishment for criminal offences Most criminal matters are heard in the local courts as only very serious crimes are referred to the district or supreme courts In the case of indictable offences, the magistrate will listen to an outline of the evidence to determine whether the prosecution has a strong enough case to be able to try the defendant in the district court or Supreme Court.

This preliminary hearing is called a committal hearing. Local court deals with the following areas: Minor criminal and summary offences Civil matters with the monetary value of up to \$100 000 Committal hearings A limited range of family law matters, such as property settlements and residence orders for children. In this area the local court has federal Jurisdiction. Intermediate Courts The district court of NEWS

Include criminal matters from charges of larceny (stealing of another person's property) to manslaughter Civil claims between \$100 001 – \$750 000 If both parties agree, the court can deal with larger amounts of money It has an appellate Jurisdiction (the ability or power of a court to hear appeals of the decisions from the lower courts and to reject, affirm or modify those decisions. Superior Courts Deals with the most serious indictable offences It hears appeals from the lower courts (last court of appeal) Corporations law (legislation that regulates corporations and the securities and futures industry in

Australia.

ASIA) Statute Law parliament has the power to make statute law. This means the state; territory and federal governments all have rights to make laws. Parliamentary Structure Bicameral (meaning they have two houses) an upper house and a lower house. At the federal level the two houses are the senate (upper house) and the House of Representatives (the lower house) Above the two houses is the position of the Governor-General Parliament is elected for a maximum term of three years. However the government

elected has the right to call an election at any time. The House of Representatives

Has 150 members, with each member representing an electorate Key role is to make new laws and amend existing ones.

When a piece of legislation is first introduced to the House of Reps it is known as a bill. If it passes through it becomes an Act of Parliament The Senate Also known as the States House Reviews legislation There can be a minority in the senate The senate has equal law making powers The senate can request that the House of Reps should make changes to a bill. The Governor-General Representative of the Queen The power to appoint a PM when there is a hung Parliament Power to dismiss a PM Legislative Process .

The initial formation of the Bill – 1st reading 2. 2nd reading 3. Committee stage 4.

3rd reading 5. The upper house Delegated Legislation Is legislation that is made by bodies inferior to the Parliament. These bodies can include government departments and local councils and they are authorized to make legislation by an Act of Parliament. There are three main types: 1 .

Regulations: Delegated legislation made by the Governor-General, state Governors or members of the executive council 2. Rules: Made for government departments, usually by the departments 3. By-laws: In accordance with the local council.

This act allows local councils to make laws that apply within the boundaries of the local government area.

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A constitution can be defined as a document that outlines the rules for the governing body of a nation. It is a written statement outlining the basic laws or principals by which a country or organization is governed (1901). Division of Powers Dividing powers between federal and state authorities Exclusive Powers: Powers that are granted only to the commonwealth Parliament. The main categories are trade, foreign relations and defense Residual Powers: Powers that states retained after federation.

Areas include health, transport, education and law and order. It is for this reason there is so much diversity between states on various issues such as criminal law, traffic regulations and educational policies.

Concurrent Powers: Powers that are shared between the commonwealth and the state governments. There are many areas of government where both levels have authority. For example in relation to health care, the state government have the responsibility of running hospitals, ambulances services etc, but the commonwealth is responsible for raising health care funding through the running of Medicare system.

University for the commonwealth and schools for the state) Separation of Powers The Parliament The Commonwealth executive Known as the Government (Governor General, PM and Ministers) The Courts The aim of the separation of powers is to ensure that authority is evenly distributed ensure that there is no abuse of power and that constitutional authority is not exceeded. The Role of the High Court 3 main aims 1 . To protect the constitution by ensuring that governments act within their constitutional power 2.

To exercise its original Jurisdiction(only for cases first heard in the high court)

3. To act as the final court of appeal.

It can hear any appeal from the state supreme courts or from the federal court. Aboriginal and Torres Strait Islander People's Customary Law One of the key differences between Aboriginal and Torres Strait Islanders customary law and the European legal tradition lies in the area of land ownership. One of the main principals of European law is the right to possess and own property, and in particular land.

In Aboriginal and Torres Strait Islander people's customary law, land is sacred and is collectively owned. Family & Kinship Kinship is the reference to family relationships and extended family ties.

Kinship is n essential feature of indigenous Australian societies and communities. Customary Laws: Principals and procedures that have developed through general usage according to the customs of a people or nation. Terra nullus: ' Land belong to no one' the idea that when the first Europeans came to Australia the land was owned by no one and thus was open to settlement.

It has been Judged legally invalid Spiritual basis, significance of the land and water The Aboriginals and the Torres Strait Islanders have a great relationship with the land and water through there customs.

Thus the lost of land that belongs to them means they are losing the groups culture and history. These are not owned by individuals, but are cared for by the group under customary law. Ritual: a regular and stereotyped behavior

Oral Law: a legal system in which laws are not written down but passed down from generation by word of mouth  
Mediation: a form of alternative dispute resolution to help two or more parties, in the presence of a neutral third party, to reach an agreement.

Elders: older men and women of recognized wisdom and authority, who are the keepers of traditional knowledge within indigenous communities.

