**Parliament, courts, lawmaking process, statute and common law.**

Rules: the principle or regulation governing conduct, action, and procedure etc. and are a vital basis of a functioning society.

Laws: the formal rules consciously determined by society and are enforceable by the courts.

Power: is used to enforce all of these laws, which is an important attribute of government. In a democracy, power is limited by constitutional law and conventions. Power is separated, checked and balanced. The rule of law limits the use of power. It can only be used in accordance with the law. Ultimately, the laws govern the behaviour and actions of all members of society.

Jurisdiction: where the law speaks/has official power – there are two types of jurisdictions: geographical and legal.

Geographical jurisdiction: Refers to the land and sea areas over which laws apply Australia is a federal system which means the division of powers defines the geographical jurisdiction of law making i.e. exclusive, concurrent & residual powers.

Legal jurisdiction: the area of law that is covered i.e. family law, trade law, criminal laws. A court hierarchy is used to delegate cases between the courts to the right legal jurisdiction e.g. murder is tried in the Supreme Court.

Characteristics of law:

* Applicable to the population
* Applicable to a geographical jurisdiction
* Applicable all the time
* Backed by sanctions that re decided by the legislative branch, enforced by the executive branch and adjudicated by the judicial branch.

4 types of laws:

* Statute law made by parliament.
* Common law made by courts.
* Delegated legislation (also called legislation, ordinances and instruments), made by subordinate authorities.
* Constitutional law.

**Constitutional law:**

Constitutional Law: Fundamental/superior law. The Commonwealth Constitution establishes and limits the law-making power of the federal branches of government. The High Court of Australia:

* Interprets and applies the constitution.
* Establishes jurisdiction.
* Specifies the processes of government- eg how it is formed.
* Protects fundamental rights. Codifies procedures to change the constitution.

Constitutions are above and beyond parliaments and courts. Therefore the circumstances for the creation of and amendments to constitutional law are very strict.

The Commonwealth Constitution: draws its authority from three sources of authority and these are stated in its preamble is an introductory statement to a document. The Commonwealth Constitution draws its authority from:

* The People
* Almighty God
* The Crown

**Statute law:**

Statute law: Law made by parliaments. These are called Acts of Parliament. Bills must pass through both houses of the Commonwealth parliament and be given royal assent before becoming law.

Statutes are superior to common law: If the two types of law conflict, statute law will always override common law.

Why?

1. Parliament is the primary legislative branch.
2. Parliament has democratic authority – it is elected & representative.

Functions of parliament:

* Law making
* Representative role
* Debate role
* Responsibility role

How does a bill become a law?

Bill must pass through both houses in Parliament. If the bill changes in the second house, it must go through the house of origin again.

**When a bill is ‘blocked’:** If the 2 houses cannot agree on a bill, it is said to have been ‘blocked’. Senate blocks more bills than the HoR because most bills start in the lower house + Senate is house of review. The Constitution contains a mechanism to resolve a deadlock in Parliament when the 2 houses cant agree on legislation.

**Procedure to resolve a deadlock in parliament between HoR and Senate:** Can be frustrating to introduce legislation in HoR but be knocked back by opposition in Senate. PM advises GG that the 2 houses will be dissolved and an election called. If following the election, the legislation still cant be passed, they have a joint sitting of the 2 houses. Eg. Malcolm Turnbull double dissolution in 2016 over industry legislation reforms- ABCC bills.

Any member of Parliament (MP) may introduce a bill. Government bills are guaranteed passage through the HoR- this is where government is formed + has the majority. Government can rely on its MP’s to vote in favour of motions to pass the bills in HoR. This is called ‘executive dominance’

**Non-government bills are called Private Member Bills (PMBs):** Usually do not progress past the first reading because the government uses its numbers to vote them down. Used to draw attention to issues- then government may make their own legislation. Eg. Recent amendments to Marriage Act 1961 were a result of legislation introduced by a private Senators bill in WA

Majority of bills are dealt with by the parliament in an efficient manner with little or no media reporting. However, government legislation that is opposed by the Opposition often leads to debate. Usually much more debate and compromise in the upper house because the government doesn’t usually have control here. Heavy debate between MPs and ministers, crossbenchers and the opposition members

Legislative process:



What are the aims of statute law?

