Talbot Sayer Notepool

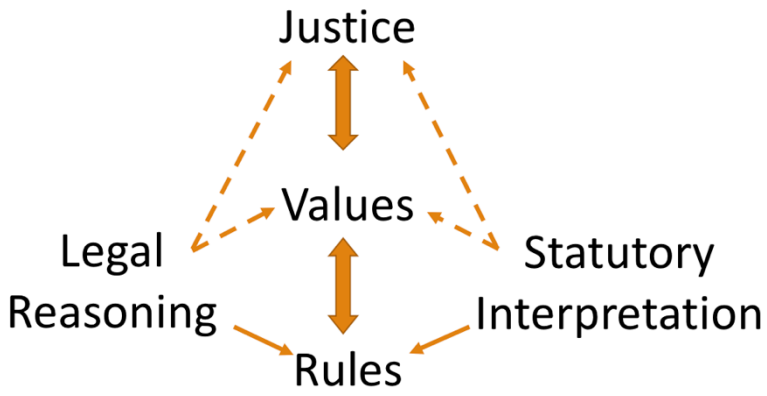
LAWS1700 – Foundations of Law

UNIVERSITY OF QUEENSLAND LAW SOCIETY INC

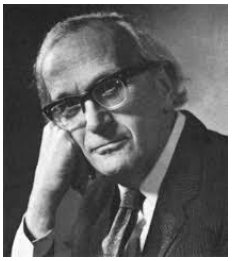
TALBOTSAYER

1700 MONDAY FEBRUARY 26 (2)

A rule is a statement that prescribes conduct.
We have an obligation to follow the rule, if we breach this, there will be repercussions (legal/health/emotional etc.)
Rules are inherently linked to conduct and condition, which is linked to obligation and which then has an inherent link to consequence.



Law is linked through legal principals – Hart and Dwarkin



HART – WHY DO WE OBEY LAW?
Legal obligation arises from valid legal rules

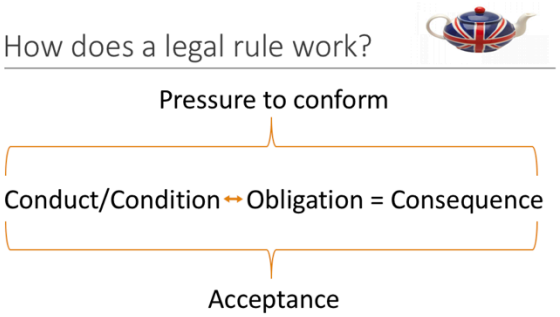
- Not necessarily about content – is a law morally right or wrong?
- Instead, how is it created – is a law valid?

Difference

- Oblige – rules of etiquette. There is no defined obligation or consequence.
- Obligate – seriousness of social pressure. Laws as rules create obligations, creating pressure which we respond and agree to by agreeing to follow the law.

Difference

- Internal and external points of view
  - External – it's not about external use of force.
  - Not an 'outsiders' perspective.
- Internal
  - Accept law and places obligations
  - Break standard of behavior – expect criticism
  - Social pressure of criticism gives rise to acceptance (rational decision making)
  - We accept pressure; we accept criticism
  - Not the 'we' – it is out perspective



JURISPRUDENCE – seeks to answer big questions. What is law and what makes it valid? Why is it we obey law?

- Natural law theory – Aristotle. Two forms of justice – natural and human law. Idea we know what is right and wrong, from universal behaviors, how we live and look at each other and society, human law must coincide with this natural law.
- 17th century – creation of rational reasons for why we seek to create law. Life, liberty, and property (John Locke).
- 18th century – not law as it should be in relation to law theory (17th century thinking), but how it is. Purely human contrast and there's no necessary construct between justice and law.
- Turn of 20th century – Wendell Holmes argued that law isn't about the idea of valid rules and that's the only sense of how it applies, but rather law is about experience. Law is indeterminate because it is based on experience.
- 1960s-1980s – critical legal studies (CLS) identifies failures of civil rights legislation of US. An attack on the basis of liberalism in law. Picks up that law is about politics and power, and is not rational and objective.

HART – WHAT IS LAW?

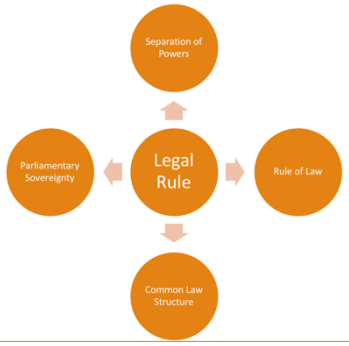
Law as a system of rules. A union of primary and secondary rules.

- **Primary rules**
  - Rules of conduct that apply to all
  - Establish obligations
  - Regulate individual conduct in societal contexts.

- Sophisticated legal systems require a whole set of **secondary rules** to change and amend primary rules. Because obligations of primary rules can go out of date and no longer have the same impact as they require.
  - Fulfil, manage and change primary rules
  - Rules of change, adjudication and recognition

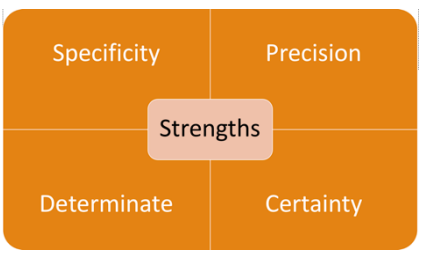
- **Rules of recognition** – the reason why we constantly follow rules. **It creates validity in law**. It is when legal officers implement a rational, legal decision. Therefore if a legal decision has been ordered through these rational legal officers, the law must therefore be rational in itself.
  - Most important – validates a legal rule
  - How?
  - Defined by the rational legal officers who order the rule.

Any legal rule can connect to a much broader system.



When can judges make decisions and what types of decisions can they make? This leads to the rule of law. Everyone has to be treated exactly the same otherwise the rule of law doesn't work.

Because legal rules are precise and determinate, you can determine outcomes from the application of a specific and precise rule. You know when a law will be broken on the basis of the components of conduct, obligation, and consequence.



DWORKIN

Dworkin is against idea that law is solely about the application of legal rules

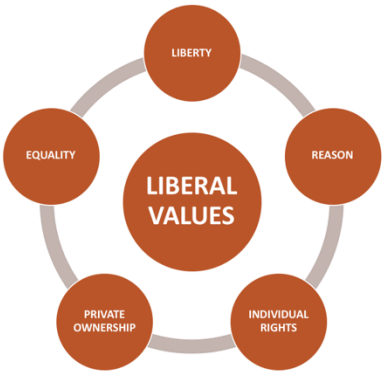
- ***Rules are applicable in an all-or-nothing fashion***.
    - If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it *contributes nothing* to the decision.

Dworkin believes that with rules you get a black and white answer, but he maintains that the real essence of law is in the grey. So, solely focusing on the rule and its outcome tells us nothing about law and the deeper questions of law, regardless of what Hart says.

- Rule gets constructed as a binary: "Conduct +/- obligation = consequence" and that is not how law works; it is much more complicated than that.

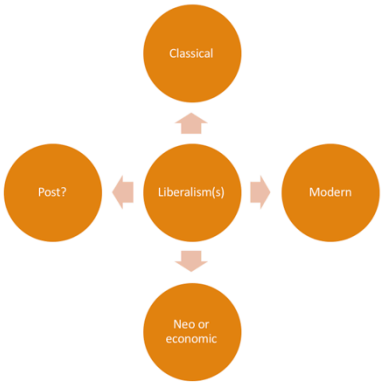
1700 MONDAY 5 MARCH (3)

Standards are passively constructed in legal rules.
These standards shape our laws, and how we think about law and its application.



Liberty: Focus on individual and the relationship between it and the law
Equality: Law applies equally to all
Reason: All laws are applied within the reason
Private ownership: The right for the individual to own things law and for the law to protect this right.
Individual rights: Provides rights to the individual over the state
These value are linked and aren't by themselves necessarily coherent.

Is liberalism really one thing? Or many?



Classic liberalism: has a focus on certain values over others
The use of private property is reasoned in argument.
Balancing complex relationship balancing needs of individual and collective.

Neo-liberalism: is closely connected to classic liberalism with a focus on economic liberty - government should only interfere in very limited circumstances through the free market.

