

Chapter 1 Notes

Syllabus Points:

➤ Operating Principles of a liberal democracy

- *Equality of political rights*
- *Majority rule*
- *Political participation*
- *Political freedom*

Key words to look at the glossary for: Democracy, Majority Rule, Representative Democracy, Liberal Democracy, Separation of Power, Legislative/Executive/Judicial Power, Checks and Balances

Democracy

- Democracy is a form of government in which people govern themselves.
- It originated in ancient Athens. Comes from Greek words demos 'people and kratos "power."

Majority Rule:

- Majority rule is the idea that 'the will of the majority' of citizens should be reflected in government and law and is an operating principle in democracy.
- Citizens have entitlements and obligations due to their belonging to a nation, and each nation decides the parameters of citizenship.
- Majority rule is still a key principle in a representative democracy; However, the will of the majority is now expressed through the composition of the elected parliament rather than directly in every decision.

Representative Democracy

- Representative democracy is a form of government in which citizens choose (by election) others to reflect their concerns and values in a law-making assembly.
- Elections are means by which representative democracies translate the will of the majority into parliaments and governments, thus into laws.
- A representative body like parliament, congresses and assemblies help govern on behalf of the people in their name and using powers given to it by the people
- Parliaments perform a number of a functions within a representative democracy:
 - Represent the people who elect them
 - Make laws; and
 - Debate issues of national importance
- In some systems of government, including Australia they make and break the government and hold it to account in between elections.
- Majority rule is so important in representative democracy and democracy in general as it is absolutely essential that the voting systems used to choose sovereignty representatives are fair and free from interference and voter intimidation.

Liberal Democracy

- A liberal democracy is a form of government in which a country's sovereignty is vested in its citizens - that is, the people have the authority to govern themselves.
- Citizens periodically delegate their sovereignty to representatives chosen through elections. These representatives exercise the people's power on their behalf and for their benefit.
- Liberal democracy is not just majority rule, it also includes respect for rights, especially the rights of minorities.
- Pure democracy could have become a tyranny of the majority if majority rule is not moderated by respect for the political rights and freedoms of those who are not part of the majority.
- A democracy that doesn't protect the weak and vulnerable is called illiberal.
- Not all countries are liberal democracies and may be non-democratic sovereignty like:
 - Absolute monarchy dictatorship
 - Elite group (oligarchy, junta)
 - Single politician party (one party state)
 - Religious clerics (theocracy)
- There are many types of non-democratic systems of government, but they all share on characteristics - the authority to govern and exercise is not vested in the people
- In non-democracies, the people are subjugated by the power of those in authority. They are subjects not citizens. Subjects do not govern themselves.

Citizens

- Citizenship entitles a person to certain rights and freedoms granted by their country.
- Citizenship can also impose obligations and responsibilities on a person.

Nation State

- Nation States have the 'authority to govern' and absolute rights to do so in their territory without outside interference.
- Nation States are independent, political units that possess.
 - A territory
 - Population
 - An organised political system

Operating Principles of a Liberal Democracy

- There are four main operating principles needed to make liberal democratic system of government to work:
 1. Majority Rule
 2. Equality of political rights
 3. Political freedom
 4. Political participation
 5. (Additional) Rule of Law

Majority Rule

- Majority Rule is the most basic principle of democracy, In practice it means two things.
 1. A legislative chosen by the people. Laws are made by a parliament composed of representatives chosen by the people. This ensures that laws reflect the values of the majority of people. Parliament reflect the will of the majority in the laws it passes

2. An executive chosen by the people. The executive, known as 'the government' executes the laws and makes policies to implement them

- Australian citizens vote in parliamentary elections to choose representatives.
- The USA does the same through congressional elections to elect representatives
- Australia achieves majority rule in its executive government by having its representative parliament determine government.
- The government in Australia is the political party(s) with a majority of seats in the lower house.
- The US directly vote for their president and vice who then choose a cabinet of executives secretaries (called 'The Administration')

Equality of Political Rights (Article 25a)

- Political rights are entitlements essential to citizens' ability to govern themselves.
- Political rights enable political participation in government.
- It is a citizens' political right to vote that allows them to participate by contributing to the composition of their parliament and to be represented in government and law making.
- Non-citizens even those living in liberal democracies lack these rights.

Political Freedom (Article 18,19,21,22)

- Political freedoms are entitlements people have that enable them to participate in their government.
- To be free means to be able to make choices without intimidation, coercion, or pressure from those with power.
- In Australia everyone can think and believe what they wish. They can have opinions and have the right to express these thoughts, beliefs and opinions freely through different forms of communication.
- This freedom is not unlimited. In Australia they can have an implied right to political communication but not to a right to free speech (as in the USA)

Political Participation

- Political participation occurs when people actively take part in their own government by putting to use their political rights and freedoms.
- Doing so enables them to influence law making and government decision making
- Voting in elections, learning about and debating issues with other people, joining pressure groups and political parties, writing to a member of parliament or the newspaper, publishing opinions, protesting and volunteering to hand leaflets.

Rule of Law

- The rule of law's most important characteristic is that everyone, even those with political legal power to make and carry out laws, must be subject to the law, including high officials like, prime minister, monarchs etc.
- All parts of the political system - its parliaments, courts, governments police and so on - must also be subject to law
- In a liberal democracy, through representatives, citizens make their own laws, through rule of law, citizens can impose limits upon those in power

- Rule of law protects citizens from abuse
- In a liberal democracy through representatives, citizens make their own laws, through rule of law, citizens can impose limits upon those in power
- Constitutions create the law-making bodies of government. They define their powers
- Rule of law exists because:
 - Universality of law - No one is above law and it overrides all customs and traditions which has caused conflict with Aboriginal customary law.
 - Laws should be known, clear, consistent and coherent - People subject to a law should know it exists before it is applied hence why in Australia when law is passed it is published. Knowledge of the law is the reason laws are applied for cases after it existed and prevents people from being charged for something that was legal when they did it. It limits ability of government to abuse their powers and unfairly prosecute individuals.
 - Independent Judiciary -
 - Courts must be free of pressure and interference from governments and others so they can adjudicate matters purely on the basis of law. Judiciary independence guarantees that judges cannot be pressured by government or powerful people to make decisions in court.
 - Judges are appointed by the executive, but they cannot be dismissed by them. They can only be dismissed by the parliament/legislature but that to only on the basis of 'proved misbehaviour or incapacity'. These arrangements make judges secure in their roles and are therefore free from interference or pressure by the executive government or parliament.
 - Judicial independence in Australia at the federal level is protected through Section 72 which provides for: tenure of judges to the age of 70 years, remuneration is unable to be reduced upon appointment and removal can only occur through a joint sitting of both Houses of parliament on the grounds of 'proved misbehaviour or incapacity'. Independence of the judiciary is seen as an important check and balance on both the legislature and executive.
 - Examples of decisions that have limited the power of the legislative arm of government; Williams (2012), Citizenship Seven (2017)
 - Examples of decisions that have limited the power of the executive arm of government; Williams (2014), Robodebt (2019)

Separation of Powers

- The separation of powers is the organisation of the powers of government in such a way that prevents the concentration of power in the hands of one leader or an elite group. No one should have too much power
- A government's main tool for governing is law. For law to work it must be:
 - Created
 - Carried out or administered
 - Applied in ways that resolve specific disputes

- When these powers are separated, they can provide accountability, or check and balances on each other
 - Checks are limits to power
 - Balances are an equivalence of different types of powers
- Checks and balances are the result of an effective separation of powers
- No one in Britain's system of government seemed to have too much power as:
 - Parliaments create law
 - Ministers administer or carry out, the law
 - Judges decide on how the law applies in specific cases and make legally binding decisions
- The power to create is legislative, administer law is executive and applies in judicial

Legislative Power - Parliament

- Legislature make or create law. A legislature may be called 'parliament', 'congress', 'assembly'. Australian legislature are parliaments
- Key part of a representative democracy is its parliament as its legislature as this institution is directly elected by its citizens and expresses majority rule.
- Because parliament expresses the will of the majority and translates this into majority rule it has to be the most powerful institution in system of government
- Has the power to check the power of other institution
- Parliamentary sovereignty is the idea that the parliament is the most powerful part of a representative democracy

Executive Power - Cabinet and the public service

- Executives administer or execute the law made by the legislature
- Executive may be called 'cabinet', 'ministry'. They contain ministers
- Ministers are responsible for an area of government activity like defense
- These areas of responsibility are called portfolios

Judicial Power - Courts and judges

- Judiciaries resolve disputes by interpreting law in specific cases
- Judges have the judicial power to make legally binding decisions when interpreting the law
- A key element of both the rule of law and the separation of powers is to complete independence of the judiciary from both the parliament and the executive government
- Judges are appointed by the executive government but cannot be dismissed by it

Checks and Balances

- Within each branch there are further checks and balances
 - Within parliament, the two houses check and balance each other, and each chamber has a presiding officer and rules they must follow
 - Within the judiciary, higher courts keep lower courts in a hierarchy accountable through the appeals process

Chapter 2 Notes

Syllabus Points:

- **Structure of the political and legal system in Australia**

- Roles of the legislative, executive and judicial branches of government
- Essential to the understanding of democracy and the rule of law are the division of powers, responsible government, constitutionalism, federalism and judicial independence

Key words to look at the glossary for:

Systems of Government

- A liberal democratic political and legal system is composed of the following:
 - Institutions
 - The components of government; that is parliaments, governments, courts and the public service
 - If the liberal democracy is organised as a federation, regional governments with their own institutions of government
 - Processes
 - Constitutional laws and rules
 - A legislative process for making laws
 - Chains of responsibility that ensure governments carry out laws according to the rule of law
 - Trial procedures for resolving disputes and protecting rights according to law
 - Fair electoral systems for electing public officials
 - Organisation/Structure
 - An elected law-making assembly - a legislature - with one or two houses
 - Accountable, responsible and elected government - an executive
 - An independent court system - a judicature or judiciary
 - A separation of powers between the branches and checks and balances between each
 - A political neutral permanent public service
 - A federal division of government
 - Representative Government

The Australian Political and Legal System

Australia is a representative democracy with a constitutional monarchy organised as a federation with a responsible parliamentary government along with an independent judiciary like all liberal democracies

Australia's legislature and representative democracy

- We learnt liberal democracy is a form of government in which the will of the majority of citizens is expressed in government and law, and in which the rights of minorities are respected. We are also a representative democracy.

- The most important institution in a system of representative democracy is a representative assembly in which all the chosen representatives gather together to re-present the views, values and concerns of those citizens who chose them.
- These assemblies are also legislatures which make laws that will reflect the views, values and concerns of those citizens who chose the assembly
- The organisation of the Commonwealth Parliament has three parts:
 - The Crown - The monarch
 - The Crown is a formal part of the parliament because of Australia's history as a British colony. Their Royal powers are limited to granting Royal Assent to laws, issuing writs for election and certain ceremonial duties
 - The House of Representatives - The Lower House
 - Bicameralism is a feature of most Australian parliaments besides QLD, NT and ACT who only have 1 house
 - This is known as the people's house because it is directly elected by citizens in electorates in which they live in. They serve 3 years
 - The Senate - The Upper House
 - Known as the state's house, Australia is a federation and therefore the upper house represents the interests of the six states at the Commonwealth level of government.
 - Original states have 12 senators per state and ACT and NT have 2 senators. There are 76 senators and can serve maximum 6 years

Australian Constitutional Monarchy

- Australia's constitution makes the Crown 'executive power' through the Governor-General. It also creates a council of ministers advising the GG called the Federal Executive Council
- Constitutional rules - unwritten conventions which govern the use of royal powers and brings the monarchy under the rule of law include:
 - Royal power must only be exercised on the advice of ministers who are responsible to the elected parliament
 - The monarch always assents to laws passed by parliament
 - The parliamentary executive (The prime minister and cabinet) may exercise the royal prerogative powers of the monarch. Prerogative powers are those the executive may use without parliamentary approval like declaring war.