1. Implement policy proposed by the executive branch of government
2. Authorise spending by the executive branch of government
3. Amend existing laws
4. Repeal existing laws
5. Consolidate law by combining several old statutes into one in order to simplify or update the law
6. Respond to court decisions and judge made common law by:

* Overriding judge made law
* Codifying (reinforcing) judge made law by elevating common law to the status of a statute

Where does statute law gets its authority from? Democratic and constitutional authority.

Parliament is comprised of elected representatives who make laws. Parliament expresses the will of the people who have delegated and entrusted their representatives with power for a period of time. They have the stamp of democratic legitimacy.

Constitutional authority: The Constitution creates a parliament of 3 key parts

1. A bicameral parliament (HOR + Senate) who must both pass a bill in identical fashion before it can proceed
2. A monarch represented by the GG who must give assent before a bill can become a law
3. There is also a ‘division of powers’ – the CW Parliament may only make laws under their ‘heads of powers’ i.e. exclusive powers, residual powers, concurrent powers.



**Court hierarchy:**

Example of judicial power:

In 2017/18 there was a case in the High Court where people disputed section 44 of the constitution- dual citizenship. This section said that any person who “is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power...” is disqualified from being a member of parliament. This meant politicians with dual citizenship could not be elected to parliament. This was a good example of judicial power and rule of law.

The highest court in Australia is the High Court: Its jurisdiction includes:

1. Constitutional disputes – primary role (must hear these disputes)
2. Hearing appeals from the state and territory Supreme courts or Federal courts (not required to hear appeal cases)

Reasons to split into a hierarchy:

* Importance - allows cases to be split up depending in seriousness.
* Consistency - Lower courts have to follow what the higher courts decide so it creates consistency across courts.
* Appeals - Decisions of courts can be appealed by a higher court if there has been an issue for example with the trial.

Criminal law: Actions regarded as anti-social and dangerous to the community. Such actions are prohibited by statutes and prosecuted and punished by government. Examples of criminal laws include. Murder, robbery, drink driving, trespass.

Civil law: The body of law that regulates the ordinary private relationships in a community. These disputes can be adjudicated by civil courts. Examples of civil laws include divorce, contract disputes, property boundaries, defamation.

Summary offence: A simple or minor criminal offence, heard through a criminal summons in the Magistrates Court. E.g. drunk and disorderly & traffic offences.

Indictable offence: A serious criminal offence that is heard in the District or Supreme Court. These are generally heard by a judge and jury.

Federal courts: Deals with disputes of a federal level. Taxation, trade practices, native title, intellectual property, industrial relations, immigration and bankruptcy.

Magistrate’s Court: deals with adults, aged 18 or over, required to appear in court after being charged with a criminal offence. Some criminal offences are known as 'simple offences' and will be dealt with in the Magistrates Court.

District Court: The District Court deals with serious criminal offences including serious assaults, sexual assaults, serious fraud and commercial theft, burglary and drug offences. The District Court also determines civil claims up to $750,000 and has unlimited jurisdiction in claims for damages for personal injury.

Supreme Court: The highest state court in the Australian State of Western Australia. It has unlimited jurisdiction within the state in civil matters, and hears the most serious criminal matters.

**The court as lawmakers:**

The Judiciary: the third branch of government is an essential element of the separation of powers, as well as the rule of law. What the judiciary does:

* Checks and balances the parliament through interpreting statute law. The High Court also interprets constitutional law
* Checks and balances the executive by ruling on the lawfulness of government administration and policy
* Also creates its own form of law, common law
* Make legally binding decisions to resolve disputes about the meaning of law

The courts: The main institutions of the judiciary. Courts are places where judges and magistrates hear cases. Their primary role is to hear disputes about the law and resolve them.

Common law: In each case the judges record their reasons for their decisions; this is referred to as their judgement. Law that judges create is called common law, case law or judge-made law.

Declaring the law: When a judgement is made by a judge, they are ’declaring the law’. Declaring the law can change a law without changing its wording. Future disputes can be resolved easily because there is now legal clarity- the once confusing written law, is now clearer.

Parliamentary statutes:

* Binding on the whole community.
* Parliament is the ultimate law making authority.
* Covers broad areas of law or policy.
* Parliament often puts principles in broad terms.

Court decisions:

* Directly affects only parties to the dispute.
* Courts are subordinate to parliament (except High Court Constitutional decisions).
* Judgements cover only those matters relevant to that case.
* Courts have to decide details of application.

Resolving Conflict: Parliamentary resolve conflict ‘in futuro’ – by predicting future cases of conflict and setting up ways of dealing with them. Courts act ‘ex post facto’ – settling a dispute after it has arisen.