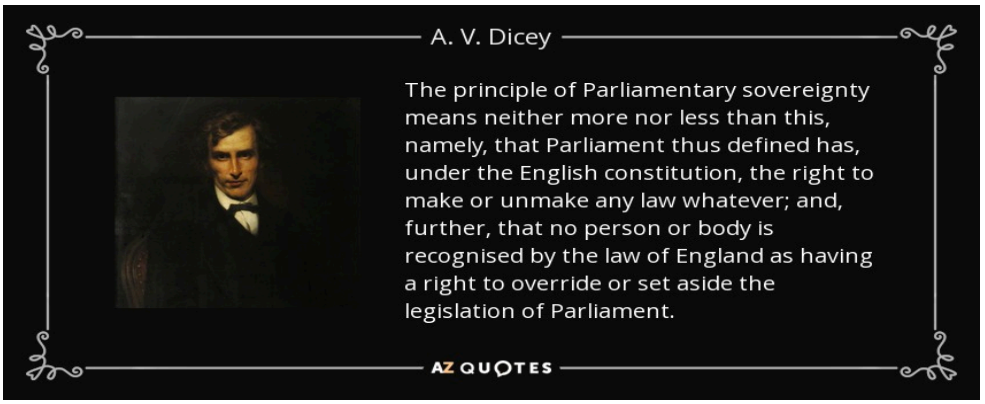
Post liberalism: An umbrella representation of different ideas that seek to critique the central idea that liberal values form the basis of our society; predominantly in 1990s with Marxism.

Idea that the taken advantage idea of liberalism is being weakened.

Reason, or rationality, is the capacity to understand or make sense of something using an ordered cognitive process such as logic, rather than simply knowing or accepting something using passion, faith or intuition.

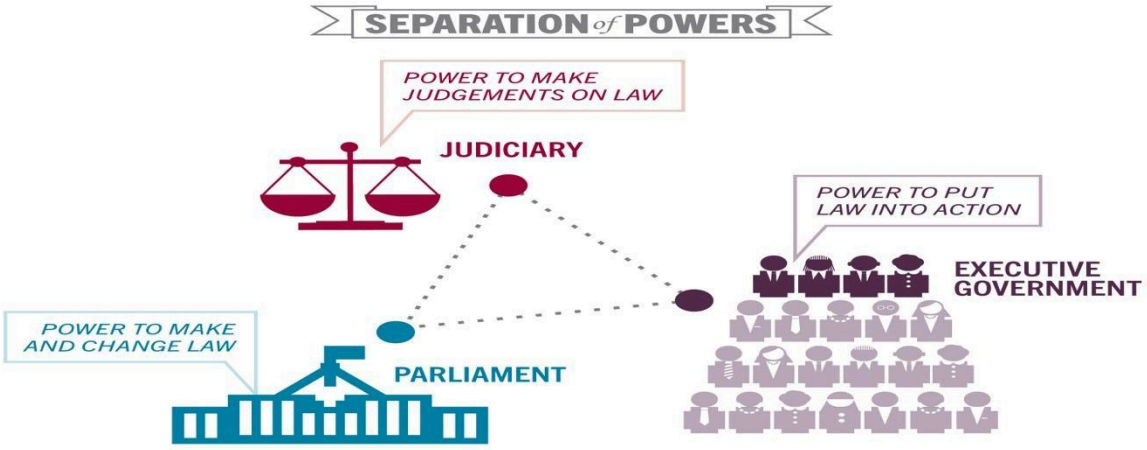
- Rise of the development of liberalism, there has to be a reasoned debate about decisions made via faith.
- A move away from the Divine Right of Kings but towards more logical attempts to understand society e.g. rule of law

PARLIAMENTARY SOVEREIGNTY
Legislation is sovereign and above all other law.



SEPARATION OF POWERS:

- We have more sophisticated understandings of the role of the government and what it should look like
- Each branch has different and distinct roles – so that each branch has checks and balances over each other so that one may not excerpt too much power over another



RULE OF LAW:

- Law is applied equally to us all

Liberalism emphasises the inherent liberty and freedom of the individual.
Genesis of the world liberalism about individual freedom, individuals should be free to live their own life generally free from collective interference.

NEGATIVE LIBERTY

- Individual freedom from collective interference
- The state is under no obligation to actively assist individuals

POSITIVE LIBERTY

- Individual freedom to better one's self
- The state has an obligation to provide assistance in making opportunities available to all

INDIVIDUAL AND THE STATE:

Relationship between forms of liberalism and minimalist government

- Government should refrain from interfering in the lives of individuals

Question in the modern context…is there a clear distinction between…

- Individual acts that only cause harm to the individuals undertaking the acts? and
- Individual acts that cause harm to others?

RIGHTS:

If you have a *negative right*, you have a right to non-interference. The right to free speech is a negative right: it is the right not to have your freedom to say what you like interfered with.

- Freedom from non-interference
- Right to privacy and freedom of speech

If you have a *positive right*, you have a right to be provided with something. The right to an education is a positive right: it is the right to be provided with an education by the state.

- Gives you a right to something

WHERE DO RIGHTS COME FROM:

The 17th and 18th centuries saw the emergence of the popular belief that all people are born with natural rights to life, liberty and property.

- Natural law theory: somehow they exist and this can be identified as the natural way to live

In the 19th century, the idea of 'natural' rights was replaced by the idea that rights are derived not from nature or religion but from the fact that those rights are granted by legal rules.

- Move away from natural to human rationality, and a shift in jurisprudential, related to the rise of rationality
- They don't exist if they don't exist in legal rule

The 20th century saw a re-emergence of natural rights thinking, reflected in the increased emphasis upon universal human rights, rights that exist regardless of the word of the law.

- Challenging oppressive laws and rights
- Some rights are fundamental on the basis we are human and everyone is entitled to them
- This lead to the formation of the Human Rights

Dworkin: rights have to come first and trump the basis of collective interest

TENSIONS

Individualism v. Collectivism

- Rights of individuals and the collective needs of the government vs. the wellbeing of the majority
- Society is a collection of individuals who all have rights but also bare responsibilities for living with each other. Constant tension under liberal doctrine between individual rights and utilitarianism consideration.
- Which should pervade?

"There is no such thing as society. There is living tapestry of men and women and people and the beauty of that tapestry and the quality of our lives will depend upon how much each of us is prepared to take responsibility for ourselves and each of us prepared to turn round and help by our own efforts those who are unfortunate."
Margaret Thatcher, interview with Woman's Own, 1987

- Thatcher is the archetype of neo-liberalism at the end of the 20th century

RIGHTS V. UTILITARIANISM

The language of rights emphasises the entitlements of the individual over and above the authority of the state and the wellbeing of the community.

Utilitarian reasoning, on the other hand, emphasises the importance of overall happiness or wellbeing.

- What is the relationships between individual and government
- Should the government positively interfere with the lives of individuals
- If so, and when.

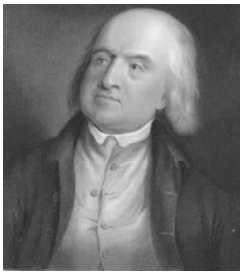
1700 MONDAY 12 MARCH (4)

UTILITARIANISM

- Reason, or rationality, is the capacity to understand or make sense of something using an ordered cognitive process such as logic, rather than simply knowing or accepting something using passion, faith or intuition.
- It is a form of reasoning very much grounded in liberal ideas
- It is a form of rational moral reasoning, enabling people to calculate the difference between right and wrong and to make choices and decisions on the basis of reason and logic rather than dogma, passion, intuition or chance.

BENTHAM'S UTILITARIANISM

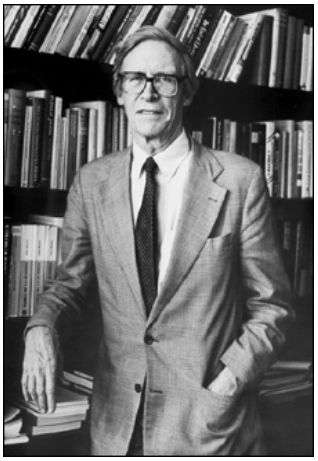
- First modern philosopher to put forward a reasoning behind utilitarianism:
    - The central idea is that all acts can and should be judged according to their utility.
    - Utility is the greatest happiness of the greatest number.
    - The basic principle for assessing any decision, legal or otherwise, is a 'calculus of pain and pleasure': does it maximise the happiness of the maximum number?