Australia's executive and responsible parliamentary government

- 'Responsible' and 'Parliamentary' describe two different aspects of the Australian executive.
- **Responsible Government**
 - Means the executive government is directly drawn from and accountable to the parliament thus being responsible to parliament
 - Australian citizens elect a parliament of representatives. Parliamentarians' roles are to legislate, to create laws, to debate matters of public importance, and to represent the people in their electorates and states.
 - Parliamentarians also have the role of questioning and scrutinizing the government through question time and through parliamentary committees that examine the executive's performance and spending.

- Westminster Conventions of Responsible Government
 - The executive (government) must enjoy majority support of the lower house and must resign if it loses the confidence of the house
 - The Prime Minister must be a member of the lower house and the Ministry and Cabinet must be members of Parliament
 - Ministers must resign if they cannot publicly support Cabinet decisions (Cabinet solidarity)
 - Individual Ministers must resign if they are the subject of a successful censure motion passed by the lower house
 - Ministers are accountable to parliament for the actions of officials under their control
 - Appointed officials are loyal to their current Minister
 - The head of State (Queen) acts on the advice of the Head of Government (PM)

- **Parliamentary Government**
 - Means that the members of government must also be members of parliament.
 - There is still a separation of powers as the executive have functions related to administration however the separation is weak

- **Executive Government**
 - Constitutional or Formal Executive
 - It includes the constitutional monarch and the governor general
 - Constitutional Executive should be above politics and does not exercise real power except in exceptional circumstances when parliamentary government cannot function e.g. hung government

 - Real or Political Executive
 - The ministry and Cabinet are the real power within the executive
 - They are drawn from and responsible to the parliament
 - They are democratically elected through an electoral contest

 - Administrative Executive or Public Service
 - Government spending generates approx. 1/4 of all economic activity in Aus
 - They are split into many agencies which carry out administration laws and employ many thousands of government workers
 - The public service has the following characteristics
 - It is apolitical meaning they are politically neutral
 - It is expert, public servants may develop skills and expertise over an entire career and know the business of the administration often more than the elected ministers they serve
 - Many positions are permanent and do not lose their job when a government is voted out of office, this permanency preserves expertise over time

Australia's Judiciary

- Judicial power is the power to make or alter law by interpreting law in specific cases. This is what the judiciary exercises
- **Adversarial Trial - Discovering the Truth**
 - Parties in court are adversaries, they are in contest with each other. The key roles of the court are to ensure fairness, find the truth and apply law to resolve legal disputes
- **Common Law**
 - Doctrine of precedent governs the way common law evolves and is applied in courts
- **Geographical Jurisdiction**
 - A court's jurisdiction refers to the area over which its authority extends for example which part of the country, state or territory.
- **Legal Jurisdiction**
 - Refers to the areas of law which a court has authority to hear and decide cases on.
 - Some courts like the Supreme and District courts of WA have general jurisdiction and can hear criminal, civil and administrative law cases, specialist jurisdiction like the Family Court can only hear cases regarding family law.

Chapter 3 Notes

Syllabus Points:

- **Key influences on the structure of the political and legal system in Australia**
 - *The Westminster System of Government*
 - *English Common Law*
 - *The US Federal System*
 - *The Canadian Federal System*
 - *The Swiss Referendum Process*
- **Essential to the understanding of democracy and rule of law are the separation of powers, division of powers, representative government, responsible government and federalism.**

Key words to look at the glossary for:

Reasons for Federation

- The creation of a federation was intended as a mechanism to address a number of problems facing the colonies in the latter part of the 19th century which pushed the colonies together including:
 - Defense
 - Economic Integration
 - Immigration
 - Identity
- At its heart the problem was how to create one nation state that could address the concerns that drove the federation movement, while also preserving the geographically and legally separate powers, laws and identities of the existing colonies, achieve unity while preserving diversity

The Westminster System from Britain

Constitutional Monarchy

- The Crown
 - The British Crown was the head of state of the colonies and Australia
- The Governor-General
 - The colonies became original states within the new nation and they retained their governors and responsible governments. The new Governor General:
 - Formed part of the new Commonwealth Parliament (Constitution Chapter 1)
 - By convention, acted on the advice of ministers drawn from and accountable to the Commonwealth Parliament

A Bi-cameral System

- An Australian legislature is composed of 2 houses if from British System
- The House of Commons has features that directly influenced the design of the Australian House of Representatives.
 - It is elected
 - It represents the people
 - It is the house that forms government, held to account
 - It passes laws
- The House of Lords did not influence the Senate instead it is based on US upper house, not keeping the inheritance principles

The English Common Law

- Judge-made law or case law, the process by which judges create new law when they make decisions in court
- It allows the law to evolve to meet new circumstances within society, filling gaps in laws not created by parliament

Responsible Parliamentary Government

- The executive government was assumed and therefore barely written into the Constitution and would follow British and colonial practice, and be formed by 3 parts
 1. A formal constitutional executive - The Crown and the Governor-General
 2. A real or political executive - consisting of a Prime Minister and Cabinet drawn from and responsible to the lower house of parliament and ministers must be members of parliament
 3. An administrative executive - a politically neutral public service to implement laws
- The Crown and Governor-General are part of the executive as well as the legislature
- The fused executive/legislature is a key Westminster characteristic

Western Conventions

- The existence and operation of one of the most central parts of the new Australian political and legal system was left entirely to unwritten conventions
- Making and breaking the government
 - The process of forming and dismissing governments is governed entirely by Westminster Conventions
 - The most important convention is that the executive government must have the confidence of the lower house. In practice this means they have the majority of support in the House of Representatives. This means at least 76 members
 - Confidence is demonstrated by the house either not moving no-confidence motions or defeating them if they are moved
 - Supply is the successful passage of money bills through the house
 - Executives cannot govern without the lower house supporting the confidence and supply
- Legislative powers of the Governor-General
 - Section 58 allows the GG to assent to a bill. These powers reflect early federation days when Australia was a dominion of the British Empire
 - Today these powers are called fictional powers and are overridden by the Westminster Convention that dictates the Governor General always gives royal assent
 - They may query a bill but they have never refused to sign one
- Executive Powers of the Governor General
 - Dissolve the parliament Prorogue the parliaments
 - Issue writs for an election Appoint Ministers
 - Dismiss Ministers Appoint judges for federal courts
 - All above parts are used only on advice from a cabinet minister who is responsible to the elected parliament. We call these formal powers
 - The Westminster Constitutional Conventions infer that the formal powers only be used on advice from the parliamentary executive (cabinet/ministry)

Other Principles and Processes Adopted from the UK

Constitutionalism

- It is the idea that the power of a government should be limited through a written or unwritten constitution
- It's purpose is to limit the potential abuse of power by all arms of government

Representative Government

- Australia adopted the UK's system of representative government - where people elect others to represent them

The United States Federal System (Maybe also read page 56)

Federalism

- Australia did not want to be a unitary state like Britain and have one ruling government as the colonies also wanted power so they decided to follow USA's solution.
- Federalism – a system of government in which sovereignty (power) is geographically divided between one central and two or more regional governments, each sovereign within their own sphere. The power balance between these levels of government is set out in a Constitution and adjudicated by a Supreme Court (in Australia, this is the High Court).
- Coercive federalism is where the federal level has more power, cooperative is when both levels have equal power and co-ordinate is where each level is independent and autonomous
- The USA had faced and solved the same problem through federalism
- **First: Divide Sovereignty geographically.**
 - The USA founding fathers divided the country sovereignty geographically
 - They did it by drafting a constitution that achieved 2 essential things
 - Created one national government
 - Preserved the colonies constitutions and converted the colonies into a number of states with their own regional governments
- **Second: Allocate the powers of government (Division of Power)**
 - When a constitution creates two levels of government, they must deal with how the powers of government are divided between the central and regional levels and decide which level of government governs which area
 - A federal constitution must allocate these powers to each level of government. They may be exclusively national, or shared concurrently or left just for states.
 - They geographically divide the legislative, financial, judicial and other powers of government based on the nature of the powers. Allocating some nationally, both or state only (exclusive, concurrent and residual powers)
 - The authors of the US constitution specified only the exclusive and concurrent powers therefore anything not specified was state power
 - The division of power is an important feature of Australia's political and legal system as:
 - At the time of federation smaller states such as Tasmania, South Australia and Western Australia were concerned about the possibility of the larger states dominating. Federalism provided the opportunity for the powers of the smaller

states to be protected by the inclusion of a States' House within the Constitution and protection of state constitutions in S106.

- It enables the national government to deal with matters of national significance while providing the ability of the state/territory governments to implement policy that is more relevant to their own constituents. For example, the federal response to the COVID pandemic enabled the shutting down of national borders and international travel enabling the country to adjust to the pandemic without health systems being overwhelmed. Various states have responded to the pandemic using policy settings which have been appropriate to the conditions faced in each state

- **Finally: Link the two levels together**

- There are 2 ways to look intergovernmental relationships within a federation:
- Federal Balance of Powers
 - The ratio of power between the 2 levels of government within a federation
 - The ratio of power within a federation can be affected by:
 - The way a federal constitution allocates powers
 - Changes made to the constitution over time
 - Changes made to the constitution is interpreted by the constitutional court
 - The ratio of balance of powers changes and unitary systems have no balance of powers as all the powers are held by 1 government
- Federal Institutions - Intergovernmental Links
 - Federal institutions link the two levels together in different ways
 - A constitutional court resolve disputed about the meaning of the constitution as well as disputed between the states or between the national government and the states. Because constitutional cases is open to interpretation. A constitutional court is essential to hear and settle constitutional cases and those between different governments
 - The head of governments (national plus state) meet to discuss and resolve issues between their governments. Representatives from each level meet to enable cooperation and the efficiency of government in their own areas of responsibility
 - It is impossible to exactly match the taxing capacities with the spending needs of each level of government. Inevitably, one level will collect more tax than it needs and the other will spend more then it collects. This 'fiscal imbalance' needs a grants commission to transfer money from the level with surplus revenues to the level with deficits

Chapter 4 Notes

Syllabus Points:

- **Structures and processes of:**
 - *One democratic political and legal system*
 - *One non-democratic political and legal system*

- **Essential to the understanding of democracy and rule of law are the separation of powers doctrine, constitutionalism and judicial independence**

Key words to look at the glossary for:

Classifying Government

Democracy Checklist: Measuring the 'goodness' of government

- Democratic Doctrines
 - Does constitutionalism apply to limit power?
 - Is there an effective separation of powers and checks and balances?
 - Does the rule of law apply?
 - Is government representative and accountable?
 - Does majority rule apply?
 - Is government representative and accountable?
 - Does majority rule apply?
- Free and Fair Elections
 - Are voters able to cast their ballots in secret?
 - Are all reasonably qualified citizens able to register to vote?
 - Are elections free from bias?
 - Do electoral systems reflect the will of the majority?
- Citizen participation and Pluralism
 - Is there tolerance for a range of political views and interests?
 - Can various associations like political parties and pressure groups form and participate?
 - Are individual citizen's political freedoms (conscience, speech, assembly, information and media access) and equality of political rights like voting, running for office being respected?
- Pluralism
 - Means there are many views, ideas, groups, and individuals competing with each other for political influence
 - In a plural political system power is distributed not concentrated

Non-democratic/Autocracies

- Absolute Monarchies - Such as Kingdom of Saudi Arabia

- Theocracies
 - Ruled by clerics according to religious ideals and laws. The Islamic Republic of Iran for example
- Dictatorships - Ruled by a single ruler with absolute power. E.g. Zimbabwe
- Juntas
 - Ruled by the military in transition or perpetuity. E.g. Fiji & Thailand
- Rigid Authoritarian
 - Regimes may call themselves democratic, but they lack any criteria for one. E.g. The Democratic Peoples' Republic of North Korea
- Soft Authoritarian Regimes (Quite Common)
 - Turkey after a failed coup on President who tightened grip on power

Chapter 5 Notes

Syllabus Points:

- **Types of laws made by parliaments and subordinate authorities**
- **Legislative processes at the Commonwealth level**
- **Codification & Parliamentary Sovereignty**
- **Essential to the understanding of democracy and the rule of law are the separation of powers doctrine and the sovereignty of parliament**

Key words to look at the glossary for:

Regulating Human Behaviour

Briefing

- In small groups you do not need formal codes to guide how we behave towards others. Our closest personal relationships are governed by concern and care, we most likely love them as family or friends.

