**Introductory Political Principles**

Politics & Government

**Politics** is the activity of making shared public decisions. It is the means by which we create and modify our political and legal structures, as well as deciding on specific laws and public policies.

**Government** is a general term that covers our political and legal structures and the roles and powers that we give to those structures. It includes the institutions of parliament, the role of Ministers and all government employees, and the framework of law, the courts and the judiciary.

Roles of Government

**Keep Order** – pass and enforce laws to deter crime

- establish courts

**Provide Security** – establish armed forces

- protect citizens from foreign attacks

**Provide Services** – protect public health

- protect public safety

- provide public welfare

**Guide the Community –** develop public policy

- manage the economy

- conduct foreign relations

Features of good government

1. **Limiting Government –** these ideas lead to changes that sought to limit the power of government. Includes the concept of the separation of powers, sovereignty, constitutionalism, citizenship and the rule of law.
2. **Checking Government** – this concerns the processes that are intended to make government accountable to the people. E.g. the British idea of responsible government and the presidential model of the US.
3. **Voice of the People Principals** – these concepts include representative government, democratic voting rights and the idea of a democratic society.

Democratic & Non-democratic Governments

**Democratic –** view is that rulers should be clearly representative of the people. Leader’s authority to rule comes from the people and they are answerable to the people.

**Non – Democratic** – authority to govern is given to the ruler by their god/s or they assumed control by force. Rulers were answerable to no one. E.g. single individuals, dictators, monarchs.

Democracy: definition

Democracy is a form of government in which citizens participate in government and therefore have a say in government.

Representative Democracy: Definition

Representative democracy is a type of democracy founded on the principle of elected officials representing a group of people, as opposed to direct democracy.

Direct v. Representative Democracy

**Direct** – citizens meet in one place and take care of government issues themselves, just like in Ancient Athens. Does not work with large populations

**Representative** – citizens vote for representatives to take care of government matters for them.

General features of democratic and non-democratic societies

**Democratic –** free and fair elections

- majority rule

- representative parliaments

- accountable executives

- open political participation

- just and equitable legal systems

**Non – Democratic** – leader had unlimited power, not accountable

- right to be leader given at birth or physical power

- individuals are subjects, status given at birth

- little to no human rights

- law as the will of the leader, leader was above law

- controlled communication, limited new ideas

Types of non-democratic government systems

**Absolute Monarchy** – all legal power is rested in the decisions of an unelected monarch who held office on the basis of hereditary entitlement. E.g. England before the growth of parliament.

**Aristocracy** – aristocracy is a legal and political system in which legal power is held by an elite section of society, known as aristocrats. E.g. France before the French revolution along with the Monarch.

**Oligarchy** – a political system in which legal power is held by a few powerful elites within a society. E.g. many South American countries. Plutocracy is similar to oligarchy but based on wealth.

**Autocracy** – is a system where legal power is exercised by an autocrat, who unilaterally decides the laws and social direction of that country. E.g. Modern Zimbabwe.

**Dictatorship** – applied widely to Autocratic governments. E.g. Absolute monarchs of the 15th and 16th centuries, Stalin and Hitler.

**Authoritarian** – rulers have total control of political and legal power and use violence to maintain control. E.g. Italian Government of the 1920’s and 30’s under Mussolini.

**Totalitarian** – rulers enforce absolute obedience and seek to create absolute social control over all citizens. E.g. Hitler’s Germany (1933-1945).

**Anocracy** – are weak and unstable States where many powerful elites compete for power. E.g. Zimbabwe and Somalia

**Principles/Features of Democratic Government**

The separation of powers (theory v. practice in Australia)

**Legislative –** the task of creating and modifying the laws of a society. E.g. The Parliament

**Executive –** the task of administration. It covers the powers and structures required to ensure the law is carried out. E.g. The Cabinet: Prime Minister and Ministers at state level.

**Judicial –** the task of the court is to resolve legal disputes and determines penalties. E.g. The court

The doctrine of the separation of powers in Australia divides the institutions of government into three branches: legislative, executive and judicial. The legislature makes the laws; the executive put the laws into operation; and the judiciary interprets the laws.

In Australia there is not a “true” separation between the Legislature and Executive, because those appointed to the Executive are also members of Parliament. Power is balanced between the three arms of Government, so checks can operate.