JOHN STUART MILL

- Mill's *Utilitarianism* and the greatest happiness principle. He develops his own form of utilitarianism calculus.
- Happiness is about personal flourishment; if we all progress as individuals, if I understand my harm in a better way, I will act different around people, they will become aware, and as a society we will become less harmful and thus there will be less need for governmental intervention.
- Not just what is best for the majority, but the flourishment of individual happiness is the desired consequential outcome.
- *"Actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure."*

It can have the effect of marginalizing a smaller community for the betterment of a larger society. It becomes possible to justify the testing of animals for the larger benefit of human safety. Also, torturing a small terrorist group for the safety of a large population.



JOHN RAWLS - CRITIC

- One of the most important political/legal philosophers of the last century
- Left a legacy regarding a concept of justice as fairness
- Deeply personal academic journey – war experience
- A theory of justice that everyone can agree upon without giving up their convictions of what is a good life. What is the census of justice that we all have, that allows us to have our own opinions and we can agree of the interests of society. What makes a just society and how can this emanate (similar questions Mills asked).
- Search for:
    - *An explanation of justice that does not privilege one concept of morality over another or one idea of a good life over another*
    - Rawls thus searches for general consensus – a justified morality without religion
    - Justification lies in 'reasonableness'
    - No about right or wrong; about reasonable or unreasonable
    - Reasonableness becomes the standard for which distributive justice should be conferred – all about decisions which are reasonable, rather than right and wrong.

A THEORY OF JUSTICE

Written in 1971 and was seen as a post script for the civil rights movement. A reestablishment of liberal foundations to the challenges that emerged during that movement. Especially the fairness of application and the distribution of goods.

- Foundational issue:
    - *Different people have different reasonable moral views, how do you ensure that one reasonably moral perspective is not privileged over another?*
- His approach is an extension of the Social Contract.

HOBBES LEVIATHAN

- The Social Contract is an attempt to reason through the nature of individual rights and collective requirements, during a change in social circumstances. So, rather than defer to a faith-based reasoning of the Divine Right of Kings (the sovereign can do anything and the people are mere subjects of the sovereign and so must obey) we start to see these of the question; what is the relationship between the individual and the collective.

- In the state of nature, each person has a right to everything in the world; this inevitably leads a 'war of all against all', and lives that are 'solitary, poor, nasty, brutish, and short'.
- We therefore form a **social contract**, giving up some of our rights and liberties to a sovereign in return for safety and security.

We give authority to the government to tell us what to do. We have to give up some part of our individual liberal rights to receive the benefits of safety and services of a winder community. We surrender some individual freedom, involving government regulation. We agree to accede to agree to the wishes of the majority to receive individual benefit.

LOCKE

- Social contract for Locke is all about needing the government and majority for the protection of property (for we don't need the government to keep peace). The purpose of the government is to protect property from harm, and thus is about enshrining a legal system that adequately protects property.
- He argued the concept of property is meaningless without the supporting legal framework; this framework gives rise to how contracts give reserve to private ownerships.
- Why should we 'part with our freedom and subject ourselves to the control of another person or group of people'? As long as everyone is equal and there is no one to regulate our conduct, our enjoyment of our property is vulnerable to interference from others. The sovereign is necessary in order to protect our property, and law is necessary to resolve property disputes

Shift from divine right of kings to foundational liberal thinking around democratic structures.

ORIGINAL POSITION AND VEIL OF IGNORANCE

Rawls takes Locke's theory to a higher order of abstraction

- Locke contends
    - Imagine no government; yet we still have the ability to recognise the advantage of collective activity to preserve our own rights and private property

Rawls goes further and suggests we have to go back to the original position and the veil of ignorance

Strip everything back; if we want to start society over we must start at the original position of what is justice? If we go right back and ask what we want of society, we have to select principals of justice which will be the basis of society, and serve as a standard for law. Linked to the original position, this trip back to the foundational question of what is a just society is the Veil of ignorance which is about stripping away our identity – working out what is the original position from a stance of not knowing anything about ourselves or anyone else.

- Original position
    - Select principles of justice to serve as a standard for law
- Veil of ignorance
    - Group of people – know nothing about themselves.

- Because you know nothing about yourself; you have no personal convictions and not just you – being completely identity neutral.
    - Therefore have to choose principles that are good for everyone
- Then have to choose from list of principles
    - And select those principles that are most generally reasonable

RAWLS' PRINCIPAL OF JUSTICE

Out of the list, Rawls contends that two principles emerge from a concept of justice as fairness

1. *First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.*
2. *Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage (takes priority over Part B), and (b) attached to positions and offices open to all (difference principle)*

- For Rawls, fair opportunity is about not being disadvantaged by foundational characteristics.

All social values - liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.
Injustice, then, is simply inequalities that are not to the benefit of all.

Everyone gets treated equally, unless someone gets treated unequally and that results in the better treatment of everybody.

1700 MONDAY 19 MARCH (5)

The Australian Constitutional System

1. Federation in Australia
2. Political institutions in Australia
3. Judiciary and Courts in Australia

Australia is a federation of six States

- Legislative powers are divided between the Commonwealth Parliament and State legislatures
- The Commonwealth and each State has a separate executive government
- There are State courts and federal courts with the High Court at the apex of the hierarchy

Representative Democracy at both federal and State levels

- The legislatures (except in Queensland) are bicameral with each House elected
- Bicameral means there is an upper (Senate) and lower (House of Representatives) House
- There is universal adult suffrage at both levels subject to certain disqualifications
- Voting in State and federal elections is compulsory

The executive government is responsible to Parliament for the conduct of Government

- In the case of the Commonwealth, the Prime Minister and ministers are responsible to federal Parliament
- In the case of the States, the Premier and ministers are responsible to the State Parliament
- The Prime Minister and the Premiers are commissioned because they have majority support (confidence) of the lower house
- They lose office when that confidence is lost
- Confidence is considered lost if
    - (a) government loses a confidence vote or
    - (b) Parliament denies supply or
    - (c) loses the general election

Commonwealth Structure

- Chapter I of the *Commonwealth Constitution* sets out the structure of the Parliament.
    - The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is herein-after called 'The Parliament,' or 'The Parliament of the Commonwealth.'
    - A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

The Senate

- Part II of Chapter I of the *Commonwealth Constitution* sets out the details of the structure and operation of the Senate as the upper house in the Commonwealth Parliament.
    - **Section 7.** The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate…
- Power of the Senate
    - Barwick CJ explained the powers of the Senate in the following terms in *Victoria v Commonwealth*:
    - The Senate is a part of the Parliament and, except as to laws appropriating revenue or money for the ordinary annual services of the Government or imposing taxation, is co-equal with the House of Representatives. Bills may originate and do originate in the Senate. Section 53 of the Constitution makes it abundantly clear that **the Senate is to have equal powers with the House of Representatives in respect of all laws other than those specifically excepted…**
        - Section 53 of the *Commonwealth Constitution* provides (in part):
            - Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate…
            - The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.
            - The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.
            - **Except as provided in this section, the Senate shall have <u>equal power</u> with the House of Representatives in respect of all proposed laws.**
- Role of the Senate
    - It is evident from the terms of the Constitution that the Senate was intended to represent the States, parts of the Commonwealth, as distinct from the House of Representatives which represents the electors throughout Australia. It is often said that the Senate has, in this respect, failed its purpose.
    - This may be so, due partly to the party system and to the nature of the electoral system: but even if that assertion be true it does not detract from the Constitutional position that it was intended that proposed laws could be considered by the Senate from a point of view different from that which the House of Representatives may take.
    - **The Senate is not a mere house of review: rather it is a house which may examine a proposed law from a standpoint different from that which the House of Representatives may have taken.**

The House of Representatives

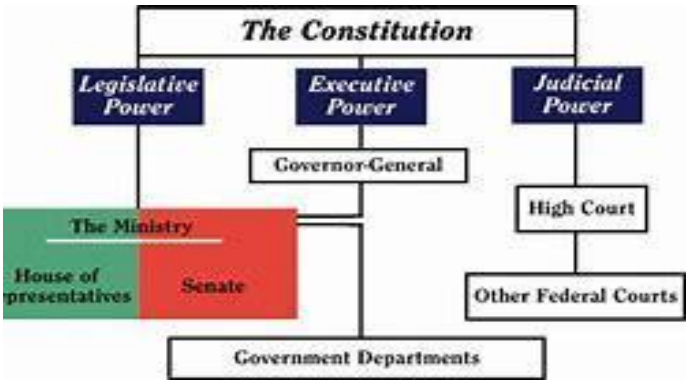
- Part III of Chapter I of the *Commonwealth Constitution* sets out the details of the structure and operation of the House of Representatives as the lower house in the Commonwealth Parliament.
    - **Section 24.** The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators. The number of members chosen in the several States shall be in proportion to the respective members of their people…
- As noted earlier, the powers of the House of Representatives are the same as the powers of the Senate except in relation to the authorisation of Commonwealth expenditure.