- Laws regulate behaviour and set standards for individuals in political groups laws create predictable behaviour by enforcing common values and norms. Laws create predictable behaviour by reinforcing common values and norms. Laws resolve disputes peacefully so that violence is reduced and large groups of strangers can live together harmoniously. Thus laws promote social cohesion

Ways of Influencing Human Behaviour

- 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. Customs and traditions are less influential and progressive countries like Australia, as tolerance and acceptance are a key feature of these democracies. Acceptance of diversity reduces the influence of customs and traditions. Shaking hands, bowing, and kissing are all customs: they're ways of greeting people that help to distinguish one society from another.
- Morals
 - Morals are in theory near universal and innate unwritten codes that tell us what is right and wrong. Morals are reinforced by a person's own internal conscience and are a part of our common humanity. They are the reason why people will do the right thing even without rule or law prohibiting an action.
- Rules
 - Rules all non legal codes of behaviour usually written that apply to particular people at a particular place at particular times for example at schools. 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 behaviour, 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 may encode and reinforce morals e.g. Against killing. Laws may also regulate behaviour by codifying a custom or tradition e.g. Creating road rules when cars came around to help manage traffic and safety

Power

- Power is the coercive ability to force others to act in ways they may not choose to otherwise.
- Power is used to get people to comply with customs and traditions and is used to make people comply with rules
- Power is used by the state to create sanctions such as fines, intensive supervision orders, community based orders and imprisonment. No one would willingly choose any of these, yet the state can force them upon those who break laws.
- In democracies power is limited by constitutional law and conventions as power is separated, checked and balanced. The rule of law limits the use of power in democracies; power can only be used according to the law.

Laws

Briefing

- Laws are the most powerful means a group has of influencing and controlling the behaviour of its members
- Laws always apply to the population of a political entity that possesses sovereignty. There is also a formal system of government to do the governing meaning only nation states or states within federal nations can make laws

Jurisdiction

- Jurisdiction means where the law speaks
- Laws have *jurisdiction*:
 - *Geographic*: the area over which the laws apply e.g. a state or whole nation. Unitary nations is their entire country but in federations like Australia the laws vary from federal to state.
 - *Legal*: the area of law that is covered e.g. marriage laws (concurrent); tariffs on traded goods (federal exclusive).

Characteristics of 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*

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.

Types of Law

4 Types of Law

- Constitutional Law
 - Statues made by parliament
 - Common law made by courts.
 - Delegated legislation (also called legislation, ordinances and instruments), made by subordinate authorities.
-
- **Superior Law - Constitutional Law**
 - The purposes of constitutional law:
 1. Establishes the geographical and legal jurisdiction of power (unitary or federal)
 2. create the three arms of government (parliaments governments and courts)
 3. specifies the process is of government for example how government is formed
 4. protects fundamental rights like the right to vote
 5. codifies procedures for constitutional change (referendum)
 - The Commonwealth Constitution: draws its authority from three sources of authority and these are stated in its preamble is an introductory statement to a document. The Commonwealth Constitution draws its authority from:
 - The People
 - Almighty God
 - The Crown

Making Constitutional Law

- Constitutional law is not made through the lawmaking bodies such as the parliaments in courts instead constitutions create these lawmaking institutions and define and limit their power. Constitutions are above and beyond parliaments and courts.
- Australia's constitution was drafted by the founding fathers and was voted on through direct democracy by the citizens of the six colonies and passed through the British parliament

Ordinary Law - Statute Law

- Types of Ordinary Law
 1. Parliaments make statute law called acts of parliament
 2. Courts make common law called case law, judges make law or presidents
- Statutes or acts are superior to common law and will always override common law and this is because:

1. parliament is the primary legislative branch of government
 2. parliament has democratic authority because it is elected and representative
- Lowes made by the parliament reflect the will of the people. Judge made law cannot be representative of the people as they are legislators and are not elected

What are the aims of statute law?

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

Parliament as a Law Maker

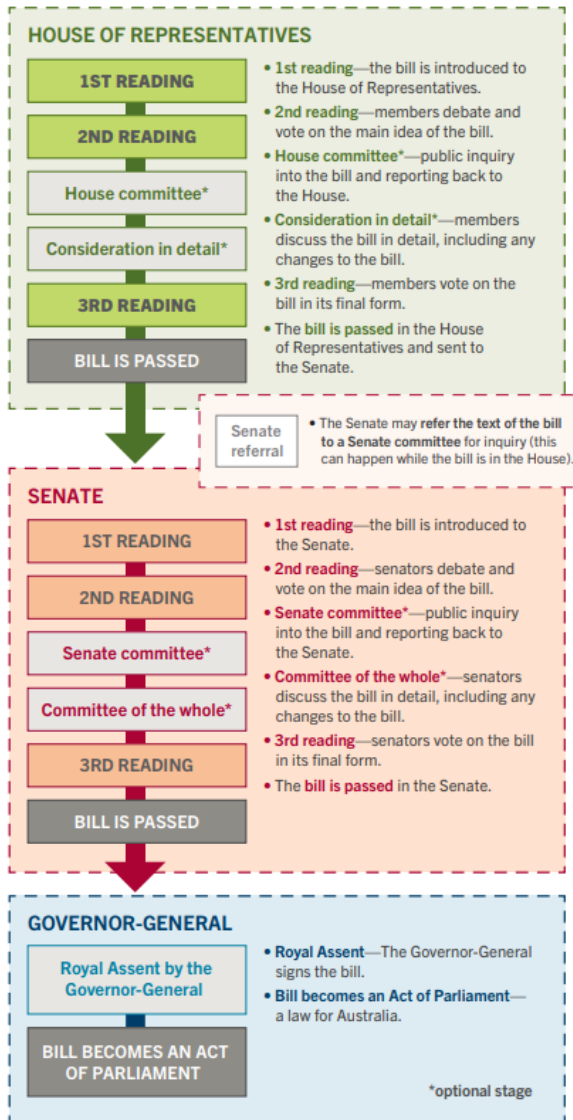
- The Functions of Parliament are:
 - Law making role: Debate, pass, reject bills
 - Representative role: Regular elections to elect MPs to represent the people
 - Debate role: Parliamentary debate on bills and exposes laws to scrutiny
 - Responsibility role: Forming and holding executive accountable, ensure majority rule

Understanding the Law Making Process

- Bill must pass through both houses in Parliament. If the bill changes in the second house, it must go through the house of origin again.
go
- When a bill is 'blocked': If the 2 houses cannot agree on a bill, it is said to have been 'blocked'. Senate blocks more bills than the House of Representative because most bills start in the lower house + Senate is house of review. The Constitution contains a mechanism to resolve a deadlock in Parliament when the 2 houses cant agree on legislation.
- Procedure to resolve a deadlock in parliament between House of Representative and Senate: Can be frustrating to introduce legislation in House of Representative but be knocked back by opposition in Senate. PM advises GG that the 2 houses will be dissolved, and an election called. If following the election, the legislation still cant be passed, they have a joint sitting of the 2 houses. E.g. Malcolm Turnbull double dissolution in 2016 over industry legislation reforms- ABCC bills.
- Any member of Parliament (MP) may introduce a bill. Government bills are guaranteed passage through the House of Representatives this is where government is formed + has the

majority. Government can rely on its MP's to vote in favour of motions to pass the bills in HoR. This is called 'executive dominance'

- Non-government bills are called Private Member Bills (PMBs): Usually do not progress past the first reading because the government uses its numbers to vote them down. Used to draw attention to issues- then government may make their own legislation. E.g. Recent amendments to Marriage Act 1961 were a result of legislation introduced by a private Senators bill in WA
 - Majority of bills are dealt with by the parliament in an efficient manner with little or no media reporting. However, government legislation that is opposed by the Opposition often leads to debate. Usually much more debate and compromise in the upper house because the government doesn't usually have control here. Heavy debate between MPs and ministers, crossbenchers and the opposition members
-
- An idea for a law is formed;
 - The idea is drafted into a bill;
 - The MP; usually a minister in the House of Representatives, initiates the bill;
 - The bill is read a first time and voted upon
 - The bill is read a second time, a speech is made by the MP or minister introducing the bill, it is debated and voted upon
 - The bill goes through the consideration in detail process (or the committee of the whole in the Senate)
 - The bill is possibly referred to a specialised committee for scrutiny and amendment
 - The bill is transferred to the 'other house' usually the Senate
 - The process of first and second reading, committee stage and third reading is repeated in the second house
 - The bill receives Royal Assent from the Governor General
 - The bill is proclaimed and becomes a law



Statute Law

Briefing

- Parliaments pass statutes to achieve particular legislative aims like:
 - Implement policy proposed by the executive branch of government
 - Authorise spending by the executive branch of government
 - Amend (change) existing statute
 - Repeal (abolish) existing statute
 - Consolidate law by combining several old statutes into one in order to simplify or update the law
 - Respond to court decisions and judge made common law by:
 - Abrogating (overriding) judge made common law
 - Codifying (reinforcing) judge made law by elevating common law to the status of a statute
 - Defining judicial freedom or discretion in the post-trial phase of court cases (for example sentencing Acts define how judges sanction those found guilty of a crime)

- Clarifying courts' interpretations of statute law
- Acts passed by parliament can govern how the other two branches of government operates

Sources of authority for statute law

- Democratic Authority
 - Derives from the fact that the parliament is comprised of elected representative legislators. Therefore, the Acts have the stamp of democratic legitimacy.
- Constitutional Authority
 - Stems from our system of government which is a constitutional monarchy - this has important implications for Acts. Without the assent by the crown (GG) a bill cannot become an Act

Purpose of Statute Law

- Implementing policy proposed by the executive
 - Parties that form the executive government make promises to the electorate and have agendas and things to do.
 - Governments may sometimes need to convince the parliament to pass laws that will enable them to carry out their agendas and electoral promises. Due to rule of law
 - **EXAMPLE:**
 - In 2018 the coalition promised to reduce tax paid by corporations by approx. \$65 billion dollars over 10 years. To do this the Turnbull government needed to convince parliament to amend the taxation laws. Since governments have executive dominance over the lower house, the Turnbull government were able to pass on the necessary bills. However, the Senate could not be convinced and the bills were blocked. The Turnbull government compromised and limited the act for small businesses with an annual turnover of less than 10 million, making the total cuts in tax to 20 billion instead of 65
- Authorising expenditure by the executive
 - Scrutinising government spending is a major part of parliament's responsibility role; that is holding the government to account
 - Government departments have budgets and according to the constitution any money spent by the government must be approved first by passing laws through parliament.
- Money bills and the Constitution
 - A special type of bill, called an appropriation bill or a money bill, must be passed by both houses to approve taxes and spending by the executive
 - The Senate according to section 53 cannot introduce money bills as they must be initiated in the house of rep
- The Budget
 - Following the announcement of the annual budget which is a statement of the expected tax revenues, expenditures and other finances, the government starts introducing money bills in the HOR. Here they are debated, scrutinised by house committees and if necessary amended.

Amending and repealing existing laws

- Amending law
 - **EXAMPLE:** Marriage Act 1961 remained unchanged until The Marriage Amendment Bill 2017 was introduced which aimed to amend the Marriage Act 1961 to remove the restrictions that limit marriage in Australia as a union of just a man and a woman. The new Bill allowed for two people in Australia to marry regardless of their sex and gender and recognised foreign same-sex marriages in Australia
- Repealing laws
 - **EXAMPLE:** Carbon Tax Reappeal

Consolidating Laws

- The rule of law requires laws to be clear and coherent. The existence of outdated or confusing law is damaging to the rule of law
- The parliament will repeal several old Acts and replace them with consolidating Act.
- **EXAMPLE:**
 - A particularly important consolidation occurred in 1947 when a successful referendum allowed the Commonwealth to start paying additional social welfare payments. The referendum allowed other forms of welfare besides invalid and old age pensions like maternity allowance, unemployment benefits, student benefits and more.