The relationship between representative and responsible government

Representative government is a political system whereby the people choose a government, and, therefore, the government represents the people. This means that the elected government must act on the behalf of the views of its electors. In order to ensure that the government is constantly reflecting the interests of the people in its legislation, elections are held regularly. For instance, elections to federal parliament occur every three years. If the government or members of parliament fail to represent the views of their constituents, they will likely not be re-elected.

Responsible government is a political principle, which states that governments and members of parliament (MPs) must be accountable for their actions. A government is accountable and answerable to its parliament, and therefore parliament is accountable and answerable to the people. In Australia, governments, ministers and MPs are kept accountable by a number of methods.

The relationship between representative and responsible government goes hand- in- hand. As the citizens choose a government and its members (representative) they rely on them to be accountable for their actions and are answerable to the people (responsible).

The rule of law and its impact on parliamentary sovereignty

At its core, the rule of law is concerned with the fairness, accessibility, and efficiency of the legal system, from the creation of laws, through their enforcement, and finally to the court process.

Parliamentary sovereignty is a concept in the constitutional law of some parliamentary democracies. It holds that the legislative body has absolute sovereignty and is supreme over all other government institutions, including executive or judicial bodies. The rule of law provides guidelines in which the parliament must abide by, in order to maintain a fair government to the population.

Rule of Law – principals and importance

**Importance**

In Australia today, the rule of law requires that our legal system and government should provide:

* just outcomes when a person is brought before a court
* consistent, fair and impartial decisions about legal matters
* protection of individuals rights, freedoms, and
* ways to settle disputes between parties according to the law
* laws that are knowable, followable and fit for purpose.

The rule of law is fundamental in maintaining a free, democratic, and fair society.

**Principles**

* Equality Before the Law - *the law should apply to all people equally regardless of their status in society*
* Checks and Balances on the Use of Power - *Where law grants powers there must be checks and balances on the use of power to ensure that the government and individuals act according to the law. (Separation of powers)*
* The Rights of the Accused and Victims - *The rights of a person accused of a crime ensure that a person receives a fair trial, and that that they are not punished until found guilty.* 
  + *the right to silence*
  + *the privilege against self-incrimination*
  + *the opportunity to see and question evidence that is brought against them*
  + *the opportunity to appeal a decision of a court under certain circumstances*
* The Presumption of Innocence - *The presumption of innocence ensures individuals are punished only when found guilty by a court.*
* Independence of the Judiciary - *Judges are empowered to protect and are ultimately responsible for the fairness of trials which happen in their courts. Independent and impartial judges are an important part in all legal matters, whether criminal or civil.*
* Right to Assemble - *The right to gather publicly or privately, and collectively express, promote, pursue, and defend common interests.*
* Freedom of Speech - *The Rule of Law also requires that people can speak freely about problems with the law - individuals must be able to do this without fear of persecution.*
* Access to Justice - *Access to justice is fundamental to the working of the legal system – a state can have the fairest and best laws in the world, but if people cannot use them to seek solutions to problems and just outcomes, then the law is useless.*
* Knowing the Law - *a person ought to be able to figure out what the law is, either on their own or with help from a lawyer.*

Accountability

Lies at the heart of responsible parliament and representative government. Systems of accountability check or scrutinise the actions of elected governments. Accountability is the ability to be answerable to the population of your country. E.g. Westminster of Britain.

Political & Legal Rights

**Political Rights**

Political rights include the right to free speech and the right of association (the right to form groups for any legal activity) as well as the existence of free media. They also include the right to dissent and protest against government policies.

**Legal Rights**

The legal system must be independent of government. The legal systems of Australia and England have as their symbol a blindfolded woman upholding the scales of justice. This symbol asserts two principles of justice: the first is the idea that all people are seeking justice within the court system are to be treated equally; the second idea, highlighted by the blindfold, is that the legal process should not be biased or prejudiced against any individual or group in society.

Elections

An election is a formal group decision-making process by which a population chooses an individual to hold public office. Elections have been the usual mechanism by which modern representative democracy has operated since the 17th century.

Popular Sovereignty

Popular sovereignty, or sovereignty of the peoples' rule, is the principle that the authority of a state and its government are created and sustained by the consent of its people, through their elected representatives, who is the source of all political power.

Constitutionalism

The concept in which government can and should be legally limited in its powers, and that its authority or legitimacy depends on it observing these limitations.