The Executive Government

- Chapter II of the *Commonwealth Constitution* provides the basis of the executive government.
    - The executive government of the Commonwealth essentially consists of the Crown in right of the Commonwealth, the Governor-General representing the Queen, the Prime Minister, the Cabinet Ministers and the Commonwealth public service, the Federal Police and statutory agencies.

The Three Arms of Government

- *Under the doctrine of the separation of powers, the functions of government are carried out by the executive, the legislature and the judiciary:*
    - The legislature makes the law
    - The executive administers the law
    - The judiciary interprets the law



The Judiciary

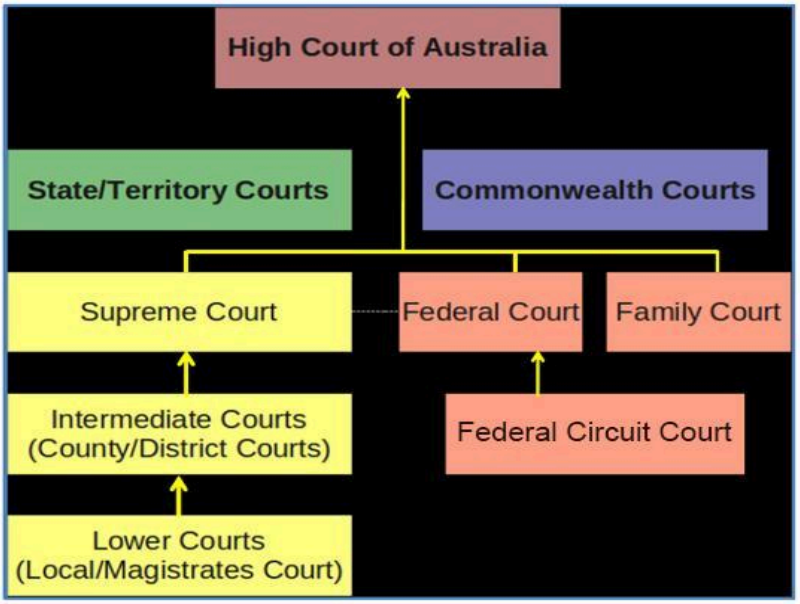
- They are important for they:
    - Ensure that government and public authorities do not exceed or abuse their powers
    - Provide citizens with means of vindicating their rights and protecting their liberties
    - Generally maintain the rule of law

Independence and Impartiality

An individual Judge must be independent and impartial

- **Judicial independence**
    - A cornerstone of the Westminster system of government and a safeguard of the rights and liberties of a citizen under the rule of law.
    - It involves consideration of the separation of powers and independence in the discharge of judicial duties.
- **Judicial impartiality**
    - A central theme of the judicial oath and involves:
        - Integrity fairness and impartial application of the law
        - The avoidance of bias or apprehended bias
        - The avoidance of a conflict of interest
        - The avoidance of any prejudgment of an issue.

The Australian Judicial Hierarchy



1700 MONDAY 26 MARCH (6)

Law and Logic

Common law legal reasoning often involves inductive reasoning, deductive reasoning and reasoning by analogy and as such, it **does not** always involve a strict application of formal logic.
By comparison: Oliver Wendell Holmes 1881: "The life of law has not been logic, it has been experience… in order to know what it is, we must know what it has been, and what it tends to become."

Logic

Predicate logic

Syllogism: a major premise and a minor premise leading to a conclusion.

- The subject or predicate common to both premises links the premises and provides the basis for the conclusion reached.
    - A believing that all Fridays are days on which there is a flight to Tokyo, and
    - B believing that today is Friday, is a reason for
    - C believing that today is a day on which there is a flight to Tokyo.

Law's use of Logic

Propositional logic and the law

Propositional logic is the most important form of logic in the context of common law legal reasoning.

- A form of deductive reasoning.
- Involves use of predicate logic to put the propositions in the form of a syllogism as illustrated by the following example of s 30 of the *Legal Profession Act 2007* (i.e. s 30 contains the propositions).

Julius Stone:
What is important is not setting out a logical answer but rather the judges reasoning as for choosing one outcome over the other:
"What is then decisive is the choice as major premise of one rather than another of the available legal propositions – and ultimately, of course, the reason, whether articulated or not – for choosing one rather than another."

Law making:

- Specific question of law
- Ratio: answer

Inductive versus Deductive Reasoning

- The method adopted at this stage is **analytical and inductive**.
- It starts with an analysis of the characteristics of the conduct and relationship involved in each of the decided cases. But we must know what we are looking for. We must approach this with some general conception of conduct and relationships which ought to give rise to a duty of care.
- This analysis leads to a proposition which can be stated in the form:
    - **In all the decisions that have been analyzed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc., and has not so far been found to exist when any of these characteristics were absent**.

- For the second stage, which is **deductive and analytical**, that position is converted to:
    - **In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, etc., a duty of care arises**.
- The conduct and relationship involved in the case for decision **is then analyzed** to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision…

NEIL MACCORMICK

Theory of legal reasoning

- MacCormick's theory provides an example of a **legal positivist** approach to legal reasoning and it is recognised, however, that this is not the only approach to legal reasoning and case analysis.
- Stone criticized MacCormick's theory
- Notwithstanding its positivist approach, the view taken in this course is that MacCormick's theory provides a very useful starting point for consideration and analysis.

Idea of the constraint of legal justice

- The constraint of formal justice is central to MacCormick's theory as it is closely linked to **legal justification**.
- The formal concept of justice requires that like cases should be treated alike and different cases be treated differently.
- Courts should only be concerned with the constraint of formal justice in treating like cases alike, as this enables the court to make a **legally justified judicial decision**.

Theory of Precedent

- MacCormick develops a theory of precedent that forms part of the constraint of formal justice.
    - His theory of precedent forms the basis of a 'formalistic' model of ***ratio decidendi***.
- The theory of precedent and his subsequent model of *ratio decidendi* must, however, form part of a coherent system of 'a complex interplay between considerations of principle, consequentialist arguments, and disputable points of interpretation of established valid rules'.
- The constraint of formal justice must be considered within the context of this complex interplay.
    - MacCormick refers to this complex interplay as '**second-order justification in hard cases**'.

Principles, analogies, and coherence

- A legal principle is a normative expression of the underlying reason for specific rules of law.
- A legal rule is a more specific expression of a general principle of law.
- Extension of the law through analogy:
    - Legal principles, as normative expressions of the underlying reasons for specific rules, provide a rational and legally justified basis for any extension of the existing law by analogy.
- Coherence in the law occurs where sets of legal rules are not inconsistent with accepted general principles.

Ratio Decidendi

[A] ratio decidendi is a ruling expressly or impliedly given by a judge which is sufficient to settle a point of law put in issue by the parties' arguments in a case, being a point on which a ruling was necessary to his [or her] justification (or one of his [or her] alternative justifications) of the decisions of the case.

English courts are obliged to follow previous decisions within more or less well-defined limits. This is called the doctrine of precedent. The part of the case that is said to possess authority is the ratio decidendi, that is to say, the rule of law upon which the decision is founded. Finding the ratio decidendi of a case is an important part of the training of a lawyer. It is not a mechanical process but is an art gradually acquired through practice and study. One can, however, give a general description of the techniques involved.

Obiter Dictum

- Everything in a judgment **(except the outline of facts, the procedural history and the order of the court)** that does not constitute *ratio decidendi* amounts to *obiter dictum. Arguments of legal principle and arguments evaluating other authorities or evaluating the consequences of the favoured ruling and its rivals, even though some such arguments are*

necessary to justify a ruling given, and even where only the very arguments actually advanced could justify the ruling, will then belong to the class of obiter dicta.