Codifying Legislation

- Occasionally a court decision will create new common law or discover rights that the parliament wishes to support, reinforce or clarify.
- **EXAMPLE:**
 - Mabo v Queensland 1992. Eddie Mabo, an indigenous man from Torres Strait fought the Queensland government over the status of his island home. He argued that he and his people had inhabited Murray Islands since ancient times and 'owned' the land and had 'native title'. High Court ruled in his favour and abolished terra nullius (land belonging to no one) replacing it with common law 'native title'. The parliament regarded Mabo favourably and recognised the historical wrong committed wrong against Indigenous Australians and the Native Title Act 1993 was passed.

Delegated Legislation

Subordinate Authorities

- Means under the control or authority of another
- Subordinate authorities are:
 - Government Departments
 - Executive officials such as public servants with decision making power
 - Specialist agencies such as the Australian Security & Intelligence Organisation (ASIO)
 - **NOTE:** These are all part of the executive branch and are under the control of parliament as the executive is responsible to parliament.
- To delegate means to authorise or place trust in another
- An agency with delegated power may exercise the power of the delegating authority under the conditions it specifies. If it breaks the trust then its authority to use power may be removed or limited by the delegating authority

- Parliamentary sovereignty is the principle that the parliament is the supreme institution within the system of government. All institutions except the constitution are subordinate to parliament.

Why law-making power is delegated

1. Efficiency: Some law making is low-order and does not need high level deliberation from parliament. **E.G.** Welfare payments are adjusted every year. Parliament delegates the power to change rates of welfare to a government department so that it does not need to amend the act every time change is needed
2. Responsiveness to emergency situations: by delegating powers to a subordinate authority, and imposing and monitoring strict conditions on their use, parliament can ensure that Australia can respond quickly to emergency situations

Why do we have committees

A parliamentary committee consists of a group of Members or Senators (or both in the case of joint committees) appointed by one or both Houses of Parliament. The purpose of parliamentary committees is to perform functions which the houses themselves are not well fitted to perform, such as carrying out inquiries, hearing witnesses, sifting evidence, discussing matters in detail and formulating reasoned conclusions. This kind of work is more effectively carried out by small groups of Members and/or Senators. A further advantage of committees is that several of them can operate at the one time, which enables many more matters to be dealt with. Committees, by concentrating on specific tasks or subjects, also offer the benefits of specialisation.

How law-making power is delegated to subordinate authorities

Chapter 6 Notes

Syllabus Points:

- **Types of laws made by parliaments, courts and subordinate authorities**
- **The court hierarchy, methods of statutory interpretation and the doctrine of precedent**
- **Essential to the understanding of democracy and the rule of law are the separation of powers doctrine and the sovereignty of parliament**

Key words to look at the glossary for:

Briefing

- Adjudicate: To hear a dispute and resolve it according to law or precedent. The decision of courts has the force of law and binds the parties to the decision
- Judicial Power: The power to adjudicate. To make decisions that have the force of law. The power and independence of courts is crucial in democracies and Judicial power is essential to rule of law because it makes everyone including the other arms of government subject to the law
- Adversarial Trial: The trial system inherited from Britain, adversaries are opponents in a contest against each other and will bring forward the best evidence from each party and Australian courts do not investigate the truth, the truth is revealed to them because of this contest
- Parties: Parties to a dispute are called legal persons.

Statutory Interpretation

Example: Uber and A New Tax System PG135-139

The Need for Interpretation

- Word meaning
- Time and changing circumstances
- Drafting error
- Inconsistencies and contradictions
- Statutes are in futuro
 - Statutes need to be as future proof as possible

Methods of Interpretation

- *Maxims*
 - Rules of conduct (similar to conventions) and legal principles that have developed over a long period of time. They are unwritten rules that guide legal professionals such as judges in their work.
- *Legal Maxims Include:*
 - **EJUSDEM GENERIS** – ‘of the same kind’ Where two or more specific words are followed by a more general word, then the otherwise wide meaning of the general word is restricted to the same class as the specific words so if a law referred to cars, trucks, vans, motorcycle and other motor vehicles then this maxim can be applied the scope of “other motor vehicles” to only land based motor vehicles as there was no mention of water-based motors.
 - E.g. The Disability Discrimination Act (1992) states “For the purposes of this Act, an assistance animal is a dog or other animal trained to assist a person with a disability...” Parliament created a category of assistance animals, with dog as the example, but has allowed for future change in the use of animals and for the courts to add meaning to the law without changing the wording.
 - **NOSCITUR A SOCIIS** – ‘by the company it keeps’ The meaning of a word may be known from the accompanying words. The rule underlines the importance of context in statutory interpretation where the meaning is to be derived with reference to the rest of the statute

- **EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS** – ‘the express mention of one excludes all others’ Parliament may list a series of specific things in a class/category. Unlike general terms allowing for *eiusdem generis*, the use of specific terms without a general term following prevents the courts from expanding the class/category
 - E.g. the *Taxi Act of WA* (1994) explicitly refers to a taxi as a vehicles capable of carrying up to 4 passengers – therefore, a vehicle such as a minibus or bus does not come under this law.
 - Careful statutory construction can allow parliament to tightly control statutory interpretation or allow judges freedom to develop a statute over time

Rules for Interpretation

- *The Literal Rule*
 - Judges assume the act says what it means and in other words interpret it ‘literally’
- *The Golden Rule*
 - Occasionally a literal meaning can be unjust or nonsense interpretation usually more likely for older acts.
 - Courts interpret a word or phrase using the golden rule to prevent an unjust outcome or absurd interpretation. Helps keep in pace with rapid technology and social change
- *The Mischief Rule (Most dominant method in Australia)*
 - When other 2 fail the courts will seek the purpose of the act by asking “what was parliament’s purpose in passing this act?”
 - Courts may refer to external sources like Hansard which is the record of parliamentary speeches and debates
 - Courts may use Hansard to see what was discussed in the second reading on an act as that is where the purpose of a law is stated and make a purposive interpretation reflecting parliament’s original intention

How Does Common Law Work? + The Doctrine of Precedent (Linked)

- Common law requires the following elements to operate:
 - an overarching principle that underpins the entire system
 - a doctrine that is applied by courts in every case
 - a court hierarchy within which these operate
- Stare decisis
 - ‘To stand by what has been decided’ this ensures judicial thinking is similar in similar cases and that past judge’s reasoning is applied.
 - Results in fairness, predictability, consistence and flexibility
- Precedent
 - When judges decide a case where no previous case law applies, they create a precedent which stands as an example or guide for future decisions
- Ratio decidendi
 - ‘Reason for decision’ Judges must explain why and how they decided a case. It is a critical component of precedent as if a judge has decided a reasoning for a similar case done by a judge applies to their case then ‘Stare decisis’ requires ‘standing by’ the

'Ratio decidendi' of the past cause. Ratio decidendi can create precedent. A new one is a common law

- Obiter dicta
 - 'Sayings by the way' non-critical judicial reasoning outlined in a decision which may be persuasive (non-binding) in future cases
- Precedent in Operation
 - There are 3 essential elements to the operation of doctrine of precedent
 1. Ratio decidendi of judges in higher courts with appellate jurisdiction, may create common law. Appellate jurisdiction means the type of cases or areas of law which a court has the power to hear 'on appeal' from another court
 2. The precedents of higher courts bind lower courts within the same hierarchy
 3. Higher courts may be persuaded by the ratio decidendi and obiter dicta of lower or equivalent courts

The Court Hierarchy

Hierarchy

- Superior Courts with appellate jurisdiction such as High Court, State/Territory Courts and specialist superior courts like Federal Family Court
- Intermediate Courts with appellate jurisdiction such as District Court and specialist courts such as Children's Court of Western Australia
- Inferior Courts with no appellate jurisdiction being Magistrates' Court

Binding and persuasive precedent in court hierarchies

- Binding precedent
 - A decision of a higher court that must be followed by a lower court in the same hierarchy. Binding precedent requires lower courts to apply the ratio decidendi of the higher courts. Lower courts may be persuaded and guided by obiter dicta from higher courts.
- Persuasive precedent
 - A precedent that may be used by a court in reaching a judgment but they are not bound to follow it. Courts at the same level are not required to follow the precedent, but may be influenced by it.

How common law evolves

- *Courts with appellate jurisdiction can avoid precedent in several ways by:*
 - Reversing the decision E.g. Wilson v Bauer Media Pty Ltd (2017-18)
 - If the law has been misapplied a higher court can reverse the judgement and create a new ratio decidendi. Keeps the lower courts accountable to the higher courts
 - Overruling the decision E.g. Mabo vs QLD (No.2 1992)
 - A higher court may reconsider a case and therefore create its own ratio decidendi, this is often the case when a precedent is outdated.
 - Disapproving the decision
 - Lower courts are bound to follow the precedents of higher courts even if they disapprove of it. In these cases a judge may express their disapproval in their

ratio decidendi & outline why they think the law is unjust. In effect, they are inviting a party to appeal to a higher court that has the power to overrule the precedent.

- Distinguishing the decision E.g. *Donoghue v Stevenson* (1932)
 - If a court decides that the case before it is substantially different from any previous case it will be distinguished from existing precedents. The ratio decidendi will create a new precedent = new common law

Statute and Common Law

Compared together

- Cases heard by courts may involve any type of law both statute and common
- Statute is in futuro prospective law made to represent the democratic will of the people through the Acts and representative parliament
- Common law is ex post facto retrospective law made by judges in cases after the dispute arises. It develops through decisions made in court with new facts that distinguish a case from previous cases or when judges avoid existing precedents

Complementary interactions between courts and parliament

- Parliament cannot foresee the future and so its law will inevitably be general and contain gaps which the courts can interpret and expand statutes to fill these gaps that are discovered in real cases.
- Courts can also discover gaps through original laws which Parliament can then respond to the discovery of gaps in law by legislating new statutes in support or extinguish the common law precedent by passing an Act to override it

Chapter 7 Notes

Syllabus Points:

- **Key processes in civil and criminal trials**
- **Essential to the understanding of democracy and the rule of law is judicial independence.**

Key words to look at the glossary for:

Natural Justice

- 'Lex naturalis' or natural law is a Roman idea that has evolved into today's principles of natural justice which define a fair trial. Trial processes must be designed around these principles.

- Natural justice comprises of 4 principles:
 1. Impartial adjudication (judge and/or jury)
 2. Hearing both parties
 3. Evidence based decisions.
 4. Open trials, so there is public confidence in justice.

The Adversarial Trial

- Built on the assumption that a context between parties reveals truth.

The Inquisitorial Trial

- Built on the assumption that inquiry will discover the truth.

UNIT 2

Chapter 8 Notes

Syllabus Points:

- **Essential to the understanding of representation and justice are the principles of fair elections, participation, and natural justice.**

Key words to look at the glossary for:

Briefing

- Representation and Justice are vital concepts in a liberal democracy.
- For a representative democracy to work in the interests of citizens, there must be fair elections.
- Elections are processes by which citizens choose their law makers and governors. Elections must accurately reflect elector's choices and also deliver stable government and accountability.

Representation + It's History

- Representation is the critical idea that distinguishes modern democracies from the democracy of ancient Athens which was direct democracy.
- During the Enlightenment era which was an era of intense questioning of accepted knowledge and beliefs beginning in 18th century. Old customs, traditions and beliefs that had formed the basis of European medieval society began to crumble as people began questioning them.
- The modern world with its respect for individual rights replaced the crumbling medieval society and its view of absolute monarchy as the form of government.
- Philosophers like John Stuart Mill began asking "which system of government is best for individual liberty? And "what should replace absolute monarchy". Mill realised that Athenian direct democracy could not work in modern societies because of the number of citizens.
- Mill wrote a book called "Considerations on representative democracy" in which the idea of a representative democracy government was introduced. Mill's form of representative democracy, citizens "delegate" or "entrust" representatives to re-present them in parliament

Representation and fair elections

The need for Electoral Systems

- Mill's idea of representative democracy requires citizens to choose representatives which created the need for the invention of electoral systems.
- Electoral systems are how citizens delegate or entrust representatives to stand for them in parliament. They are also the primary tool for holding each of them accountable for their job as representatives by electing others to replace them or keep them by re-electing them.
- Electoral systems are critical to representative democracy. They are mechanisms that 'transform individual votes into seats in the representative assembly', that is parliament or congress.