Citizenship

Citizenship requires a limited government and the rule of law, as well as the responsibilities of living in a free society. Citizens have rights including basic rights such as freedom of speech, legal rights such as the right to a fair trial and political rights such as voting.

**The Australian Political System**

The separation of powers specific to Australia

**Legislative –** the task of creating and modifying the laws of a society. E.g. The Parliament

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Compare separation of powers in Australia and USA

* AUS system of Government and the American system is split into three separate powers. Each of these powers provides checks and balances on the other two.
* Legislature, in Australia that’s the Parliament and in the US, they call it the Congress. This arm or branch of Government in both countries is made up of two Houses who make the laws.
* Executive, they run the country and administer all the Government departments, but they must stay within the bounds of laws made by the Legislature. The party that has the majority of MPs in the House of Representatives in Australia is effectively the Executive. AUS have a Prime Minister and all the other Ministers, and we call them ‘the Government’. In the US the President is the Executive, along with his Vice President and all the appointed Secretaries of State.
* Judicial Power - This is the system of courts, with the High Court in Australia and the Supreme Court in the US sitting at the top.

Westminster system of responsible government

**Features in Australia**

* Founded on the British Palace of Westminster model of responsible government which comprises:
* A head of state, being the Sovereign or his/her representative (or, in a republic, the president)
* An elected Parliament, with one or two Houses
* A Government formed by the political party, or coalition, with majority support in the Lower House
* A Prime Minister or Premier, who heads the Government
* A Ministry, drawn from members of Parliament – usually Government members – exercising executive authority and accountable to the Parliament
* An independent Judiciary.
* At the heart of the system is the concept of the separation of powers between the three branches of government:
* The **Legislature**: The Parliament, which makes the law
* The **Executive:** The Governor, Prime Minister/Premier, Ministers, departments and agencies, which implement the law
* The **Judiciary**: the courts, which interpret and apply the law.

**Conventions in Australia**

* Conventions underpin the operation of the Australian Constitution and the Executive Government.
* A convention is an accepted way of doing something. The Westminster parliamentary system is built around these kinds of unwritten rules.
* Conventions include:
* Appointment of Governor General – chosen by the Prime Minister in conjunction with Cabinet
* Parliamentary Sessions – the government decides when Parliament will sit
* Terms of Parliament - no House of Representatives may continue for longer than three years. Earlier dissolution of the House is decided by the Prime Minister
* Executive Government Conventions – all ministers must be members of parliament. The Westminster system requires that the ministry must command the support of the House of Representatives.
* Collective Ministerial Responsibility – Cabinet meets in secret and speaks with one voice
* Individual Ministerial Responsibility - Ministers are expected to take responsibility for the administration of their departments (the actions of their staff and themselves).
* Caretaker Conventions - apply during the period immediately before and after an election. The caretaker conventions require that the government makes no significant policy decisions during the election period. Caretaker period ends when election time ends

Federalism

**History of Federation**

On January 1st, 1901, the Australian colonies united to become a single nation. They established a federation that created a new level of government – the Commonwealth – but also retained the existing colonial governments that became the states.

**Types of federalism**

* Confederation – independent nations (European Union)
* Dual Federation – centre power and regional power have relatively equal power
* Coercive Federation – feature weak state governments
* Unitary State – power is concentrated in the hands of the centre power (France)

**Arguments for and against**

* For – federalism allows cooperation between diverse groups and can create more choice and freedom for citizens
* Against – inefficient and limits the ability of nations to deal with global issues and that it also reduces the accountability of government

**Strengths and weaknesses**

* Strengths:
* Regional governments are able to respond to their community more efficiently
* Enhanced political freedom as federalism limits power of government by dividing it
* Competition between regional governments is claimed to stimulate improvements in government services by allowing experimentation and choice
* Weaknesses:
* Leads to ‘over – government’ and confusion and creates too many politicians and public service departments, duplicates services, divides regulations and laws, and leads to unclear lines of political responsibility
* Exaggerates conflict in political life and creates excessive legalism
* Divides power, which may reduce a nation’s ability to make national decisions in policy areas