1700 MONDAY 16 APRIL (7)

According to Professor John Gray:

- It must be observed that at the Common Law not every opinion expressed by a judge forms a Judicial Precedent. In order that an **opinion** may have the weight of precedent, two things must concur: it must be, in the first place, an opinion given by a judge and in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*.

According to Professor John Salmond:

- A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio* decidendi. The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large.

Professor George Paton believed:

- '[T]he classical view was that the *ratio* was the principle of law which the judge considered necessary to the decision.'

According to Professor J L Montrose:

- 'It is better to use the phrase *ratio decidendi* to mean exclusively the principle of law propounded by the judge as the basis of his decision, a usage which would correspond to judicial usage.'

Professor Rupert Cross was of the opinion that:

- 'The *ratio decidendi* of a case is any **rule of law** expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury.'

- What happens when each member of the court delivers their own judgment agreeing on the result in the case but using different legal reasoning, precedents/legal rules?
    - Look to each separate ratio, and try to amalgamate them.
    - If a ratio cannot be found, the case does not have any legal value. *The ratio can be turned into the rule of law, it is thus binding on the courts that come behind them (dissent is not the ratio).*

Glanville Williams has observed why we need ratio (Doctrine of Precedent– lower courts must follow higher courts' rule, higher courts must follow their own rules by in large. Theory of Precedent: looking for law, cannot just make something up to determine a case):

- 'English courts are obliged to follow previous decisions within more or less well-defined limits. This is called the doctrine of precedent. The part of the case that is said to possess authority is the *ratio decidendi*, that is to say, the **rule of law** upon which the decision is founded. Finding the *ratio decidendi* of a case is an important part of the training of a lawyer. It is not a mechanical process but is an art gradually acquired through practice and study. One can, however, give a general description of the techniques involved.'

A Principle of law is an overarching norm, expressed through an internal or external (moral precept, policies) form, which gives rise to more specific Rules of law.

ARTHUR GOODHART

Professor Arthur Goodhart took a different approach to the identification of *ratio decidendi* in the 1930s. We will consider his approach and compare and contrast it to the approach taken by MacCormick. The reason for being that we can identify the use of Goodhart's approach today when particular circumstances arise in appellate court decisions with several, majority judgments. Goodhart's approach also provides the opportunity to apply an alternative approach to that taken by MacCormick. Goodhart was influenced by his rejection of the classical theory approach to the identification of *ratio decidendi*.
According to Goodhart:

- … the first rule for discovering the ratio decidendi of a case is that it must not be sought in the reasons on which the judge has based his decision.
- When we consider the appellate courts it becomes even more obvious that the principle of the case cannot necessarily be found in the rule of law enunciated, for it is not infrequent to find that, although the judges may concur in the result, they differ widely in their statement of the law.
- The first and most essential step in the determination of the principle of a case is, therefore, to ascertain the material facts on which the judge has based his conclusion.
- Undoubtedly this theory has the attractiveness of simplicity. No longer will we have to analyse the sometimes lengthy and difficult opinions of the judges; all that we are concerned with are the facts and the conclusion.

Goodhart then said, in 1959:

- "[T]he principle of a case [can] be found by determining (a) the facts treated by the judge as material, and (b) his[/her] decision based on them."

It is the facts that matter, not the reasoning.

CRITQUE OF GOODHART'S APPROACH

According to HK Lucke:

- Goodhart's formula: ***ratio decidendi* = material facts as determined by the judge + decision.** The really serious difficulties with Goodhart's formula lie in (1) his reference to the 'facts of the case' as part of the ratio, and (2) his insistence that the precedent judge has the power to declare the facts material or non-material and thus to shape the future course of the law. These aspects of his theory raise issues of fundamental importance concerning the logical structure of the *ratio decidendi* and the nature of the judicial law-making process.

Professor Sir Neil MacCormick provides the following **very important** definition of *ratio decidendi*:

- **'A *ratio decidendi* is a ruling expressly or impliedly given by a judge which is sufficient to settle a point of law put in issue by the parties' arguments in a case, being a point on**

which a ruling was necessary to his [or her] justification (or one of his [or her] alternative justifications) of the decisions of the case.'

- The ruling, rather than the rule of law.
- Is a ratio a rule of law (what Cross would suggest)? MacCormick does not think so.
    - MacCormick believes that Cross's definition of *ratio* is too wide:
        - 'In doubly stressing the importance of judicial lines of reasoning, as indicating what is necessary to a conclusion, this is admirable. But the trouble is that it clearly extends too wide. In any case in which a statute is being interpreted and applied, the statute itself, or a section of it, will constitute a rule without which the same conclusion could not be reached (so far as we mean by the "conclusion" a conclusion of, e.g., liability *under the statute*). **But nobody supposes the statute to be the *ratio*; rather it will be what the court holds to be the correct interpretation of the statute, that is the *ratio*.**'

Everything in a judgment **(except the outline of facts, the procedural history and the order of the court)** that does not constitute *ratio* amounts to *obiter dictum*

- According to MacCormick:

'Arguments of legal principle and arguments evaluating other authorities or evaluating the consequences of the favoured ruling and its rivals, even though some such arguments are necessary to justify a ruling given, and even where only the very arguments actually advanced could justify the ruling, will then belong to the class of obiter dicta.'

JULIUS STONE

- Julius Stone rejected the approaches taken by MacCormick and Goodhart.
- He believes that the approaches advocated by both MacCormick and Goodhart fail to properly address the critical issue of whether court decisions contained **different levels of abstraction or generality** of a *ratio decidendi* in relation to the same issue
- According to Stone, there are various levels of generality in the decisions of trial and appellate courts. The reason for this relates to the problem associated with determining what facts were considered by a court to be **'material'** (for Goodhart) and what was considered to be **'necessary'** (for MacCormick) for the court to decide the issue or issues before it.
- There is an infinite set of questions of generality that can be applied: does it just relate to a coke bottle or ginger beer too? Is it just in relation to the specific house or all possible dwellings. A doctor, or all humans. Etcetera.

1700 MONDAY 23 APRIL (8)

FOLLOWING AND DISTINGUISHING PRECEDENT
The idea of following precedent is a practice (should be followed) – and not a doctrine (must be followed).
Generally, a court decision might have 1 or 2 issues, potentially 3 principle issues. The other issues will only be sub-issues. There is a ratio connected to each issue. Thus if there are 2 principle issues in the case, there will be 2 discernible ratios.

HISTORICAL BACKGROUND

- Two historical conceptions of precedent
    - The traditional or classical common law conception (approach): the declaratory theory of adjudication
        - A court decision is evidence of the law only. It is a statement of what the law is.
    - The positivist conception (approach) to precedent
        - The court decision, constitutes the actual law.
- Significant changes to the practice of following precedent occurred during the 19th century in England and these changes had a significant influence on the development of the common law
- The practice of following and distinguishing precedent has not been static over time

The issue of the status of precedent during the 19th century will be addressed through considering the following past exam question.

'Significant changes to the practice of following and distinguishing precedent occurred during the 19th century in England. These changes had an important influence on the development of common law adjudication in England at the time.' Discuss. (One of the short essay questions from the LAWS1111 Legal Method Final Exam 2009.)
The question requires discussion of the influence that the changes to the practice of following and distinguishing precedent in 19th century England had on the development of common law adjudication in England.

- Changes to the structure and composition of the courts in England contributed to the emergence of a practice of following precedent.

- It was not until 1812 that decisions of the House of Lords were properly recorded. It was not until the 1820s that professional judges sat on the House of Laws.
- A chaotic system of appeal also existed until the reforms in 1830.
- An English Court of Appeal was created in 1875 and this provided a clearer line of appeal to the House of Lords.
- In 1898 the House of Lords decided in the *London Tramways* case that it was bound by its own previous decisions.
- These changes provided the platform for the development of a practice of following precedent within a structured court hierarchy.
- This development in turn influenced the development of common law adjudication in 19th century England because it was now within this context that adjudication took place.
- This developing practice of following precedent was influenced by, and coincided with the influence of the positivist conception of precedent and adjudication.
- John Austin and Jeremy Bentham ridiculed Blackstone's classical declaratory theory of common law adjudication. Austin thought that the declaratory theory was 'childish fiction'.
- The positivist approach considered that the decisions of judges as recorded in the law reports constituted the actual law itself. This was in contrast to the declaratory approach where the reported decisions were considered to be only evidence of the law.
- Under the positivist approach, a judge was therefore part of the actual development of the common law because the judicial decisions constituted the law.
- During 19th century England the importance of certainty in the law and in English public life generally emerged. Recognition of the need for certainty in the law was consistent with the positivist approach.
- Consequently, the 19th century changes to the court structure and composition, and the emergence of the positivist conception of precedent had an important and lasting impact on common law adjudication.