Essential characteristics for electoral systems

- Good electoral systems must have the following characteristics:
 - Provide political choice
 - Value votes equally and be fair to political parties
 - Create a stable government
 - Facilitate accountability
- There are many electoral systems throughout the world, combining all four ideal characteristics is impossible and therefore not all electoral systems are equally effective.

Representation and Participation

- Participation is what makes democracy democratic. Participation can take many forms, but all are dependent on 'political rights'
- Rights are 'universal freedoms and entitlements' which enable people to flourish. Rights are classified into – civil, political, economic, social, and cultural rights etc.
- Respect for rights is crucial feature of liberal democracy and a key component of rule of law
- Political rights are subset of human rights and belong in the category of civil rights. Civil rights include equality and freedom from discrimination.
- Political rights are those freedoms and entitlements that enable a citizen to participate in government
- The most fundamental political rights are:
 - Right to vote
 - Freedom to associate with other people
 - Freedom to assemble in groups which have a political purpose
 - Freedom of access to political information through a free press/media
 - Freedom of political communication, which is a form of freedom of speech
- Political rights fit within the broader category of civil rights. People must have civil rights, like freedom from discrimination, or their political rights cannot exist. They need to have all rights to have any rights is an example of the 'indivisibility of rights'. Political rights are essential for political participation and citizens must enjoy all their rights before any of their rights can exist in full.

Participation through elections

- The right to vote is essential for fair elections. To be enfranchised is to have the right to vote and suffrage also means the right to vote.

- In a fully-fledged liberal democracy, there should be the broadest possible franchise, with few qualifications to vote – that is universal suffrage.
- In Australia these are the only qualifications needed to vote:
 - Australian citizenship
 - Being 18 years old or older
 - Being resident at an address for more than a month
 - Being enrolled to vote
 - Not currently serving a prison sentence of greater than 3 years
 - Disability
- Back when gender qualifications existed and only men could vote it was called 'Universal manhood suffrage' to describe the limited franchise. Before universal suffrage, only men with property could vote – if a man owned two properties he got two votes, this is called plural voting. This was present in WA until 1963
- Universal suffrage is a crucial requirement of a fair electoral system, any discriminatory suffrage is inconsistent with electoral fairness because it limits participation, and should be abolished
- 22 countries including Australia go further than universal suffrage and treat voting as a duty. The idea that citizens have a duty to vote justifies compulsory voting.
- Universal suffrage combined with compulsory voting results in high participation.
- Voting must be secret so that electors cannot be intimidated or pressured into making a political choice. Australia invented the secret ballot, which is now universally used in all representative democracies.

Informed choice and the right to vote

- As electors, citizens need to access political information. 'Freedom of political communication' ensures political information is freely available.
- Access to information is necessary so electors can learn about issues and participate in discussions with other citizens.
- Citizens engage with each other face to face or through various channels such as traditional and social media. Learning about issues and discussing them with others is essential for making an 'informed political choice.' The more informed and engaged citizens are, the healthier their democracies will be

Participation through association and assembly

- Voting is a personal and individual act of participation that only occurs at election time. Nevertheless, there are other ways citizens can participate in politics and government
- They can use their 'freedom of association and assembly' to **form political groups and collaborate with each other in the public sphere**. The aim of collective political action is to influence law making or seats in parliament
- Groups that act in the broader public sphere with the intent of influencing law making are called pressure groups.
 - Pressure groups represent interests or causes and tend to use advocacy techniques like lobbying or direct action to influence parliament or government. Their advocacy aims to change law or policy to benefit their interest or cause.

- Members of a pressure group share the same interests. Pressure groups act all the time, not just in election time and enable citizen participation to be constant not periodic.
- Groups that aim to win seats in parliament and influence law making from within the legislature are called political parties.
- A political party represents a particular worldview or ideology. A set of interrelated ideas about how to govern a country is called a political ideology. Examples of ideologies are Liberalism and Socialism
- Ideology provides a framework for developing policies in all aspects of governing a nation – health, education, immigration etc. Because ideology is a complete worldview, it guides a party’s policies which makes them consistent and coherent
- Both pressure groups and political parties exploit freedom of political communication through free press/media to get their message out to the public.
 - Pressure groups use communication to put pressure on parliament and government by influencing public opinion
 - Political parties use communication to try and convince the public to support their worldview

Purpose of Elections

Justice

- Justice has been described as ‘the first virtue of social institutions.’ The term ‘social institutions’ includes all the parts of government – legislatures, executives, and judiciaries. Even electoral systems are social institutions that must be ‘just’ if they are to be fair.
- Justice is an essential quality of liberal democracy.
- Justice is not just related to the judicial branch of government alone; it must be a quality of all parts of a liberal democratic political and legal system.
- In theory, liberal democracy places individual liberty as the core value of government. If liberty is to work in practice, then individuals must be treated justly by the government. Injustice denies equality of rights and freedoms

Theory of Justice

- A Roman legal code developed by Emperor Justinian called the ‘*Institutes of Justinian*’ translated in plain English as “People should get what deserve. To be treated deservedly is to be treated justly”
- The following ideas should be kept in mind when learning Justice, think of the Justinian definition above.
 1. People deserve their rights to be respected. Rights are due to each person. Rights are universal entitlements due to each human being
 2. People deserve to have contracts, duties of care and obligations enforced. Enforcement of obligations is the ‘will to render’, which involves both parties – the person undertaking the obligation and the person receiving it. People enter formal contracts. For example,

when people pay taxes in return for government services, there are duties owed by everyone to everyone else. Governments must be willing to give or provide (to render) to each party what is owed to them by such agreements

3. People deserve impartial administration of the laws. There must be a 'constant and perpetual' environment within which rules and laws are applied without bias. A government must make fair laws and then always apply and interpret them without favour. No arbitrary decisions should ever be allowed

Justice and Judicial processes

- Justice is an essential quality of all parts of liberal democratic systems. For example, laws made by parliament must be JUST laws and be JUSTLY carried out by the government.
- Nevertheless, it is the judiciary and court system that specifically focus on justice
- Trial procedures is the primary procedure of the judiciary which can be evaluated according to how well they achieve Justinian's ideals of:
 - Protection of rights
 - Enforcement of obligations
 - Impartiality and fairness

Natural Justice

- Justice requires impartiality, evenhandedness, fairness, objectivity, and open-mindedness. All of these attributes can be summed up in the four principles describing adversarial trial processes
 1. Impartial adjudication
 2. Equal opportunities for each party to know the case against them and to present their case
 3. Evidence based decisions
 4. Transparent and open court processes
- Any system of trial should incorporate all of these principles or be at risk of producing arbitrary and unjust outcomes. An example of an arbitrary 'justice' is China who has a non-democratic system of government with a judicial branch that is beholden to the Communist Party of China.
- Thus, China's justice system is not fully independent.

Chapter 9 Notes

Syllabus Points:

- **The Western Australia and Commonwealth electoral and voting systems since Federation**
- **Advantages and disadvantages of the electoral and voting systems in Australia**

- **A recently implemented or proposed reform (the last ten years) to the electoral and voting systems in Australia**

Key words to look at the glossary for:

Parliament – Our Representative Assembly

- Australians elect the Commonwealth Parliament, there are no direct elections for the Prime Minister and Cabinet. It is a Westminster convention that determines who forms government.
- 3-year term in parliament and WA has a fixed 4-year term for state parliaments

Parliament representation – What the constitution says

- Section 24
 - Specifies that members of the HoR have maximum 3-year terms meaning all 151 electorates must be re-elected every 3-years.
 - Each state has electorates proportion to its population, for example NSW has 47 and Tasmania has the least with 5
 - States must have a minimum of 5 electorates which guarantees minimal level of representation for states
- Section 7
 - Specifies that senators have a 6-year term with half of the senate being elected along the House of Representatives every 3 years
 - All states have equal representation in the senate with 12 senators each and the territories have 2 each
- A Senate rotation is a feature of Australian upper house elections. Electing only half the Senate every 3 years ensures the parliament retains 'elders' who have experience of the last parliament – feature designed to provide continuity and stability in governance. The idea came from the USA which has rotation for 1/3 of the Senate every 2 years

Calling an Election

- Less than 3 years after the first sitting of a parliament, the Prime Minister must advise the Governor General to dissolve the HoR
- The Governor General then issues writs for a general election. Section 24 of the Constitution gives the Governor General the power to carry out these legal formalities but the real power to call an election rests with the Prime Minister.
- The Governor in each respective state also has the power to issue writs for Senate elections
- On occasions when the two houses are deadlocked over legislation, the Prime Minister may advise the Governor General to dissolve both houses, using powers specified in Section 57 of the Constitution to issue writs for a double dissolution election

House of Representatives – The people's house

- There are approximately 107,000 electors being represented by 1 representative.

- Equal representation makes this house a 'popular chamber' or people's house because everyone's vote has the same value. There is an equality of the political right to vote
- Each electorate are single-member electorates

Senate – The state's house

- The Senate has 76 representatives for 8 electorates, with the six states being electorates with 12 representatives each and 2 for the mainland territories.
- Each state has the same number of representatives no matter the population allowing for the Senate to be a 'federal chamber' because of equal state representation
- At a general election, 36 of the Senate's 72 state senators and all 4 territory senators (3-year term) are elected.
- All candidates contest the election within their state or territory
- Each state electorates are multi-member electorates

Electoral Systems

- An electoral system is a mechanism for choosing representatives to occupy elected positions in a legislative assembly.
- Some countries also directly elect their executive, usually called a President
- Australia does not use a separate election for its executive government but instead the majority among the elected representatives choose the executive government and hold it accountable until the next election


Types of Representation

Types of representation

Electors in electorates always retain the power to govern, which is referred to as **popular sovereignty**. However, they temporarily delegate their sovereignty to elected representatives. Representatives may represent their electors (called **constituents**) in several ways:

- **Delegate representation** occurs when the constituents present their values, concerns and interests to their representative who then re-presents them to parliament. Delegate representatives have close links, through meetings or communications, with their constituents. They translate their constituents' desires directly through law making. Their personal views do not count.
- **Trustee representation** occurs when constituents entrust their representative's judgment to represent their best interests in parliament. Trustee representatives are less directly linked to their constituents and are less reliant on frequent communication with them to discern the issues that matter or their opinions on the issues. Trustee representatives may rely on the commands of their own conscience rather than the dictates of constituents.
- **Partisan representation** occurs when representatives are members of disciplined political parties. They act in parliament according to the dictates of their party, not so much the directions of their constituents or their own conscience. Partisan representation is justified because the overwhelming majority of electors intentionally vote for candidates based on a candidate's political party membership, not their personal attributes. They, therefore, expect their representatives to 'toe the party line'.⁷
- **Mirror representation** occurs when a legislative chamber's composition reflects the composition of the society it represents. For example, parliament should reflect society's composition in terms of gender, ethnicity, indigeneity, age and other types of diversity. The Australian population is 49 per cent male and 51 per cent female. If the Commonwealth Parliament truly mirrored Australia, it would be 49 per cent male and 51 per cent female.

7 Political parties expect partisan representatives to support the party's position on issues. It means representatives must sometimes vote against their conscience and even against their constituents' interests. For example, many MPs resisted voting for marriage equality until 2017 — because their parties would not allow them to, even though constituents and their conscience may have been telling them to do so.



