CIVIL PROCEDURE AND ARBITRATION
WEEKLY/FINAL EXAM NOTES

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WEEK #1:
THE ADVERSARIAL SYSTEM

JURISPRUDENTIAL VIEW

As per Jeremy Bentham, who formed the utilitarianism view, proposed justice has two ends, a direct end – for a judge to reach the correct (accurate/procedural fairness) decision, and the subordinate end – to do so without undue delay and frustration. This also entails misdecision – an incorrect decision made, failure of justice – no decision being made, sacrifice of rights – settlement or compromise. This philosophy underpins our present procedure and reflects the current tension that faces the procedures of civil law.

As per John Rawls, he proposed the view of pure procedural justice – heads or tails, alongside perfect procedural justice – a set of rules that, if followed, guarantee correct outcome (a slow discovery). He also formed the view of imperfect procedural justice – rules designed to, but cannot' guarantee procedural fairness. 'We need swift justice, but that's often at the expense of the right decision.'

The **rules of the court** are an important source of civil procedure but are not a code and they compliment the inherent jurisdiction of the court. The **inherent jurisdiction** enables superior courts to make orders to regulate the administration of justice to prevent abuse of processes. The inherent jurisdiction entails a doctrine of the English common law that a superior court has the jurisdiction to have any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal. **This jurisdiction extends to matters necessary for the administration of justice, including the power to prevent abuse of process and to punish for contempt – *Grassby v The Queen* (1989).** Courts created by statute, including all federal courts, do not have inherent jurisdiction, but only those powers expressly or implicitly conferred by statute or which are incidental or necessary to the exercise of their jurisdiction – ***Jackson v Stirling Industries Ltd* (1987).**

As per Dockray, the old power which the supreme court inherited on creation, the powers the court has by virtue of being a court. In the case of ***Connelly v DPP,*** per **Lord Morris,** 'there can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within' such jurisdiction.'

Common law system – court decisions: this normally entails a formal procedure:
1) Commence proceedings (claim).
2) Defence.
3) Discovery/document production (courts are beginning to dislike this).
4) Evidence.
5) Trial.
6) Judgment.
7) Enforcement.

Common types of ADR: this also follows a formal procedure, and is not determined by the following order:
1) Negotiation.
2) Mediation.
3) Arbitration.
4) Expert determination.
5) Mini-trial.
6) Dispute review boards.
7) Referees.

Some advantages of ADR procedures include – confidentiality, cost effective, time effective, informal, relationship conservation, enforceability, flexibility of outcomes. Some disadvantages of ADR include –

can be a waste of time, delay tactic, not appropriate in all areas, not always cost-saving, and precedent does not apply. This is problematic with issues that need to go to court for public interest/to be determined in line with precedent.

ADVERSARIAL VS INQUISITORIAL

Adversarial system: only 25% of the world operates under a common law legal system. This entails discovery, predictability, costly process, and is inaccessible. It has likely to have stemmed from the Magna Carta providing a right to be judged by peers. The general system of litigation is common law jurisdiction. The term adversarial does not have a precise meaning, as there are often elements of both adversarial and non-adversarial systems in Australia, for instance, judges intervene a lot more now in cases, moving away from the adversarial system. Determination of legal disputes according to individual circumstances and legal principles, the law is found in precedent and legislation, and includes a process of inductive reasoning. The consequence is always the same, win or lose! Some advantages of the adversarial system include, the truth can be exposed (cross examination), party control of litigation, delays/expenditures ensure accurate results, and the adversarial system has an impact.

Inquisitorial system: this system is much faster, but also has the highest rates of appeals, less expensive, less reliance on legal representation, more emphasis on written arguments, no reasoning for judicial decisions, courts investigate as parties have invoked it's inherent jurisdiction, predetermined legal principles (no inherent jurisdiction), deductive legal reasoning, and more judicial activism.

MANAGERIAL JUDGING

In the present day, judges are no longer passive but active in investigating the best way to resolve disputes. Judith Resnik opined 'judges are not only adjudicating the merits of the issues.' Some models of management include:

1. Individual case management – a docket system whereby judges know the history of the case/judges can form bias, and also may be drawn from an expert panel.

2. Master lists – cases do not go to trial until they are ready, as this can be a quicker process, and that judges know procedure in that list will be efficient and consistent.

3. Differential case management – mixture of the two aforementioned.

4. Electronic case management – electronic filling.

Some advantages of managerial judging include reducing criticism of perceived inefficiency, and that it speeds up the process. Some potential issues of managerial judging include, apprehended bias in judge managing cases, the court becomes a place to have your case managed, or dispute settled, and not your rights enforced, no precedent, no appeal, not public, using judicial gravitas without public scrutiny.