FOLLOWING A PRECEDENT: DOCTRINE OR PRACTICE

According to Professor Charles Rickett: 'The commonly asked question is: are "rules of precedent" rules of law or statements about practice; and, if the latter, what precisely does this mean?'

- Professor Cross's three 'rules' of precedent
    1. All courts must consider the relevant case-law; (This rule is not controversial.)
    2. Lower courts must follow the decisions of courts above them in the court hierarchy; and
        - Is this a rule of law or a statement of practice?
        - According to Professor Charles Rickett following an analysis of decisions of the House of Lords and the English Court of Appeal:
            a. 'What emerges very clearly is that the true rationale of rule 2 lies in an element of necessity. Rule 2 is necessary for the smooth operation of the judicial system as an integral part of the political structure in England. It makes workable the English system of hierarchical courts and indeed it goes a very long way towards maintaining that hierarchical structure.'
        - This rationale applies equally to the various State, Territory and Commonwealth court hierarchies in Australia.
        - Furthermore, it is accepted practice in Australia that courts below the High Court of Australia 'follow the decisions of courts above them in the court hierarchy'.
    3. Appellate courts are generally bound by their own decisions.

- The joint majority of the High Court of Australia in *Nguyen v Nguyen* (1999) 169 CLR 245, 268-270 takes the view that the issue of whether a State or Territory appellate court departs from its own previous decision is a matter of practice, not a rule of law.
- Lord Denning MR took a similar position in *Davis v Johnson* [1978] 1 All ER 841, 855. When referring to this *Practice Statement* he said, 'That shows conclusively that a rule as to precedent (which any court lays down for itself) is not a rule of law at all. It is simply a practice or usage laid down by the court itself for its own guidance…'.

DISTINGUISHING PRECEDENT

Can a precedent be avoided? The question is not : how do we avoid precedents?

The question should be: after considered analysis of the ratio decidendi of a past decision in the context of its position in the court hierarchy, does the relevant practice of following precedent in this court require application of the rule from the previous decision in view of the circumstances of the present appeal?

- Is a past court decision, considering court hierarchy, applicable and relevant to the case now?
- It is not simply a matter of thinking of ways to avoid a precedent.
- The issue of a decision being made *per incuriam* is, however, a different matter.

Distinguishing precedent and the concept of *ratio decidendi*

- *Per incuriam*: A decision made *per incuriam* means the decision has been made 'through want of care' (or 'wrong in law').
- A decision given *per incuriam* may be given in three categories of cases:
    - (1) Where a court has overlooked a relevant case authority;
    - (2) Where a court has overlooked a relevant statutory provision; and
    - (3) Where a court has clearly made an error.
- A decision made *per incuriam* therefore involves some error by a previous court. It does not merely involve concluding that a previous decision can be 'avoided' where it appears necessary or convenient.

DOES EVERY CASE CONTAIN A DISCERNIBLE RATIO DECIDENDI

- Relevance of the court hierarchy
- Ramifications for the practice of following precedent
- Two schools of thought
    - An intermediate position
    - Goodhart's 'material facts' approach?
- Practical examples:
    - *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241
    - *Hawkins v Clayton* (1988) 164 CLR 539
- The 'not reasonably distinguishable' test

If an appeal is going up through the QLD hierarchy, to get to the high court, it would have to go through the QLD Court of Appeal. Precedent can only be created by a superior court. QLD superior courts: the supreme court and above. On a federal level: federal/family court and above. These superior courts have the power to create precedent. A decision from a different court hierarchy (e.g. a different state), is only persuasive; not binding.

Esanda Finance: was about whether or not the auditors (Hungerfords) owed a duty of care to Esanda (the financier). The judges in majority all had different ratio. Thus the ratio for the whole case was hard to put together/identify.

When you read an appellant court decisions with multiple judges:

1. How many judgements and how many judges – how many in majority and dissent.
2. Read through the judgements separately.
3. Put it all together.

Technically nothing said in dissenting judgement can contribute to or be part of the ratio of the whole case.

JUDGES:	A	B	C	D	E	F	G
	1,2	1,2,3	1,2,3,4	1,2	Joint dissent (5,6)		
		MAJORITY			DISSENTING		

There is a second sense of majority: when we're trying to determine whether there is a ratio for the entire case, there must be sufficient commonality between a majority of all of the judges sitting. Hence, you cannot say the ratio is 1,2 because its common, because in ridding of 3 & 4 it disregards these points.
However:

JUDGES:	A	B	C	D	E	F	G
	1,2	1,2	1,2	1,2	Joint dissent (5,6)		
		MAJORITY			DISSENTING		

The ratio of this case is 1,2.

Likewise:

JUDGES:	A	B	C	D	E	F	G
	1,2	1,2	1,2	1,2	1,2		
Joint dissent (5,6)							
			MAJORITY				
DISSENTING							

The ratio of this case is still 1,2.

1700 MONDAY 30 APRIL (9)

LEGISLATION AND THEORIES OF STATUTORY INTERPRETATION

- The legislative process
- Fundamental legislative principles
- Delegated legislation
- Theories of statutory interpretation

THE LEGISLATIVE PROCESS

- Primary and delegated legislation
- Policy
- Drafting a Bill
- The Explanatory Memorandum (or Explanatory Notes)
- Initiation of the Bill and the First, Second and Third Readings
- Importance of the Second Reading speech (State and Commonwealth interpretation)
- Passage of a Bill through Parliament

        - Commonwealth Parliament
        - Queensland Parliament
    - Royal Assent and Proclamation

FUNDAMENTAL LEGISLATIVE PRINCIPLES (BACKGROUND)

- In a parliamentary democracy based on the rule of law, there are certain fundamental legislative principles which must be considered during the legislative process.
- These principles are contained in the *Legislative Standards Act 1992* (Qld). Queensland is the only jurisdiction in Australia to have enacted such legislation.
- First, since 1922, Queensland has had a unicameral system of Parliament. Arguably, a unicameral system of Parliament reduces scrutiny in the legislative process.
- Second, the *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* in Queensland from 1987 to 1989 (the Fitzgerald Inquiry).
    - One recommendation of the Fitzgerald Report was the establishment of an **Electoral and Administrative Review Commission (EARC)**.
        - **EARC had a statutory function to investigate and report in relation to the operation of the Queensland Parliament and the whole or part of the public administration of the State of Queensland.**
        - EARC investigated the need for fundamental legislative principles and reported its recommendations in its *Report on Review of the Office of the Parliamentary Counsel* (the EARC Report) which was delivered in May 1991.
        - The EARC Report asked: 'Should fundamental legislative principles be set forth in statutory guidelines?'

***Legislative Standards Act 1992* (Qld)**

- Should fundamental legislative principles be set forth in statutory guidelines?
- On the basis of the EARC Report, the Queensland Parliament answered this question in the affirmative with the passing of the *Legislative Standards Act 1992* (Qld).
- Part 2 of this Act reflects the fundamental legislative principles set out in the EARC report
- Departure from fundamental legislative principles
    - The Fitzgerald Report stated the need for an independent Office of Parliamentary Counsel in Queensland:
        - In Queensland, the Parliamentary Counsel is attached to the Premier's Department, not the Attorney-General's Department as in other states. The office is not established as an independent entity by statute, as in the case of the Commonwealth Parliamentary Counsel. The Parliamentary Counsel obviously should not tailor advice to political expediency or fail to point out fundamental errors in principle or obligation in any proposed course. The present role and functions of the Parliamentary Counsel should be reviewed…to ensure its independence.

DELEGATED LEGISLATION

- Introduction
- Early delegated legislation
- Legislative versus executive activity
- Necessity for delegation
- Criticism of delegated legislation
- The Commonwealth
- Queensland
- Henry VIII clauses and s 4(5)(c) of the *Legislative Standards Act 1992* (Qld)

THEORIES OF STATUTORY LEGISLATION

The relationship between a statute (legislation, an act of parliament) and common law is very important.