■ Figure 9.5 — Acting as a delegate is one of the theories of representation.
Source: Vectors Market, Delegate, Noun Project, <<https://thenounproject.com/search?q=delegate&i=1333651>>

10 [Chapter 8] Democracy and Justice

Electoral Systems

- Electoral systems are the basis of all electoral systems; they are also called **electoral divisions**. An electorate is a **geographical area containing citizens** who elect one or several individuals to represent them in their representative legislature

- They may be single-member or multi-member electorates

How electoral systems work

- Electoral systems work by presenting electors with a choice of candidates on a ballot paper.
- Electors secretly express a preference for one or more candidates from among those listed on the ballot paper
- They are then collected and counted. The preferred candidate is elected to fill a position (called a 'seat') in parliament
- In short electoral systems are mechanisms for converting electors' votes into seats in parliament

Electoral systems are critically important

- Electoral systems are critical for representative democracy.
- A poorly designed electoral system will severely compromise the operating principles of a liberal democracy by undermining the principles of majority rule, equality of political rights, participation, and the political freedom of citizens
- Therefore, the adoption of a particular electoral system is an important choice for a democratic country as the choice will affect political representation, majority rule and other fundamental democratic principles.
- There are many different types of electoral systems, each one converts votes into seats differently so knowing that different electoral systems result in different outcomes is fundamental.
- Some electoral systems are fairer than others. Some are of questionable value

Fair elections

- *Fairness is the most critical aspect of an electoral system. Fairness in electoral systems applies to electors, candidates, and political parties that:*
 - All citizens must have a political right to vote
 - Electors must not be intimidated or pressured when voting
 - Electors' voting power must be equal
 - Nominations for candidates should be as open as possible, maximising political participation for citizens and political parties
 - Political parties must be treated equally
- *Fairness also necessitates upholding the democratic principles that:*
 - A majority of votes must result in a majority of seats. Majority rule is a fundamental democratic principle.
 - The rights of minorities must be respected. Political rights and freedoms are fundamental liberal principles.
 - No distortion or manipulation in the conversion of votes into seats should occur. Equality of political rights and participation is an operating principle of democracy.
 - Elections must be regular enough to make government responsive to the peoples' will. Majority rule and popular participation are principles of a democracy.

- Elections must be frequent enough to allow electors to have a political choice and to hold representatives accountable through the ballot box
- *All of the above can be summed in four essential criteria that match the operating principles of democracy. A fair election will:*
 1. Produce effective and stable government, reflecting the freely expressed will of the majority (majority rule)
 2. Provide accountability of representatives who have direct links to electors, ensuring the parliament remains representative and responsible to electors (majority rule, participation)
 3. Be fair to electors, candidates and political parties (equality of political rights and participation)
 4. Represent society's diversity in gender, age, ethnicity, social values and so on (equality of political rights, political freedoms, and participation)

An ideal electoral system

- An ideal system would achieve all the 4 criteria above.
- Each electoral system may emphasise different elements of the 4 criteria.
- Despite the diversity of electoral systems, no system yet devised can achieve all the essential criteria for fairness.
- In short, there is no ideal electoral; system, some are good at achieving stable government and accountability and others are good at achieving fairness for participants and representing diversity

Classifying electoral systems

- Electoral systems fall into 2 broad categories
 1. Majoritarian systems
 2. Proportional systems
- **Majoritarian systems** Are always based on single-member electorate.
 - They are very effective at achieving:
 - Majority rule
 - Strong representational links between elected members of parliament and their constituents
 - Majoritarian system weaknesses are that they:
 - Distort the size of the winner's margin (the winner's bonus) both in individual electorates and in parliament
 - Reduce political participation by minimising minor party representation
- **Proportional systems** are always based on multi-member electorates
 - They are very effective at producing:
 - Fairness for political parties
 - Representation of diversity
 - Proportional systems weaknesses are that they:

- Tend to undermine majority rule
 - Tend to weaken the links between representatives and their constituents
- Fair electoral systems can only be achieved using both types of systems in some form of combination either as two complementary systems or blended into one hybrid system
 - Fair electoral systems use complementary systems that are able to compensate for each other's weaknesses
 - Australia uses two complementary systems to elect each house separately.

Majoritarian Electoral System

- All majoritarian electoral systems are based on single-member electorates that return one candidate to sit in parliament as the electorate's representative

First past the post

- First past the post (FPP), also called plurality voting, has the following key features:
 - A simple majority is needed to win (a plurality); and
 - Electors choose one candidate from amongst those on the ballot paper
- **Advantages:**
 - First past the post's is simple and very straightforward.
 - Electors can easily cast a ballot. It is quick and easy to count, there are no complicated calculations to find out who won.
 - FPP effectively creates majority rule because it amplifies the winner's margin to produce an exaggerated majority in parliament.
 - The exaggerated majority occurs because FPP gives the successful candidate and party a **winner's bonus**.
 - The winner's bonus occurs because all single-member electoral systems have a 'winner takes all' bias. This occurs because there is only one seat to win in each electorate, so if a candidate wins a plurality of votes, they win the electorate
 - Only one candidate represents electors. Electors know who to hold responsible for the quality of representation they receive. They know who to delegate their interests to or who to entrust to act for their welfare
 - Their representative is under intense scrutiny because they are the only one representing the electorate as its delegate or trustee. It is, therefore, easier for the electorate to hold their representative accountable for the quality of the representation they deliver
- **Disadvantages:**
 - FPP creates a two-party system. There is one winner and one loser
 - Minor parties rarely win seats in parliament. Typically, anyone who votes for a minor party wastes their vote
 - Vote wastage occurs when an elector's vote does not contribute to electing a representative. Such electors are unrepresented in the parliament. Their vote did not count

- Vote splitting occurs when the two or more similar political parties compete for the same electors. A third party with less voter support might win because neither of the similar parties win enough votes on their own. The popular parties lose because they divide the vote between them. Vote splitting is a grave flaw in FPP elections where there are more than two candidates.
- **Summary**
 - Winner's bonuses might be useful for creating majority rule, but they severely undermine representation and participation. Electors who waste their votes will get no representation at all from an FPP system. FPP is not fair to political parties and can result in a less preferred candidate or party winning.

First past the post in Australia

- The first Commonwealth Parliament in 1901 was elected using colonial electoral systems because there was no electoral Act governing federal elections.
- Two of the earliest acts were the "Commonwealth Franchise Act 1902" and the "Commonwealth Electoral Act 1902" which was used by both the HoR and the Senate until the "Commonwealth Electoral Act 1918" replaced both acts.

FPP, representation and the Commonwealth Parliament

- The use of FPP to elect both houses was efficient and quick, however it resulted in strong majorities in both houses. The Senate was usually dominated by the same party that held majority in the lower house, occasionally it was controlled by the party in opposition
- A government dominated Senate meant the executive controlled both houses. Government controlled Senates tended to:
 - Rubber stamp government legislation.
 - Negotiation and consensus were hampered by the lack of alternative parties
 - Scrutiny of bills and debate were ineffective
- Captured by the governing party, the Senate was unable to effectively represent the states or act as a house of review, therefore undermining its Westminster roles
- Opposition controlled Senates tended to be obstructionist. The power of the Senate, which is co-equal to that of the HoR gave the opposition tremendous power. Such power could be used to frustrate a government by rejecting its legislation and moving anti-government motions in the upper house. Obstructionist Senates undermined majority run in lower house

Preferential Voting (PV)

- Preferential voting is a electoral system with many of the advantages of FPP but without several of its flaws. It's key features are:
 - An **absolute majority of 50%** plus one vote is needed to win
 - Electors number candidates from most preferred, 1 indicating **primary vote** down to the least preferred from 2 and on wards
 - If no candidates win an absolute majority of primary votes, **preferences** are distributed until a candidate achieves an absolute majority
- Some PV systems require preferencing every candidate. Numbering all the candidates is called **exhaustive preferential voting** or full exhaustive voting because electors have to exhaust all options. HoR uses this

- Others require voters to number as many candidates as they wish. These systems are called **optional preferencing voting**. Queensland has used this

- **Advantages:**
 - The requirement for an absolute majority enhances majority rule by ensuring a majority preferred candidate is elected.
 - Like FPP, PV produces exaggerated majorities due to a winner's bonus and is, therefore, strong at producing **majority rule** if used to elect a lower house.
 - Because electors can vote for alternative candidates, **vote splitting is eliminated** between related political parties. For example, if an elector votes for a political party that gets eliminated their vote is distributed to their second preferred candidate. Their vote will follow their preferences until someone is elected
 - The requirement for an absolute majority **reduces vote wastage**. At least 50 per cent of all electors plus one more must have contributed to electing a representative, meaning no more than half the votes can ever be wasted. In PV preferences mean that a primary vote for a defeated candidate will keep on counting until an absolute majority is reached
 - Like FPP, PV is a single-member system which promotes **accountability**. It means only one candidate represents electors. Citizens know their delegate and who to hold responsible for quality of representation. They also know who to contact for their concerns and interests.

- **Disadvantages:**
 - The need for electors to number candidates in order of preference is more demanding than merely choosing one candidate
 - PV does result in a higher number of **informal votes** by electors who have misunderstood how to vote, but the rate of informal voting is still low.
 - Vote wastage does occur since anyone whose vote does not contribute to electing a representative has wasted their vote. That number can be as high as 50% less 1 vote, however there can never be a majority of votes wasted, which can happen under FPP
 - The winner's bonus in PV is less extreme than in FPP, but it still promotes **overrepresentation** of major political parties. It prevents electors who vote for losing parties getting any representation in the legislature – this is **underrepresentation**. There is some compensation because smaller parties or candidates can trade their preferences to other candidates in return for some policy commitments from them. Arrangements between candidates over preferences are called preference deals.
 - Preference deals allow smaller parties with little hope of winning seats an opportunity to get their ideas represented in parliament.
 - But preference deals are not enforceable contracts. The party getting the votes only promises to consider the smaller parties ideas when they get elected, they are not bound to.
 - Political parties may also arrange preference deals across more than one electorate, and between the lower and upper house.

 - Another type of winner's bonus operates in both FPP and PV. An even distribution of its supporters across many electorates benefits a party.

- It may win more electorates by small margins. A party with many supporters concentrated in fewer seats is disadvantaged. It will win fewer electorates by large margins.
- In extreme cases, such as the 1988 federal election, it is possible for a party with fewer votes overall to win a majority of seats and form government.
- **E.g.**, 1988 election, Kim Beazley's ALP won 50.98 per cent of the national vote, but only 67 of the 150 seats. Prime Minister John Howard's Liberal National Party Coalition won 80 seats with only 49.02 per cent of the vote giving him majority of the 150 seats in the HoR. The ALP won fewer seats by large margins whereas the distribution of Liberal's vote across more seats enabled John Howard to win more seats by slim margins. It is the number of seats a party wins that matters in forming government
- Lastly PV does not reflect society's diversity very well. Two party representation, resulting from all single-member system, excludes many parties.
- Worse still, the "winner takes all" nature of single-member systems results in parties selecting 'conventional' or 'safe' low risk candidates. In such high stakes win or lose contests 'diversity candidates' tend not to be selected because of a fear they may divide popular opinion and alienate parts of the electorate. Well-founded or not, the fear is that 'unconventional candidates' are a higher risk.
- The result is the overrepresentation of white, middle class, tertiary educated males in parliament which are the conventional and safe candidates in other words. Quotas for women have been used by the ALP to force the election of more Labor women to the HoR however Liberal Party has no such thing
- There is one complication to a simple two-party system in Australia. The nationals are a minor party that PV does not disadvantage. The Nationals have about the same support as The Greens across Australia. The Greens vote is spread thinly throughout the 151 electorates, so they do not win an absolute majority of votes in any seat, maybe 1. The Nationals vote, however, is more concentrated in specific rural seats which allow for them to achieve an absolute majority of the votes in these electorates. Hence why Australia's system is a two and a half party system because of the lower house representation of Nationals

Preferential voting in Australia

- Federal elections have used exhaustive preferential voting since 1918 which replaced first past the post for both houses.
- It is still used in the HoR however PV was stopped in the Senate in 1949
- PV is a majoritarian single-member electoral like FPP
- Large majorities in the HoR created stable governments that dominated the House. Stable government is a positive outcome because the HoR is the house of government, and a democratic government needs to embody the operating principle of majority rule
- **E.g.**, Majority Government example is Abbott Government which enjoyed a 14 seat majority
- **E.g.**, Minority Government example is The Gillard Government (2010-2013) which was the first minority government in decades and was so rare that the hung HoR was unable to form a

government for 17 days after election. During this time Gillard negotiated with a small number of independents and single greens in a bid to gain their support

- Under PV Senates continued to be captured by the two major parties. Most Senates were government dominated, rubber-stamp chambers with reduced potential for effective review or state representation.
- Alternatively, they were obstructionist opposition dominated chambers. PV did little to enhance the Senate's review function or its capacity to represent states, be fair to all political parties or fairly reflect society's diversity