**Exclusive, residual, specific and concurrent powers**

* Exclusive:
* Exclusive powers are ones that only the Commonwealth can make laws for and the States cannot.
* These include areas of national concern such as immigration, defense and currency.
* These law-making powers are part of specific powers, but they are considered and termed differently because the states are excluded from legislating on them.
* Residual:
* These law-making powers are not found within the Australian constitution.
* At the time of federation, colonies wanted to retain some of their law-making powers and not completely give up their legislative authority to the Commonwealth.
* As such, they retained a set of law-making powers that each state can legislate based on the need of their states.
* These areas of law making include education, criminal laws and health.
* Concurrent:
* Commonwealth and the States have the authority to legislate in these areas - These areas are marriage, divorce and bankruptcy.
* If States made a law that conflicted with Commonwealth's laws, S109 within the Constitution states that Commonwealth's laws will always override that of the states.
* Specific
* These are law making powers that were given to the Commonwealth to make laws.
* They are enumerated (listed one by one) under Section 51 & 52 of the Constitution. These law-making powers are given to the Commonwealth to make laws for 'peace, order and good government of Australia'.
* Some examples of these law-making powers include fisheries, lighthouses and immigration.

**Division of powers and responsibilities as established by the Commonwealth**

* The division of powers refers to the separation or allocation of law-making powers to Commonwealth and the States determined at the time of federation.
* Includes specific, exclusive, residual and concurrent powers
* The constitution provides for the allocation of law-making powers to the Commonwealth Parliament. Here it sets out what is referred to as the division of powers.

**Centralisation of power in Federal government**

Over 110 years of federation, there has been a tendency towards the centralisation of power in the hands of the federal government. As a result, the Commonwealth now has responsibility for a range of areas not envisaged by the original drafters of the constitution: education is an example of this. This tendency, together with the demands of managing the increasingly complex interplay of policy between the different levels of government, has resulted in the development of an intricate set of schemes and arrangements to promote cooperation in efficient delivery of policy.

The influences on the AUS Federation:

* The British and US systems of government have had substantial influence on the Australian system of government.
* Australian federal Parliament has been referred to as a "Wash-minster" model – a combination of the US "Washington" model and the British "Westminster" model.
* Before 1901 the Australian continent had six partly self-governing colonies which were modelled on the British Parliamentary system. When developing the Australian federation model in the 1890s, the British Parliamentary model was very influential. This influence can be seen in many aspects of the appearance and function of the two chambers of the Australian Parliament. The idea of responsible is a significant British contribution
* Australia's version of the separation of powers – the division of power between the Parliament, the executive and the judiciary - owes much to the British model.
* The major influence of the US system can be seen in the overall model of Australian federation – particularly independently governed states working together under a central federal government structure. Also, the representative structure of the Australian Senate draws heavily on the US model of the Senate.

**The link to Britain: British political system – the Westminster system: responsible and representative**

* Responsible:
* Ministers account to Parliament for their decisions and for the performance of their departments.
* Representative:
* The people are able to vote for their representative to demonstrate their wishes within parliament.

Constitution (Australia)

The constitution is a set of rules by which a country or state is run. The Australian Constitution was drafted at a series of constitutional conventions held in the 1890s. It was passed by the British Parliament as part of the Commonwealth of Australia Constitution Act 1900 and took effect on 1 January 1901.

Constitutional conventions

* **Section 61 -** the Cabinet, led by the Prime Minister, which performs this task.
* **Section 62 -** the Governor-General, acting on the advice of the leader of the majority party in the House of Representatives, summons members of the majority party and swears them in as ministers.
* **Section 64 -** the ministers are chosen by the Prime Minister who advised the Governor-General of the names and jobs allocated to the ministers.
* **Section 68 -** the Prime Minister and the Defence Minister are in charge of the armed services.
* **Section 28 –** Prime Ministers decide when the House will be dissolved, and elections called. The one power that both major parties give exclusively to their leaders is the power to decide election dates.
* **Section 72 -** judges are appointed by the Prime Minister, possibly with advice from the Attorney-General and Cabinet. The Governor-General simply acts on the Prime Minister’s advice and rubber-stamps the decision.

Francoist Spain

**Francoist Spain – What is it?**

Francoist Spain is the political regime that was ruled by Francisco Franco from 1936 to 1975. The nature of the regime had evolved during Franco’s rule. Franco emerged as a single rebel military leader and became the head of state on October 1st, 1936 ruling a dictatorship over the territory controlled by the Nationalist faction. In 1937, the Unification Decree merged all parties supporting the rebels and created a single – party regime. The end of WW11 brought the extension of Franco’s rule to the whole country and the exile of Republican institutions. The regime was influenced by the fascist nature of Hitler’s and Mussolini’s regimes in Germany and Italy. The dictatorship changed from being a Fascist Dictatorship to a Developmental Dictatorship in later years.