Checks and balances:

* Parliament may delegate power to make laws to another authority (delegated legislation) but always reserves the right to hold the delegated authority accountable.
* Courts check that both parliaments and delegated authorities do not act ‘ultra vires’ which means exceed their powers. Courts cannot delegate their powers, but parliament may be able to do this for them (i.e create a tribunal.)

We expect courts and judges to be:

* Independent and not swayed by community (or parliamentary) pressures – the independence of the judiciary is seen as one of the hallmarks of a democratic society
* Authoritative and consistent (decisions based on established authorities and legal traditions) and subject to appeal when this is in doubt
* Equitable (recognize and individual or groups right to due process and a fair trial)

Judicial power: Courts resolve disputes between parties, discover the truth, interpret and declare the law in a case. Interpreting the law is called adjudication. Court decisions are legally binding.

Legal jurisdiction:

* Different courts have jurisdiction over different types of law
* Eg. High Court has jurisdiction in cases involving constitutional law
* Eg. Supreme Court of WA has jurisdiction over more serious civil and criminal cases

**Common law:**

Common law:

* Judge-made law
* They interpret statute laws in a dispute and arrive at a decision
* This decision becomes known as common law and is applied to this case
* This forms the basis of precedent

How does Common Law work? Common law requires the following elements to operate:

1. an overarching principle that underpins the entire system
2. a doctrine that is applied by courts in every case
3. a court hierarchy within which these operate

1. The overarching principle- Stare Decisis:

Stare decisis is Latin for. ‘To stand on what has been decided’. This is the basis of the doctrine of precedent that judges should abide by past judgements. Stare decisis ensures that judicial decisions are similar for similar circumstances. Stare decisis results in fairness, predictability, consistency, but also flexibility if a court is convinced that no similar case exists. The new judgement becomes part of case law. This flexibility also allows the law to adapt to new circumstances.

3 Rules of Stare Decisis

1. Precedents are exclusively set by superior courts
2. All lower courts are bound by the decisions of higher courts in the same hierarchy
3. Decisions by courts at the same level are not binding

2. The Doctrine of Precedent:

A judge made decision that stands as an example/guide for future decisions in cases of similar factual circumstances. All court decisions are put in writing and published in law reports. Lawyers and judges are trained to know important past decisions and where to find them in law reports.

**Ratio decidendi:** Latin for ‘reason for deciding’. Judges must explain their judicial reasoning – this enhances the openness and transparency of the court proceedings. The Ratio is the reason/core principles underlying a court judgement and is the critical component of precedent. The judge must decide if the reasoning of a past case applies – if it does then stare decisis applies. If not, the judge can create a new ratio decidendi. All judgements contain both a ratio decidendi and an obiter dictum.

**Obiter dicta:** Latin for ‘sayings by the way’ – judges comments on other cases to illustrate and clarify their judgements. The obiter is not binding, but may influence subsequent decisions.

**Difference between Stare Decisis and Precedent?** Precedent is a legal principle or rule that is created by a court decision. This decision becomes an example, or authority, for judges deciding similar issues later. Stare decisis is the doctrine that obligates courts to look to precedent when making their decisions.

3. A court hierarchy within these operate:

Depending at what level a court is will determine how a precedent applies.

**A binding precedent** is a decision of a higher court that must be followed by a lower court in the same hierarchy.

**A persuasive precedent** is a precedent that may be used by a court in reaching a judgment but they are not bound to follow it. Courts at the same level are not required to follow the precedent, but may be influenced by it.

**If no precedent exists:** courts are allowed to look at similar case law in other countries or jurisdictions to assist them with their findings.

**Parties to cases who are unhappy with a decision:** can appeal to a higher court.

Duty of care: In law, a duty of care is a legal obligation which is imposed on an individual, requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. It’s moral or legal obligation to ensure the safety or well-being of others.

Negligence: the failure to meet a standard of behavior established to protect society against unreasonable risk. It is a failure to take proper care over something/someone. It’s founded on 3 concepts:

* A duty of care is owed/required.
* There is a breach of duty of care.
* Damage is suffered by the plaintiff as a result of the breach of duty of care.

What is ‘caveat emptor’? Latin for ‘Let the buyer beware’. It warns purchasers of goods that they should check products for themselves that they intend to purchase. Until Donoghue v Stevenson the common law reflected the importance of encouraging & protecting businesses – therefore operating in favour or manufactures.