- Textualist theories (most restrictive)
    - Soft plain meaning theory
    - The new textualist theory
- Intentionist theories
    - Subjective versus objective intention
    - Specific intent theory
    - Imaginative reconstruction theory
- Purposive interpretation theory
- Dynamic theories (least restrictive)
    - Best answer theory
    - Pragmatic theory
    - Critical theory
    -

STATUTE AND THE COMMON LAW

- **Influence of legislative change**
- According to former Chief Justice Murray Gleeson:
    - There are now few appeals that can be decided without the application of legislation. Legislative concern with issues of tort, contract and equity has transformed litigation. An increasing part of the ordinary work of judges of all courts, including the High Court, turns on the interpretation and application of statutes; some of extraordinary complexity. The relationship between common law and statute is symbiotic. The interaction of common law and statute adds a new dimension to the task of the High Court at the apex of the Australian legal system.
- Justice Kirby's important *obiter dicta* comments in *Harriton v Stephens* (2006) 226 CLR 52, 93-8 [134] – [144] will be analysed in the lecture.
    - Law of negligence comment, relating to the interaction of statute and common law.

TEXTUALIST THEORIES

- **Textualist theories** of statutory interpretation constitute the most **restrictive** theory in the spectrum of theories of statutory interpretation.
    - Emphasise the actual meaning of the words. **This is very important today. One of the first things you do is read and consider the text.**
    - Place far **greater emphasis on the meaning of the text** than on the **intention of parliament.**
    - Based on the belief that the interpretation of a provision in a statute cannot change over time. The meaning of a provision is the same at the time of enactment and at any time in the future.
    - Statutory interpretation is an exercise in ascertaining the plain meaning of the words of the statute. This is one of the first steps taken. This is the plain ordinary meaning.

(1) Soft Plain Meaning Theory

- Although the plain meaning of the statutory provision in question forms the basis of the soft plain meaning theory, **the theory considers the plain meaning within its historical context (historical context: previous statutes before it).**

- The history of the legislative provision plays a greater role in the process of statutory interpretation under soft plain meaning than the context of the provision within the statute or the purpose of object of the statute.
- Where a legislative provision under consideration has no legislative history from the point of view of earlier versions of the provision, interpretation under the soft plain meaning theory is similar to interpretation under the new textualist theory (or hard plain meaning theory): see next slide.

(2) New Textualist Theory (or Hard Plain Meaning Theory)

- Emphasises that the actual text of the statute provides the **only** basis for the interpretation process.
- The meaning of the actual text must provide the **only** basis of statutory interpretation.
- Requires **strict** interpretation of the meaning of the text of the statutory provision.
- This is not reflected at all in practise. It is not correct to look at the words and nothing else.

Statutory Interpretation involves interpretation of parts of a statute **in the context of particular circumstances.**

INTENTIONIST THEORIES OF STATUTORY INTERPRETATION

- Legislative intention is very important today. When considering this, it is from an objective point of view – objectively the parliament as a whole (not each individual judge).
- When you are considering legislative intention it should be more in respect of the particular issue under consideration. Think of it in relation to the specificities (narrow consideration in respect to issue), not the entire statute (object and purpose).

Subjective versus objective intention

- According to Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396:
  - Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation.
- According to Lord Reid in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A G* [1975] AC 591, 613: 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.'

(1) Specific Intent Theory

- The common law literal approach to statutory interpretation is an example of a specific intent theory and is no longer applied.

- Higgins J described the literal approach in the following terms in *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited* (1920) 28 CLR 129, 161-2:
    - …The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic [i.e. inexpedient or unsuitable] or improbable.

        - Today it is very important to read the statute as a whole.
- The literal approach fails to give sufficient weight to the object or purpose of the statute. It does, however, require words to be read in context as 'intention has to be found by an examination of the language used in the statute as a whole'.

(2) Imaginative Reconstruction Theory

- Imaginative reconstruction theory 'reconstructs' the reason for the enactment of a statute.
- The common law mischief approach to statutory interpretation is an example.
- The theory and the mischief approach can be traced back to the 16th century decision in *Heydon's Case* where the Court of the Exchequer stated that 'the sure and true interpretation of all statutes' requires the consideration of four matters:
    - 1. The state of the common law before the making of the statute now before the courts.
    - 2. The mischief or defect for which the law prior to the statute failed to provide.
    - 3. The remedy resolved by Parliament to cure the pre-existing mischief or defect.
    - 4. The true reason for the remedy.
- The mischief approach was usually adopted when a literal interpretation resulted in ambiguity or inconsistency.

PURPOSIVE INTERPRETATION THEORY

- **Purposive interpretation theory** emphasises the importance of the object or purpose of a statute when interpreting the meaning of a provision of the statute. This approach is the approach specified by the various *Interpretation Acts* throughout Australia.
- This approach is not, however, based only on the purpose or object of the statute. For example, Justice Michael Kirby advocates a purposive interpretation theory which acknowledges the use of context and extrinsic material.
- Justice Kirby's *obiter dicta* comments in *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, 264-6 will be analysed in the lecture.
    - Three interpretative principles:
        - (1) purposive interpretation;
        - (2) contextual interpretation; and
        - (3) access to extrinsic materials.
            - These reflect the modern approach, however he placed emphasis on purpose and often considered purpose first up. This is not how

we are going to approach it. We will consider context before purpose because that is the way the High Court does it and has been for many years.
- Purpose is very important in modern Statutory Interpretation as in the old common law approach not enough emphasis was placed on its purpose. However whenever considering object or purpose (similar ideas) its more in respect of the entire statute.
- Purpose or object sections are very general.

Thus, the difference: Legislative intention is more specific in relation to the issue. Object or purpose is more general in relation to the entire statute.

DYNAMIC THEORIES OF STATUTORY INTERPRETATION

- The least restrictive theories in the spectrum are the dynamic theories of statutory interpretation.
- Dynamic theories of statutory interpretation cover a variety of approaches from a normative perspective. A normative theory is concerned with what 'ought to be' over a period of time.
- Dynamic theories do not restrict interpretation to the plain meaning of a statute at the time of enactment, or to its purpose or the intention of parliament.
- Dynamic normative theories approach statutory interpretation from the point of view of the evolving meaning of the statute in changing times. This requires a more flexible approach which takes into account a variety of 'relevant' factors and considerations.

(1) Best Answer Theories

- Best answer theories make an interconnection between law and morality. At the heart of this, according to Lon Fuller, is the need for coherence in this interconnection as the 'bulk of human relations find their regulation outside the field of positive law'.
- In his 1940 Rosenthal Lectures at Northwestern University Law School, Fuller attacked the positivist claim that law can be separated from morality. Fuller believed that statutory interpretation was a process of interpretation of law and social morality. Lon Fuller, *The Law in Quest of Itself* (1940) 111-2.

(2) Pragmatic Theory

- The process of statutory interpretation is multi-dimensional in that it does not focus on a single issue. Eskridge Jr, Frickey and Garrett explain the argument in support of a pragmatic theory of statutory interpretation as follows:
  - An overall problem with the big theories of statutory interpretation is that they are based on a single foundation (text or specific intent or general intent). This ignores the pragmatic insight that our intellectual framework is not single-mended, but consists of a "web of beliefs", interconnected but reflecting different understandings and values. As a consequence, human decisionmaking tends to be polycentric, spiral, and inductive, not unidimensional, linear, and deductive. We consider several values, not the strength of each in the context at hand, before reaching a decision…Thus, goals of statutory interpretation maybe multiple and the sources may be various.
  - William Eskridge Jr, Philip Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (2nd ed, 2006) 249.

(3) Critical Theories

- Eskridge Jr, Frickey and Garrett explain critical theory of statutory interpretation as theory 'that deconstructs statutory texts, typically in order to show how particular readings are ideologically based rather than objectively grounded'.
- Deconstruction is at the other end of the spectrum of theories of statutory interpretation to textualist theory.
- The aim of critical theories is to analyse the statutory text from the stance that the actual words in the text only provide a starting point for the process of statutory interpretation.
- Statutory interpretation is thus a far more complex process than the merely working out the plain meaning of the statutory text.