**4.5 Francoist Spain – Features of Government**

The government is ultimately responsible for passing all laws. Francisco Franco was the person who chose and dismissed all ministers. Franco was known as the ‘Chief’ of state and Government. The law of National Referendum (1945) approved for all fundamental laws to be approved by a popular referendum. Voters were the heads of families, no one else could vote. Local councils were appointed by heads of families and local corporations. The councils focused on municipal elections. Mayors were appointed by the Government.

Francoist Spain was a fully centralised form of government the regime was reluctant to enact any form of legislative or administrative decentralisation. Franco had total cultural control over his citizens, traditions that were deemed ‘not proper’ were supressed.

**Introductory Principles of law**

Values and the law

* Respect for life: *Laws against murder and assault*
* Equality:  *Anti-discrimination laws*
* Freedom and Tolerance: *Laws protecting freedom of religion*
* Protection of the Weak: *Anti-slavery laws; welfare*

Customs

A custom is defined as a cultural idea that describes a regular, patterned way of behaving that is considered characteristic of life in a social system. Shaking hands, bowing and kissing are all customs: they're ways of greeting people that help to distinguish one society from another.

Rules

Non-legal rules provide us with guidelines of what is acceptable behavior at school, on the sporting field etc.  These rules are made by private individuals or groups in society.

Laws

Legal rules, or **laws**, are applicable to the community as a whole.  They regulate behavior, set standards for individuals and political groups and help to peacefully resolve disputes. They are made by law-making bodies and are enforceable through the courts.

Laws apply to the population of a political entity that possesses sovereignty (nations/state).

Laws have *jurisdiction*:

* Geographic: the area over which the laws apply e.g. a state or whole nation.
* Legal: the area of law that is covered e.g. marriage laws (concurrent); tariffs on traded goods (federal exclusive).

Functions of law

* Establishing standards
* Maintaining order
* Resolving disputes
* Protecting liberties and rights

Characteristics of an effective law

* Applicable to a whole population.
* Applicable to a geographical jurisdiction.
* Applicable all the time.
* Backed by sanctions:
  + *Decided by the legislative branch*
  + *Enforced by the executive branch*
  + *Adjudicated by the judicial branch*

Classifications of law

**Public and private law**

Public law comprises constitutional law, administrative law, tax law and criminal law, as well as all procedural law. The government must obey the law. For example, a citizen unhappy with a decision of an administrative authority can ask a court for judicial review. Private law refers to private relationships between individuals - contracts, torts, etc. Samples are contract law, tort and private international law, for example relating to international trade.

**Civil and criminal law**

Criminal law deals with behaviour that is or can be construed as an offense against the public, society, or the state—even if the immediate victim is an individual. Examples are murder, assault, theft and drunken driving. Civil law deals with behaviour that constitutes an injury to an individual or other private party, such as a corporation. Examples are defamation (including libel and slander), breach of contract, negligence resulting in injury or death, and property damage.

**State and federal law**

Some state or territory laws cover areas where there is no federal law, or their laws can be in line with federal law. If there is a clash between federal and state or territory laws, the federal law overrides them. The Federal Government can only pass laws under the power of the Constitution of Australia.

**Law-making in Australia Parliament**

Define legislation

The process of making or enacting laws.

Laws made by parliament - statute law

* *Definition: A type of law created by parliaments.*
* *Is superior to common law made by courts. Why?*
  + Parliament is the legislative branch.
  + Parliament is democratically elected so laws reflect the ‘will of the people’.