Donoghue v Stevenson (1932) Case Overview: Mrs Donoghue and a friend visited a café in Scotland. Her friend ordered her a ginger beer. Mrs Donoghue drank half the bottle, then poured the remainder over her ice cream. This resulted in a decomposing snail falling out of the bottle. Mrs Donoghue developed severe gastro and shock from the experience and she sued the manufacturer. The defence claimed that they owed no duty of care to Mrs Donoghue because there was no direct relationship between them & that ‘caveat emptor’ should apply to protect the business- friend bought drink.

**The Privy Council’s, Britain’s highest court, ratio decidendi (explained decision):**

The majority found that the manufacturer (Stevenson) owed a duty of care to the final consumer of its product therefore creating a new precedent. Lord Aitken on the Privy Council: deemed the existing case law as unjust and no longer reflected community values and expectations. “you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. This is now known as the ’neighbour principle’”.

‘love thy neighbour’

Should be the basis of our duty of care of others.

**Duty of Care:**

* The manufacturer owed the consumer of the product a legal duty of care
* The acts complained of by the accuser (Donoghue) were a breach of that duty of care
* The damage alleged to have been caused by the breach of the duty of care was reasonably foreseeable and not too difficult to avoid

Grant v Australian Knitting Mills (1936): Mr Grant purchased underwear manufactured by Australian Knitting Mills. He soon developed dermatitis & sued Australian Knitting Mills for breaching their duty of care to him as the purchaser of their product. The High Court of Australia applied the Donoghue v Stephenson principles to this case. Australian Knitting Mills appealed to the Privy Council; however they upheld the High Court decision = common law precedent of negligence applied in Australia.

Mabo 1992: Landmark Australian Common Law precedent and an example of a superior appeals court overruling an outdated precedent.

**What is ‘terra nullius’?** Belonging to no one/ vacant land.

The legal principle applied to Australia at the time of British settlement that allowed land to be granted to settlers without the need to acknowledge any pre-existing property rights of the Indigenous Australians. It meant that no compensation was required and no need for a treaty.

**When was terra nullius created?** The doctrine of terra nullius became a legal precedent in the 1836 case of Murrell v NSW. Eddie Mabo was an Indigenous community leader & human right activist from Murray Island (Torres Strait). In 1974 Mabo discovered the his people (the Meriam people) did not own the land in which they lived, that it was in fact Crown land. The Mabo decision involved 2 High Court challenges: Mabo (1) 1988 and Mabo (2) 1992. They challenged the common law precedent of ‘terra nullius’. The defence was the Queensland state government.

The High Court defined the property rights of the Meriam people & in doing so created a new common law right to ‘native title’ for Indigenous Australians.

**Native Title existed when:** A connection had been maintained with the land (or waters) through communal use based on traditional law or custom (including spiritual connection with the land). The title had not been extinguished by the creation of freehold title or any use of the land in ways that were clearly inconsistent with customary use. Native Title did not exist where control had passed to others – ultimately this meant that it applied to only a small proportion of Indigenous Australians

**Australian parliament could respond in a number of ways:**

1. Overturning the principles of Mabo
2. Endorsing them in legislation
3. Doing nothing & leaving the common law to develop & regulate native title disputes

**The Keating government chose to endorse the principles of Mabo via the Native Title Act** which meant it strengthened the common law principle by turning it into a statute

Timber Creek: Officially known as the Griffiths Case, 2019. High court brought to the NT. The High Court ruled native title holders from the remote NT town of Timber Creek receive $2.5 million in compensation for loss of their rights, including spiritual connection to the land. First time the HC had examined the Native Title Act’s compensation provisions- including how to put a price on intangible harm caused by disconnection with country. The claim was about rights that were extinguished through the building of roads and infrastructure. The decision has set a precedent for similar claims across the country.

Judges can take four different actions to avoid the precedent and change the existing decision. These include:

1. Reversing the decision
2. Overruling the decision
3. Disapproving the decision
4. Distinguishing the decision

Reversing the decision: If the law has been misapplied a higher court can reverse the judgement and create a new ratio decidendi.

Overruling the Decision: A higher court may reconsider a case and therefore create its own ratio decidendi. This is often the case when a precedent is outdated.

Disapproving the decision: Lower courts are bound to follow the precedents of higher courts even if they disapprove of it. In these cases a judge may express their disapproval in their ratio decidendi & outline why they think the law is unjust. In effect, they are inviting a party to appeal to a higher court that has the power to overrule the precedent.