They are responsible for such things like handing down punishments when community law is broken. The relevance of customary law today  
Many aspects of customary law can be seen embodied in Australian law today. The practice of sustainable development for example is the basis for current environmental law.

Conciliation and mediation are increasingly used to resolve disputes in criminal, consumer and employment law.  
Mitigation: making the severity of an offence or a sentence milder or less severe. For example: If there is evidence of a crime being provoked the accused may be submitted in mitigation of a sentence  
Domestic Law

Each country has laws for its own people, known as domestic law. A defined territory  
A permanent population  
An effective government  
The capacity to enter into international negotiations  
the power to enforce these rules  
(Australia is a national sovereignty)  
The term state can refer to a political division within a federation. E. G.

NEWS and Tasmania  
International Law  
International law is the body of law that governs the relationship between nations. Without international law,

nations would be unable to participate in trade and commerce and there would be greater likelihood of conflict between nations.

Differences between domestic and international law Australian Domestic Law

Application: Applies only to those nations who agree to be bound by the law

Application: Is universal, meaning it applies to everyone Enforcement:

Complex legal tribunals exist but countries are permitted to exempt

themselves from cases Enforcement: Law enforcement agencies exist, such

as the police, to enforce the law Creation: Made through negotiations

between nations Creation: Made by parliament or the rulings of Judges

Treaties & declarations Treaties are the most common used source of international law.

A treaty is an International agreement concluded between states in written form and governed by the guidelines of international law. Treaties can either be: Bilateral: Between two nations.

E. G. The treaty Australian has with Papua New Guiana, giving aid.

Multilateral: Between many countries. E. G.

The UN which offers aid to countries in need. Over 20 countries have signed up to the UN treaty.

International Customary Law Based on long established traditions or common practices followed by many states and countries of the world. ( fair and right by the international community) It is not noninsured law until the states accept that the practice is binding upon them.

This is called opinion Jurist General Assembly The main body of the United Nations, made up of the entire member states (194 members) United Nations The united nation is the chief organization involved in international law.

The United Nations has 192 members and has its headquarters in New York It encourages human rights, has reduced disease and hunger on a global scale and has established the legal framework for the prosecution of international crimes Security Council It consists of 5 people from the UK, US, Russia, China and France (countries victorious in the Second World War) Intergovernmental Organizations Organized groups of states, established to pursue mutual interests in a wide variety of areas. E. G.

Greenback. Many 'GO's are additional agencies of the I-JNI.

No's Are associations based on common interests and aims which have no connection with any government. They contribute to a wide variety of areas from world peace to disaster relief. E.

G. Amnesty International. It stops violence against women, defends rights, abolishes death sentences, free prisoners of conscience and protects the rights of people. Relevance of International law to Australian law

International law does not dictate the way in which Australia implements the obligations under treaties. The preferred method of giving effect to most treaty provisions is to make it domestic legislation.

Public Law & Private Law Public: The body of law governing relationships between individuals and the state, and the structure and operation of government itself (e.

G. Criminal, administrative, and constitutional law) Private: The body of law governing relationships between individuals (e. G. Contract law, torts, family law and property law) Criminal law Criminal law is the body of rules under which certain acts or omissions are punished by the state. Its function is to maintain public safety and order for the whole society.

The state has this as an offence is seen as being against the whole community even if only one individual is affected.

Administrative law Deals with government powers and decisions made by government bodies E. G. A tax payer can challenge his or her tax assessment under administrative law, on certain specific grounds There are three ways a person can seek a review Internal review: occurs when a decision is made by a member of the agency External review: review by a person or body outside the agency that made the decision Judicial review: provided by courts, to see if the decision was lawfully, fairly and rationally made.

Constitutional law Branch of public law Focuses on the rules governing the executive, legislative and Judicial functions of the government. Cases are heard by one or more Judges Decisions are not given at the end of the hearing, they are delivered after much deliberation Each Justice makes their decision on the case Civil Jurisdiction: the power of a court to hear matters involving disputes between private individuals, and to award civil remedies. Contract law It is an agreement between two or more parties that is recognized by the law.

If one of the parties believes the contract has been breached he can bring legal action to the civil court. Plaintiff: the person who initiates a civil action  
Injunction: a court order requiring an individual or organization to perform or more commonly not to perform a particular action  
Specific performance: an order perform  
Tort law  
Torts are ‘civil wrongs’. Tort cases deal with situations in which someone has done something to interfere with the rights of someone else. There are many different types of torts  
Negligence  
Nuisance  
Trespass  
False imprisonment  
Defamation  
Property law

Governs relations involving things and interests that can be owned and that have commercial value. Tangible goods such as a block and land and intangible goods such as shares.

Intellectual property: intangible property that has commercial value. E. G. Computer programs and shares.  
Criminal and civil court procedures  
Onus: the burden or duty of proving the case to the court  
Standard of proof: the degree or level of proof required in order for the plaintiff or prosecution to prove their case  
Beyond reasonable doubt: the standard of proof required in a criminal case in order for the prosecution to obtain a conviction against he accused.