Legislative process – passing of a bill



Strengths and weakness of statute law

**Strengths**

* easily accessed by general public (but disadvantage because not many people actually know what statute is law)
* predictable
* very long scrutiny process
* can be repealed if changes in society/technology require
* made by politicians; who arguably know what the public want best

**Weaknesses**

* Disenfranchised minorities - *e.g. minorities like indigenous people can be poorly represented, therefore, disenfranchised under the system of representative govt. (e.g. Mabo case of 1922 forced parliament to respond to Native Title Act).*
* Parliamentary Process in general – *expensive and time consuming*
* Parliament can make laws retrospectively - *based off previous cases (e.g. deny people natural justice)*
* Australian law is fragmented - *e.g. 9 different education systems, 9 road laws, complicates travel, trade, and commerce between the states*
* Deadlocks can destabilise law making process - *e.g. upper house can use its power for political purposes (bias)*
* One tier of govt. can blame another for problems - *buck passing- can be used as an excuse for inaction*
* Political parties very sensitive to socially controversial issues - *e.g. abortion, prostitution, recreational drugs- not willing to commit to reform*

Example of statute law

* Mabo (1992) lead to the Native Title Act 1993.

Ways the need for laws is recognised

* Respect for life: *Laws against murder and assault*
* Equality: *Anti-discrimination laws*
* Freedom and Tolerance: *Laws protecting freedom of religion*
* Protection of the Weak: *Anti-slavery laws; welfare*

**Law-making in Courts**

Review the hierarchy of courts in Australia

* Court Hierarchy - *The order of importance of courts in legal decision-making.*
* Australia has both federal *and* state court hierarchies.
* Australian states follow the following basic court hierarchy:

1. Inferior - *Magistrates/Local Court*
2. Intermediate Court - *District/County Court*
3. Superior Court - *Supreme Court*

Laws made by courts

**Common Law**

* law based on judgements made by courts over time.
* Also known as judge made law or case law.
* Is inferior to statute law made by parliaments

**Precedent**

**Binding Precedent**

* Binding precedent binds courts at a lower level in the court hierarchy that the court that made the precedent.
* Lower courts must apply the ratio decidendi of the higher courts and may be persuaded/guided by the obiter dicta from higher courts.
* Increases fairness, predictability and consistency in resolving disputes.

**Persuasive Precedent**

* **Persuasive precedent** influences courts above and equivalent to it in the court hierarchy in its own jurisdiction or other jurisdictions.
* Higher courts may be persuaded by the ratio decidendi or obiter dicta of equivalent or lower courts.
* Also helps to increase fairness, predictability and consistency within and across common law jurisdictions.

**Statutory Interpretation (rules of and aids to)**

**Literal**

* Requires that judges follow *‘the black letter of the law*’.
* The Act is read by its *plain or literal meaning* –exactly as the words are written, the assumption being that parliament has said what it means.
* Can lead to absurd outcomes.
* *Uber B.V. v The Commissioner of Taxation (2017):* definition of ‘taxi travel’ was interpreted literally by the court and Uber was classified as a ‘taxi travel’ service.

**Golden**

* If the Literal Rule yields an absurd outcome, the judge will apply the Golden Rule.
* E.g. ‘Taxicab’ once meant ‘a one-horse vehicle for hire’.
* It allows judges to refer to the general aim of a statute in interpreting an apparently inconsistent part of an act.
* When the usual meaning of a word causes unjust outcomes, judges interpret the offending word to reduce the absurdity.

**Purpose**

* If the Literal and Golden Rules have failed to achieve a just result, the judge will seek identify the purpose of the Act or the wrong (or mischief) that parliament was trying to legislate for.
* They try to interpret the Act in accordance with parliament’s intention.  This is the most common method used in Australia.
* May consult the Hansard (record of parliament) to review speeches and debates on the Act.

**Ejusdem Generis**

* Means ‘of the same kind’.
* Relates to a general term used in a statute to act as a ‘catch all’ for similar things.
* E.g. Disability Discrimination Act 1992: *“For the purposes of this Act, an assistance animal is a dog or other animal” trained “to assist a person with a disability to alleviate the effect of the disability.* The court is left to decide what ‘other animals would fit this category.
* Each time the court determines a case related to another animal; it creates new *meanings* of the Act (but doesn’t add words).

**Noscitur a Sociis**

* Means ‘by the company it keeps’.
* Involves finding meaning from looking at other words around the problem word –the context.
* Important for terms that can have multiple meanings.
* E.g. In the European case *HMIL Limited v Minister For Agriculture and Food*, the maxim *noscitur a sociis* was applied.
* In interpreting regulations on the export of beef, the judge held that the Court should recognise the common denominator between 'scraps’ of meat and 'large tendons, cartilages, pieces of fat’ is that they all are unfit for human consumption.