Proportional Representation System

- Proportional representation (PR) systems aim to reflect the proportion of the vote received by a political party as a proportion of seats gained in the parliament.
- For example, if a party received 30% of the vote in an election it would receive 30% of the seats in the chamber
- Note the difference between majoritarian and proportional systems
 - Majoritarian systems are high stakes 'winner takes all' systems
 - Whereas proportional systems are 'get what you deserve' systems
 - PR systems are much fairer to political parties than majoritarian systems.
 - Major Parties are the winners under PV because winners' bonuses cause exaggerated majorities. Under PR systems, minor parties get seats in proportion to their electoral support and there are no winner's bonuses for a successful party
- The key to proportional electoral systems is their multi-member electorates. Each PR electorate elects multiple candidates to parliament
- PR systems tend to elect more diverse chambers with a greater variety of parties and independents being represented. PR systems are also better at representing society's diversity
- Proportional representation is fairer for parties, they have no winner's bonus or vote splitting and little vote wastage.
- A parliamentary chamber elected using PR system will be more diverse than a house elected under FPP or PV

Single transferable vote proportional representation

- From 1949 the Senate has been elected using single transferable vote proportional representation (STV/PR). It was the first time in Australian federal history that the HoR and the Senate had different electoral systems.
- STV/PR is a complicated electoral system. It has the following key features:
 - A quota rather than a majority of votes, is needed to win a seat
 - There is one quota per seat to be filled and multiple quota because there are multiple members to elect per electorate
 - Electors rank candidates (below the line) or political parties (above the line) in order of preference
 - When a candidate's votes exceed a quota (that is, they receive **surplus votes**) all votes are distributed to other candidates according to electors' preferences, but at a reduced value (known as the **transfer value**)

- Preference distributions continue until the last quota fills the final seat, A flow of lower order preferences, rather than first preferences usually makes up the final quota
- To win requires a quota if voters instead. A quota is a fixed share of voters a set proportion of the formal votes cast, which once achieved, results in winning a seat
- **Advantages:**
 - STV/PR is much fairer to electors, candidates, and political parties because all of them that can achieve a quota can win a seat. Quotas are much lower than absolute majority or even simple majority.
 - In a federal general election for the Senate in each state, a quota is equivalent to approx. 14.3% of the formal votes
 - When a double dissolution election occurs and all 12 senators for a state are to be elected, this quota is effectively halved. This results in minor parties being elected as well as micro parties and Independents.
 - Electors benefit in that their will is reflected in the election results
 - STV/PR creates a multi-party system. A Senate elected this way more accurately mirrors the diversity of society. It helps achieve minor representation. It (STV/PR) reduces the incentive for parties to pick 'conventional' or 'safe' candidates
 - Electors tend to vote for political parties rather than vote directly for individual candidates. Therefore, Parties can nominate 'diversity candidates' with less fear of alienating segments of the voting public. Far more women get elected under STV proportional representation
 - STV/PR tends to produce a 'hung' Senate because there is no winner's bonus to exaggerate a winner's margin. A hung house is a one in which no party has a majority in its own right
 - No party can then control the procedures of a hung Senate or be guaranteed victory when voting on motions or bills. The results in a house in which multi-party negotiation and consensus building are essential.
 - Compromises must be reached to achieve success in a hung Senate, a useful feature for a house of review when scrutinising lower house government legislation.
 - It is also effective when the upper house reviews estimate of government spending during the budget process. Meaning, hung Senates are more likely to check and balance a government dominated lower house and the government itself.
 - The combination of a mirror representation, diversity and the need for compromise makes an STV/PR chamber a good protector of rights and freedoms, especially for minority groups that may well have representation in the Senate.
 - Elected in different ways and with different aims in mind, the House of Representatives and the Senate together make for an effective liberal democratic bicameral parliament
- **Disadvantages**
 - Electors find it almost impossible to understand how their votes are counted or candidates are elected using STV/PR. The reason is its **complexity**.

- The method used between 1949-1984 to fill in the Senate ballot paper was identified as tedious and led to rates of informal voting rising up to 10%.
- **Above the line voting**, introduced in 1984, drastically reduced the informal vote, but introduced new complications.
- Hun Senates produced by STV/PR can lead to an **impasse in parliament** – between the houses or the government and Senate – if parties cannot achieve a compromise or reach consensus. In a system with strong bicameralism, such as Australia, it means the powerful upper house can block government bills transmitted from the lower house
- Arguably, a non-majority Senate blocking bills passed by a majority controlled HoR undermines the principle of majority rule
- The link between voter and representative is much weaker than in single-member systems such as FPP and PV because electors tend to vote for parties rather than individual candidates.
- Equally, direct accountability is weaker because there are multiple representatives per electorate
- Many electors know their HoR representative but not their Senate representatives. In this case of the Senate, electors have 12 representatives instead of one.
- Because of this STV/PR **weakens direct democracy and accountability**. All multi-member systems, especially those that use a ‘party vote’ instead of a ‘candidate vote’ suffer this problem. It makes delegate and trustee forms a representation almost unworkable in such a system

Single Transferable Vote Proportional Representation in Australia

- When STV/PR was first introduced, electors had to number every box on the ballot paper – they were required to make a ‘candidate vote’.
- Due to the size of the electorates and increasing the size of the number of parties and independents seeking election, the number of candidates rose
- According to the law, no errors in numbering the sequence of preferences were allowed. In NSW Senate ballot papers sometimes had 100 or more candidates listed on a huge and cumbersome ballot paper, other states were similar.
- The result was many informal votes. The complexity of STV/PR proved to be a barrier for many citizens trying to exercise their right to vote and participate
- STV/PR was adopted in 1949 and has had two significant reforms since to address its weakness. The reforms were:
 1. 1984: Introducing an option to vote for a ‘political party vote’ or **group ticket voting (GTV)** was added to the ballot paper
 2. 2016: Reducing political party control over preferences

Group Ticket Voting and ‘Preference Whispering’

- Group tickets allowed parties to:
 - Pre-register a list of candidates (a party list) with the Australian Electoral Commission (AEC) before an election, and then
 - Determine how the preferences of electors who vote for their political party would be allocated

- Parties' group tickets were publicly available so electors could research the distribution of each party's preferences. On the ballot paper, electors has the option of choosing the party they preferred (rather than all the individual candidates)
- If a voter chose a party instead of preferencing all the candidates, the party controlled how their preferences were counted
- Hence ballot papers from 1984 onwards contained two voting options. A heavy black line separated the ballot paper horizontally. **Above the line voting** allowed electors to vote for party by placing a '1' in the box next to their preferred party.
- **Below the line voting** allowed electors to vote by numbering all the candidates listed, as in the past. Below the line voting was much more complicated, but it meant the elector controlled their preferences. The 1984 reforms relaxed the strict counting rules by allowing up to 3 breaks in the numbering sequence of candidates and only 90% of the boxes to be filled before a vote was declared informal
- As many as 85% of people voted above the line (for a party) rather than below the line (for candidates), It is because group ticket voting is more straight forward but has its problems like Above the line voting further weakens the already weak link between electors and representatives by obscuring the names and personalities of the candidates
- Above the line voting made delegate and trustee models of representation impossible in the Senate. Secondly, surrendering control over preferences to political parties permitted inter-party preference trading in complicated deals brokered by specialists who were experts in trading preferences, but had little regard for electors' intentions. The result was electors often ended up contributing to the election of Senators they would have never chosen themselves. At best, inter-party preference trading undermined the Australian upper house democracy, at worst, it corrupted it.
- **E.g.,** The 2013 election of Ricky Muir from the Australian Motoring Enthusiast Party is a recent example of preference trading undermining democracy. Muir received 0.51% of the primary vote yet won a seat via preference flows from 23 other minor and micro parties' group tickets. The 24 parties concerned had hired the services of Glenn Drury to construct complex preference trades between them. Drury's method guaranteed at least one of the 24 minor parties' candidates would win the 6th quota through harvesting preference from other parties. Muir's victory was a Senate election record for the lowest primary vote win ever for a successfully elected Senator. His election was the result of preference harvesting which is an exploitation of the voting systems by putting too much power in the hands of political parties and backroom deal makers with too little power in the hands of electors.

Reducing Party Control Over Preferences

- In 2016 the preference harvesting corruption of the STV/PR preference system was addressed. Through the 'Commonwealth Electoral Amendment Act 2016' group ticket voting was abolished, the way electors cast their vote was changed and party identification was improved.
- Electors can still vote for political parties (above the line) or candidates (below the line), but political parties can no longer determine how electors' preference flows.
- The 2016 electoral reform puts electors in command of their preferences, whether they vote above or below the line. Instead of just placing '1' next to their party of choice when voting

above the line, electors must now number parties from 1-6 in order of their preference and below the line the must now preference a minimum if 12 candidates by numbering them from 1-12 they can do more then they are required too as well.

Summary

- Above the line preferencing by electors replaced group ticket preferencing by parties. Electors now control their preferences. Moreover, simplified below the line voting encourages more electors to vote for real people instead of parties because filling in 12 boxes is not as daunting as numbering several dozen. The electoral reforms also led to the introduction of political party logos on HoR and Senate ballot papers to reduce elector confusion over similar named parties.

ballot papers for the Senate and House of Representatives. This was done to reduce elector confusion between political parties with similar names — such as the Liberal Party of Australia and the Liberal Democrats.

Single transferable vote proportional representation — An example

There are eight Senate electorates in Australia — the six states and two territories. There are 12 representatives for each state and two for each territory. At a general election, six of each state's 12 senators are elected and all of the territory senators (note, a normal general election is a whole House of Representatives and half Senate election).

Calculating the quotas

Senate quotas are calculated mathematically using the following formula:

- the number of formal ballot papers divided by the number of seats to be elected plus one, plus one vote equals one quota; or
- $(\text{number of formal ballot papers} / \text{number of seats to be elected} + 1) + 1 = \text{one quota}$

In a hypothetical STV/PR election for a state with 2,000,000 electors the formula for a quota is:

- $(2,000,000 / 6 + 1) + 1 = 285,715$ votes comprising one quota

A quota for an ordinary half-Senate election is 14.3 per cent of the entire electorate, while for a double dissolution election the quota is 7.7 per cent — very much less than an absolute majority vote needed to win a PV election. The low threshold is what makes Senate seats winnable for minor parties and independents.

Counting votes

Candidates who win a quota are immediately elected.

Surplus votes

An elected candidate's votes exceeding the quota are called surplus votes and are calculated as follows:

- Total number of votes received by the candidate minus the quota required equals the number of surplus votes; or
- $\text{Total number of votes} - \text{quota} = \text{surplus votes}$

In our hypothetical STV/PR election the candidate received 385,242 total votes. As surplus votes are votes received in excess of the quota, this means the candidate has 99,527 surplus votes.

Votes are secret and an elected candidate's votes 'in the quota' compared to those which are 'surplus' cannot be known. Therefore, all of their votes are transferred, but at a reduced value called the **transfer value**.

Transfer value

The transfer value is calculated as follows:

- Surplus votes divided by total votes for the candidate equals the transfer value; or
- $\text{Surplus votes} / \text{total votes} = \text{transfer value}$

In our hypothetical STV/PR election the candidate received more votes than the required quota:

- $99,527 / 385,242 = 0.25835$ transfer value

In this scenario all the votes received by this candidate — who has already achieved quota and will be elected — are redistributed at a value of approximately one quarter of a vote.

The transfer value is a way of keeping all votes flowing according to electors' preferences and in the ongoing count without the problem of any votes counting more than the value of one vote.

Once all candidates who have achieved a quota are elected the process of elimination of candidates, distribution of preferences and transferring discounted surplus votes continues until all quotas and seats are filled.

Finalising the count

If no further quotas are reached the candidate with the least votes is eliminated (after the transfer of surplus votes) and their votes are distributed to remaining candidates according to electors' preferences. This process of elimination, distribution of preferences and transferring discounted surplus votes continues until all quotas and Senate seats are filled.

Note: This method is very complicated and this is the reason why the average elector has no idea how their votes are counted and how candidates get elected!