Distinguishing the decision: If a court decides that the case before it is substantially different from any previous case it will be distinguished from existing precedents. The ratio decidendi will create a new precedent = new common law.

**Statutory interpretation:**

There are three tools that courts use when interpreting statutes to achieve parliament’s intentions:

1. Maxims to ensure consistency
2. Rules to declare the law
3. Acts Interpretation Acts passed by parliament which provide guidance

Maxims: Rules and legal principles that have developed over a long period of time- usually for judges. The maxims of interpretation assist courts in applying consistent methods of interpretation of statute law.

Ejusdem Generis: Latin for “of the same kind”. Applied to a list of words where a general word appears after a list of specific words of a similar case. This allows the court to decide on a case by case basis if other things are of the same category.

**For example:** “The use of spear guns, spears, knives and other such instruments is prohibited” this would be interpreted to items used in fishing

Noscitur a sociis: Latin for “by the company it keeps – to know a thing by its associates”. The meaning of a word may be known from the accompanying words i.e. look at the surrounding words for its context.

**For example:** The word “disability” when alone can mean many things – medical, legal (bankruptcy), less able to perform etc

Expressio unis est exlusion aterius: Latin for “the express mention of one excludes all others”. Parliament may list a series of specific things in a class/category. Unlike general terms allowing for ejusdem generis, the use of specific terms without a general term following prevents the courts from expanding the class/category. Careful statutory construction can allow parliament to tightly control statutory interpretation or allow judges freedom to develop a statute over time

**For example:** the Taxi Act of WA (1994) explicity refers to a taxi as a vehicles capable of carrying up to 4 passengers – therefore, a vehicle such as a minibus or bus does not come under this law.

There are three main rules of statutory interpretation:

1. The Literal rule  
2. The Golden rule  
3. The Purpose (mischief) rule

The literal rule: A rule for statutory interpretation in which the courts apply the standard dictionary definition of a word in a statute i.e. the courts use the ordinary meaning of the language within the statute – the Act is read literally.

The golden rule: A rule of statutory interpretation in which the court seeks alternative meanings of a word in a statute if the literal meaning results in absurd or unjust outcomes. The golden rule is used to help statutes keep up with changing society.

**For example:** a taxicab once meant a ‘one horse vehicle for hire’. If courts used a literal interpretation of this word, there would be no taxis or Ubers on our roads despite there being thousands of motorized vehicles for hire. This definition is no longer relevant.

Mischeif rule: A rule for statutory interpretation in which the court seeks the original purpose of a statute i.e. what mischief did it seek to prevent? The courts may refer to Hansard to seek the purpose of the law.

Judicial discretion: the freedom of a judge to decide an appropriate outcome for a particular case within the bounds of the law.

Acts interpretation acts: Judges have always had some degree of judicial discretion when interpreting statutes.

**There are two types of judges that exist** – those that are conservative and those that are adventurous. **A conservative judge** relies heavily on literal interpretations of statutes i.e. the law says what it means and means what it says. These judges are reluctant to change the meaning of statutes through interpretation – they believe this is the task/role of the parliament as the legislative branch. These interpretations are predictable and consistent = upholding the rule of law; however, they may not always be fair.

**An activist judge** is more likely to use their discretion in order to keep the statute updated and in line with social, economic, technological and cultural change. These judges more readily use the golden and purpose rules. Judges know that parliamentary statutes are superior to common law decisions and that their interpretations can be overridden at any time. Activist interpretation is less predictable and consistent, which is not good for the rule of law; however, they are more likely to be fair.

**Parliaments prefer** the courts to interpret statutes literally. This has resulted in two important approaches by parliament to ensure greater clarity in the law:

* Plain English laws
* Acts Interpretation Acts

There are two main legal systems in the world: In Australia we use the common law legal system. In the common law system, judgments are developed over time based on the previous judgements of the courts. These form precedents that are binding on lower courts in the hierarchy. Civil law is where laws are codified in a written collection of laws that must then be followed by judges.

Parliamentary sovereignty: Laws made by parliament have sovereignty over all other laws. This means that parliaments can either:

* Enact statutes that endorse common law principles e.g. the Mabo decision
* Allow common law to govern certain aspects of society and pass statutes
* Complementing or partially regulating areas of common law e.g. negligence
* Enact statutes overturning common law principles on the basis that they do not adequately or accurately reflect the values of society