**Expressio unis est exclusio alterius**

* Means ‘the express mention of one excludes all others.
* The use of specific terms with a general term at the end would prevent a court from expanding the things in that category.
* E.g. An Act could state “Riding of trail bikes is prohibited in *National Parks*, *‘A Class’ Nature Reserves and Conservation Areas*”.
* Therefore, riding trail bikes in ‘B Class’ Nature Reserves ispermitted because the express mention of the others excludes ‘B Class’ Nature Reserves.

**Example of common law**

* Grant v Australian Knitting Mills [1936]
* Grant contracted dermatitis from chemicals in woollen underwear and sued the manufacturer AKM.
* The Australian court extended *Donoghue* to include all manufacturers.

**Effectiveness of courts as a law maker**

* Strengths of Courts as Law Makers
* One strength of courts is that they are able to make laws quickly. Unlike parliament passing a bill whereby voting may need to occur across a bicameral structure, courts are able to make decisions efficiently when a dispute comes before them whereby precedent has not been established.
* Ability to update legislation to ensure that they remain relevant and modern to society's purposes. Through the ability to interpret legislation, courts are able to expand (and contract) meanings of words to ensure that they can be reasonably applied to current situations.
* Appeals process available to parties. If a party is dissatisfied with the outcome of their case on certain grounds, they have the ability to appeal to a higher court in order to seek a second opinion from a superior judge. This allows the decision previously made at trial to be checked and if deemed incorrect, reversed if necessary. This forms new precedent and ensures fairness within the legal system.
* Judges are independent law makers. That is, compared to members of parliament, judges do not face the same political pressure to be re-elected.
* Weaknesses of Courts as Law Makers:
* Courts can only make laws when a dispute arises before them. This means that problem or dispute has already arisen in society and now courts can only seek to resolve to dispute, not prevent it from happening like parliament can even though they can foresee the problem arising.
* Precedent can be overridden through being abrogated by parliament at any time. If parliament disagrees with the decision made by courts, provided that they have the necessary jurisdiction, parliament can introduce legislation that overrides or abolishes the decision made by courts.
* Judges are appointed, not elected. This places judges in a law-making decision without being democratically voted in power by the people.
* Restricted in their law-making role if they're bound by precedent they are unable to avoid. Due to the notion of stare decisis and standing by what has been decided, if a lower court finds that they cannot distinguish material facts in a case, they have no choice but to follow existing precedent established by higher courts even if they do not agree with the outcome. This creates a situation were common law may becomerigid or out dated.

Define terms: Stare decisis, Obiter dictum, Ratio decidendi

**Stare Decisis**

* Stare decisis: *‘to stand on what has been decided’*.  This is the fundamental principle behind precedent.
* Ensures judicial reasoning is consistent in similar circumstances and results in:
  + *Fairness*
  + *Predictability*
  + *Consistent outcomes*
  + *Flexibility*
* These characteristics help to ensure *natural justice* and the *Rule of Law*.

**Ratio Decidendi**

* **Ratio decidendi:** the reason for a judge or judges’ decision in a case.  This forms the basis of common law.
* •A new *ratio decidendi* is a new common law.
* •If the reasoning of a judge in a past case applies to a present case, the *stare decisis* requires standing by the *ratio decidendi* of the past case.

**Obiter Dicta**

* **Obiter dicta:** ‘sayings by the way’.  These are the judges’ other considerations and comments.  They are not law but can be persuasive.

Parliament V’s Courts for Law Making

* Courts and parliament interact in the law-making process - They need to work together so that the law is flexible and can apply to any situation that might arise.
* Parliament pass acts to establish courts - For a court to exist there must be an act of parliament that establishes the court and sets out its jurisdiction.
* Courts apply and interpret the law - For legislation to be effective, the courts must apply the legislation to the cases before them.
* Parliament can confirm or change law made by courts - Courts depend on parliament to make the bulk of the law. Parliament depends on courts to apply the law made by parliament and to establish new law on situations that have arisen for the first time. Parliament can make law that confirms a precedent or make law that overrides a decision made through the courts.
* Court decisions can influence changes in the law by parliament - Courts can influence changes in the law by parliament through their comments made during court cases. Parliament can also be influenced in change the law if a court is bound by previous precedent and makes a decision that creates an injustice.   
  Parliament can be influenced for the following reasons
* Courts may be too conservative and may be reluctant to change the law because there is a need for the type of investigation that parliament can carry out on a whole area of law.
* Courts' decisions highlight problems and lead to public outcry.
* Creativity by courts may alert the parliament to an area of law where new laws made by parliament are needed. The Mabo decision was an example of the High Court breaking new ground.
* Lenient sentences can lead to changes in the law