1700 SEMINAR 10

ANSWERING STAT. INTERPRETATION QUESTIONS IN TEST

- Indicate you know what isn't relevant
- Modern stat. statutory purposive approach
    - Interpretation in context
    - Purpose/object (to be considered in detail next week)
    - Extrinsic material

Former common law approaches developed at common law

1. Literal approach; do not consider object, purpose, extrinsic material
2. Golden rule; absurd interpretation that parliament couldn't have intended, the judge would possibly add words in to make it non-absurd
3. The mischief approach was usually adopted when a literal interpretation resulted in ambiguity or inconsistency (e.g. Civil Liability Act) – judge would look at the problem existing at common law which that statute was intended to fix, and would give an interpretation

Kirby J said there were three interpretive principles;

1. Purposive interpretation
2. Contextual interpretation
3. Access to extrinsic materials

Using purposive first it renders a wider interpretation, as opposed to context first which considers the specifics around the singular case. Normally in Australia, courts consider context first.

NEED TO: Consider context in view of the circumstances, link it back to issue. Prior to considering the immediate context of the section and those around it, you need to have the legal issue clear in your mind.

- **(1) Interpretation in Context**
- **Context in statutory interpretation (ie a contextualist approach)**
    - (1) Consider the 'immediate context' of the provision in issue by examining other provisions in the immediate context of the provision in issue.
    - (2) Examine the 'wider context' of the particular Act as a whole.
    - (3) Examine other relevant statutes and possibly, depending on the particular circumstances of the case, examining the common law.
        - *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ):
        - …the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its

widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.

- **(a) Ascertain the natural, ordinary meaning of the section or sections in issue (ie the immediate context)**
  - (i) Relevant dictionary definitions (if provided)
  - (ii) Determine legislative intention (if necessary)
    - A more narrow intention that is linking specifically to the issue
  - (iii) Relevant past case authorities (if provided)
    - If it addresses another stage of analysis (object, purpose, extrinsic material) you can use it elsewhere
  - (iv) Relevant internal aids to interpretation eg *noscitur a sociis*, *ejusdem generis*, express inclusions and implied exclusions and the specific prevails over the general. (Remember the Queensland position under s 14A(3) AIA (Qld).)
  - (v) Relevant common law presumptions (Remember the Queensland position under s 14A(3) AIA (Qld).)
- **(b) Act to be read as a whole (ie the wider context)**
  - Each provision must be read in its immediate context and within the context of all of the other provisions of the Act ie the wider context.
- **(c) The historical context (ie the even wider context)**
- **(d) Effect must be given to the whole Act**
  - This may, at times, require that a court determines a construction which results in the least inconsistency between provisions in a statute. In this regard, the court must attempt to give some construction to the provision or provisions which are in issue.
- **(e) Presumption that words are used consistently**
  - There is a presumption that words are used consistently in statutes. In other words, if the same word is used in different parts of the statute, there is a presumption that it has the same meaning in the different provisions unless the statute expressly states that this is not so. Courts will normally interpret the same word in the same way throughout the statute.
  - This presumption also provides that where the same word could have been used but is not, and a different word is used in a different part of the statute, then the court will take the view that Parliament intended a different meaning to each word in the context of each word's usage in the statute.
  - For example, if the word 'medicine' is used in some provisions of a statute but the word 'drug' is used in other provisions of the same statute, there is the presumption that through the use of different but similar words, Parliament intended that different constructions be given to each word.

- **Internal aids to statutory interpretation**
  - Interpretation provisions including dictionary or definition parts in *Acts Interpretation Acts* or *Interpretation Acts*
  - The long title, headings, schedules and examples
  - Specific rules of statutory interpretation
    - Note: In view of the modern practice of using plain English when drafting legislation, in modern statutes the use of these specific rules of interpretation should be less than it was when statutes were not written in plain English.
  - Words of similar meaning: *noscitur a sociis*
    - Words take their meaning from the context in which the words appear.
  - The class rule: *ejusdem generis*
    - Where there are two or more specific words in a provision of statute followed by a general word or general words, then the wide meaning of the general word or general words is restricted to the same class, if any, constituted by the specific words.
    - ***Difference between noscitur a sociis and ejusdem generis?***

        - *Application of noscitur a sociis does not require identification of a class or genus in two or more specific words. It requires interpreting a word or words in a provision within the context of the other words in the provision. In contrast, a class or genus must be capable of identification in two of more specific words of a provision before ejusdem generis can be used.*
    - Express inclusions and implied exclusions: *expressio unius est exclusio alterius*
        - Express inclusions and implied exclusions provides that if one member of a class is mentioned expressly, then other members in that class are impliedly excluded.
        - The rationale for this rule of interpretation is that where the Parliament expressly includes one member of a class, there is a reasonable implication that Parliament intended to exclude the other members of that class.
        - Notwithstanding the rationale, courts have expressed the view that the rule should be applied with caution.
    - The specific prevails over the general: *generalia specialibus non derogant*
        - Where one provision in a statute deals generally with a matter and another provision in the same or a different statute deals specifically with the same matter, the specific provision prevails over the general provision.
        - The proper principle to apply if an enactment contains two similar prohibitions, one wide and the other applying only to a limited class of case wholly within the wide prohibition, is to treat the wide prohibition as not applying to cases within the limited prohibition, especially if the limited prohibition is made subject to some exception and the wide prohibition is not.

1700 MONDAY 21 MAY (11)

At the beginning of answering a statutory interpretation question, consider commencement (has the Act or relevant parts of the Act commenced operation). Retrospectivity; does part of the Act or the whole Act apply retrospectively.

1. Legal issue(s)
2. Context
3. Purpose or object section
4. Extrinsic material (second reading speech, extract from explanatory notes)
5. Conclusion

In answering a statutory interpretation problem, the methodology or framework should be used flexibly depending on what the question is.

1. Identify the legal issue(s) to be considered to give legal meaning to the statutory provision(s) in the particular circumstances being considered;

2. Locate the provision(s) in question, determine whether the provision(s) has commenced operation, and analyse the provision(s) in the context of other relevant provisions and the particular, circumstances under consideration;

3. Read the Act as a whole, give effect to the whole Act including its historical context, use the presumption that words are used consistently throughout an Act, and as a preliminary step, attempt to ascertain the plain, ordinary meaning of words in the relevant provision(s) in the context of the legal issue and the particular circumstances being considered;

4. Identify the relevant interpretative criteria (such as the relevant *Acts Interpretation Act*, relevant aids to interpretation, relevant Oxford or Macquarie dictionary meanings, legislative intention, relevant past case authorities, the purpose or object of the Act and relevant extrinsic material) for the legal issue(s) being considered;

5. Evaluate the extent to which the relevant interpretative criteria assist with determining the legal meaning of the provision(s) being considered;

6. Apply the relevant interpretative criteria, formulate available and opposing constructions of the provision(s) in the context of the particular circumstances and issue(s) under consideration;

7. Evaluate the strength of each construction in the context of the relevant interpretative criteria and judge which of the constructions, on balance, carries more weight and should be regarded as expressing the legal meaning;

8. Taking into account the methodology set out above, you should be able to plan and write a reasoned opinion justifying your determination of the legal meaning of a statutory provision(s) and its application to particular set of complex circumstances to resolve the issue(s) under consideration.

1700 MONDAY 28 MAY (12)

In case analysis, address the judges separately, and then within a singular judgement, address each issue or sub-issue separately.
Use McCormick's process.

	Majority		Dissenting
	Judge A	Judge B	Judge C
Legal issue 1	Yes	Yes	
Legal issue 2	No	Yes	

- Ratio for legal issue one, but no ratio for legal issue 2.
- Therefore state these separately.
- However, no ratio for whole case.

WHAT CAN A RATIO BE:

- A ratio may just be the application of a previously existing legal rule. Just because it was decided in the past doesn't mean it can be used again.
- It could be something new too; for example in regards to a novel legal issue. Thus the ratio is something new.

- It may be in relation to statutory interpretation. The judges' interpretation of how a section of statue applies or operates (McCormick) can be a ratio; this is a ratio in relation to statute.

The nominal defendant is an artificial legal entity set up by statue. One purpose of it is to allow an injured person to sue for damages allowing for court action, if the identity of the perpetrator or car is unknown. It is relevant with CTP insurance.

Relevant case authority is not extrinsic material! – do you reference case authority before or after