**Adversarial system of trial**

Definition

* The adversary system resolves disputes in the same way that we conduct a debate.
* This system involves two opposing parties who present their cases in front of an impartial third party (an adjudicator) to make a final judgement.
* An adjudicator can be a magistrate, judge alone or judge and jury

Features

**The role of the parties**

* Parties are responsible for the preparation and presentation of their case
* Parties determine the issues to be contested and the witnesses to be called

**The role of the judge**

* Case conducted before an independent and impartial adjudicator
* Judge decides questions of law and procedure
* Judge asks questions only to clarify points raised in examination or cross examination by the parties

**The role of the legal representatives**

* To represent the interest of their client
* To prepare and present the client’s case to the court

**Rules of evidence**

* Strict rules of evidence, with a strong reliance on oral evidence
* Parties collect the best evidence to support their case
* In most cases, previous character cannot be introduced as evidence except as a consideration in sentencing

Rules of evidence

|  |  |
| --- | --- |
| **Rules of Evidence** | **Definition/Explanation & Any Exceptions** |
| **Hearsay** | Hearsay evidence is information that a witness, in giving evidence, recounts as having heard from someone else. A witness giving hearsay evidence does not have personal knowledge of these events. The witness is, therefore, not relying on their own experience or observations. Hearsay evidence is excluded because a person’s words may be distorted in the retelling. There are multiple exceptions to the hearsay evidence rule. Such as, the statements made to another person by a person who has died may be admitted as evidence in some circumstances |
| **Irrelevant Evidence** | Irrelevant evidence is evidence presented that does not provide any advancement within the case at hand. Information considered to be relevant to a case is information that helps prove a fact at issue. Some types of evidence are specifically excluded by the rules of evidence; for example, the use of hearsay evidence. |
| **Opinion Evidence** | Opinion evidence refers to evidence of what the witness thinks, believes, or infers in regard to facts, as distinguished from personal knowledge of the facts themselves. Witnesses cannot give a personal opinion unless the court recognises that the witness is an expert |
| **Evidence of bad character** | Bad character evidence is evidence of, or a disposition towards misconduct; other than evidence which has to do with the alleged facts of the offence with which the defendant is charged or is evidence of misconduct in connection with the investigation or prosecution of that offence. |
| **Evidence of prior convictions** | Providing evidence in which the defendant’s past convictions are brought into evidence. |
| **Privileged Information** | Privilege is a rule of evidence that allows the holder of the privilege to refuse to disclose information or provide evidence about a certain subject or to bar such evidence from being disclosed or used in a judicial or other proceeding. |

Strengths and weaknesses

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**Inquisitorial System**

Definition

* This system is where the court is actively involved in determining the facts and conduct of the trial.
* Variations of this system are used in many civil law countries within Europe, Asia and South American countries.
* The justification of the inquisitorial system is that the effective operation of the legal system is of benefit to society as a whole. Therefore, it is the responsibility of the State to ensure the relevant information is brought out and the truth is reached.

Features

**The role of the parties**

* This role varies according to the case
* Parties mainly respond to the directions of the court in presenting arguments or evidence to court.

**The role of the judge**

* The Judges objective is to find the truth of the matter, so their role is to find both incriminating and exonerating evidence.
* Judge takes an active role and investigates the case
* Defines the issues to be resolved
* Gathers evidence alongside the police
* At Trial
  + Judges calls witnesses
  + Witnesses give version of events, rather than be questioned
  + May raises matters of law or fact
  + Character evidence and past records are known by judge

**The role of the legal representatives**

* Due to the judge’s active role the legal representatives play a lesser role.
* Assist the judge in finding the truth
* In some instances, to ask questions after examination by a judge

**Rules of evidence**

* Less reliance on strict rules of evidence and procedure as the emphasis is on finding the truth.
* Extensive use of written evidence
* Witnesses are able to tell their stories uninterrupted and in a conversational format.
* Evidence can also include character evidence (good or bad) and information relating to prior convictions.
* No restriction on hearsay evidence

Comparison of systems

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