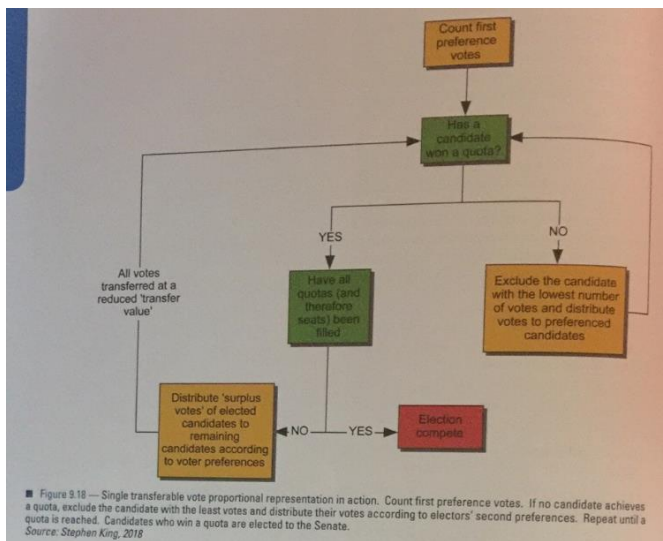
Single transferable vote proportional representation, representation and the Commonwealth Parliament

STV/PR transformed the Senate by breaking the 'two party system' and the ability of major parties to capture the upper house. Prior to the 1984 reforms, the upper house was either a government controlled rubber stamp or an opposition controlled obstructionist house. Now it is a multi-party chamber with a reduced likelihood that either major party can control a majority of seats.

Democracy and Justice | Chapter 9 | 223

Single Transferable Vote Proportional Representation, Representation and The Commonwealth Parliament

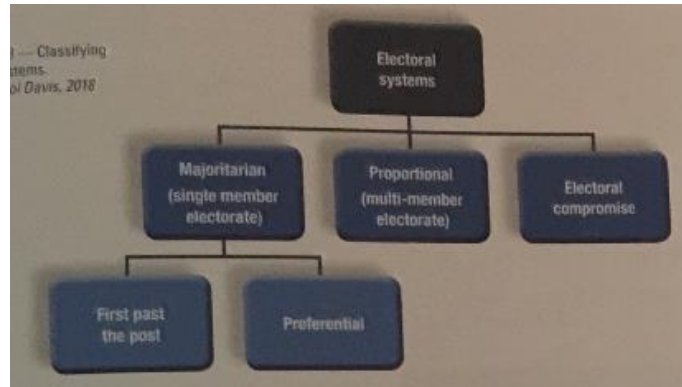
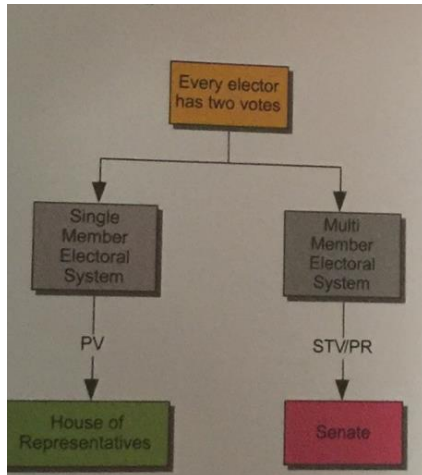
- STV/PR transformed the Senate by breaking the 'two party system' and the ability of major parties to capture the upper house. Prior to the 1984 reforms, the upper house was either a government-controlled rubber stamp or an opposition-controlled obstructionist house.
- Now it is a multi-party chamber with a reduced likelihood that either major party can control a majority of seats



The Senate 'Balance of Power'

- Since the 1980s except for the period of 2005 to 2007, the Senate has been a hung house in which a crossbench composed of minor party and independent senators have held the balance of power.
- Crossbenchers are in a strong position to influence law making and hold government accountable because of the combination of Senate power and the STV/PR electoral system
- The crossbench balance of power enhances the Senate's ability to check and balance the HoR and the government formed in that place.
- There are several ways that governments can be accountable to a powerful 'balance of power' Senate in that:
 - Governments must persuade either the opposition or enough members of the crossbench to agree with its bills or motions before a government vote in the chamber can succeed
 - The opposition may persuade enough crossbench senator to vote against the government to defeat bills or motions
 - With crossbench support, opposition may also force through motions to establish Senate inquiries into matters the government opposes
 - Senate committees form a robust and independent system of checks and balances within the political system. They can scrutinise legislation thoroughly and conduct inquiries against the wishes of the government
- The above are all aspects of Senate power and enhance the Senate's 'house of review' role. The Senate can scrutinise government legislation or inquire into estimated of government spending. Ultimately, it can use its power to check executive dominance of the parliament
- **E.g.**, 'The Treasury Laws Amendment (Enterprise Tax Plan) Bill 2016 clearly illustrates the power of the Senate crossbench. The Turnbull Government's planned reform to corporate taxes was defeated in the Senate when government senators could not persuade Senator Tim Storer, an independent from South Australia and a member of the crossbench, to agree to the proposed tax cuts
- **E.g.**, Another example demonstrates the power of the Senate to uphold rights – the liberal part of liberal democracy. "The National Security Legislation Amendment (Espionage and Foreign

Interference) Act 2017” was amended by the Senate to prevent the proposed law limiting press and media freedoms. The government agreed to soften its proposed law by changing the original wording of the bill requiring journalists to be ‘fair and accurate’. The words “reasonably believe that a story is in the public interest” replaced the original words, reducing the risk for journalists publishing stories about national security. The Senate amendment reduced the threat of journalists being criminally prosecuted and, thus, protects the freedom of the press/media



Compulsory Voting

- Compulsory voting is a significant feature of Australia’s electoral system. Compulsory enrolment of eligible electors has been law since 1911.
- Successive amendments to the ‘Electoral Act 1902’ added further compulsory elements to encourage political participation. In 1915 Queensland introduced the first compulsory voting laws requiring electors to attend a polling place, get their name marked off the **electoral roll** and receive ballot papers
- In a rare example of a private member’s bill becoming law, the ‘Commonwealth Electoral Act 1924’ amended the ‘Electoral Act 1902’ by introducing compulsory voting for federal elections. The effect was a spectacular increase in voter turnout from 60% in the 1922 election to 91 per cent at the 1925 election.
- Turnout has been very high ever since and is much higher and more consistent than turnout in comparable democracies such as the UK, US, Canada and NZ. In the years that followed, all the states introduced compulsory voting. WA adopted it in 1936.

Advantages of Compulsory Voting

- The main advantages of compulsory voting are:
 - Increased voter turnout, resulting increased political participation
 - Increased education and understanding. Citizens know more about their democracy
 - Enhancement of the liberal democratic operating principles of majority rule
 - Increased democratic legitimacy and authority of parliaments and governments, that is, stronger **mandates**
 - Reduced electoral impact of extreme political ideologies
 - A greater focus on issues and policy

- The fundamental operating principles of a liberal democracy are all enhanced by compulsory voting. Majority rule is better established if more people vote and there is an increase in political participation, that is, if more people exercise political freedoms and rights.
- Parliaments and governments can claim to be enacting the true democratic will of the majority if all eligible electors have cast a ballot. This also means that governments have a stronger claim to legitimacy and authority when they try to persuade crossbench senators to pass their proposed laws. A government's claim to a 'will of the majority mandate' is stronger after an election in which people voted on a specific policy promise.
- E.g., When Tony Abbott won the 2013 election with a 14-seat majority after campaigning vigorously to 'axe the tax' it was difficult for opponents to argue he did not have the authority to pass the Carbon Tax repeal bills. The Senate eventually passed them.
- A significant benefit is the 'drowning out effect' compulsory voting can have on extreme political views.
- In any society there are always highly motivated and well organised minority groups whose views are outside mainstream public values and opinions. These groups are more likely to vote because of their passionately held beliefs.
- Moderate mainstream electors are less motivated to turn out on election day. Extreme views can be overrepresented in systems with voluntary voting.
- E.g., Arguably, the election of Donald Trump in the US and the British 'yes' vote in Brexit referendum are examples of this distorting effect. If all moderately minded US and British electors had cast ballots in these polls the results might well have been different.
- Australia has a less polarised political climate because Australian political parties must not only win their core voter base, but they must also win unconvinced swinging electors. American political parties tend to 'play to their base', with more extreme policies than Australia as a result.
- Australian political parties that stray too far into extremes of the political spectrum tend to get punished at elections
- Another positive effect of compulsory voting is in **the enhanced quality of political debate**. Political parties do not have to spend resources trying to motivate supporters to turn out on election day.
- There is less focus on lightweight, commercial style advertising. Parties can rely on high turnout rates and devote more effort to winning policy arguments against their political opponents.
- The pre-election contest of ideas is more rigorous because political advertising does not have to focus on encouraging electors to vote

Disadvantages of Compulsory Voting

- Disadvantages of compulsory voting include:
 - Politically uninterested or disengaged electors, who often cast donkey votes, may affect election outcomes
 - Increased informal votes
 - Because voting is a right, to compel people to vote is seen as wrong by libertarians
 - The creation of predictably 'safe seats' which parties may ignore knowing they will win them

- A great focus on 'marginal seats', where elections are won and lost
- The biggest criticism of compulsory voting is its compulsion. Citizens of democracies generally do not like being told what to do by governments, especially when it affects their rights
- Forcing uninformed or uninterested electors to cast a ballot can result in high rates of informal votes. Worse, it can result in donkey votes. A **donkey votes** is a randomly filled in ballot paper, usually numbered in order from '1' at the top, down the ballot to the last candidate.
- Donkey votes are impossible to separate from formal votes because the voter may have considered their vote carefully and filled in their ballot the same way. Donkey votes are formal votes and are counted
- This may affect the outcome in a close contest. Donkey votes are especially problematic because they are much more likely to be influential in the few marginal seats that can change government
- Certain demographic groups who tend to vote in predictable ways may dominate some electorates. For example, lower middle class and working-class electors clustered in lower socioeconomic suburbs near industrial or commercial areas tend to vote for the ALP.
- Farmers are clustered in rural areas and are more likely to vote for the Nationals. Expensive coastal and river suburbs are populated by professionals and business people, who tend to support the Liberal Party.
- Compulsory voting can make these areas 'safe seats.' **Safe seats** are predictable and are very unlikely to be tightly fought electoral contests. Parties may take them for granted or not bother running a candidate in a seat they know they cannot win.
- These decisions reduce political choice for electors living in safe seats.
- **E.g.,** Two 2018 by-elections in the Western Australian electorates of Perth and Fremantle provide contemporary examples. The Liberal Party did not run candidates in either of these safe Labor seats. In the 2016 election, there was 35,000 electors in the Perth electorate and 31,000 in Fremantle who voted for the Liberal Party. These 66,000 electors had no candidate espousing their world view to vote for in the 2018 by-elections
- Voluntary voting would reduce the tendency to create safe seats because particular issues may reduce the predictability of who will turn out to vote

Integrity of Australian Elections

The Australian Electoral Commission

- The best guarantee of electoral integrity is to remove the power to organise and run elections from those who benefit from elections. Political parties and members of parliaments are the beneficiaries of elections so they should have nothing to do with running them
- The AEC is an independent statutory authority established by law. The AEC's role is "to deliver the franchise: that is, an Australian citizen's right vote, as established by the Commonwealth Electoral Act 1918".
- This Act gives the AEC powers to run all aspects of Australia's electoral system. The AEC manages federal elections and referendums. Employees of the AEC cannot be members of political parties. They have even been asked to assist with other countries' elections.

- Each state has its own electoral commission for WA its (WAEC) which runs local government and state elections, state referendums and manages significant non-government organisation.
- The AEC ensures fair elections by being entirely apolitical, independent, and disinterested in election outcomes. It maintains electoral rolls and recruits, and trains thousands of temporary staff to work in polling places on election days.
- It distributes electorate divisions to maintain the equality of the political right to vote (one vote, one value) according to law. It counts the votes and declares winners.
- The AEC eliminated gerrymandering and other forms of electoral corruptions

Malapportionment

- Equality of political rights is an operating principle of a liberal democracy. All citizens should have the right to vote, but this is not enough in itself. The values of citizens votes must be equal too
- The principle of one vote, one value is fundamental for the equality of the political right to vote. It means that the quantum (amount) of voting power is the same. **E.g.**, In an electorate of 100,000 electors represented by one MP, electors have twice the voting power of those in an electorate of 200,000 represented by a single MP. There is a severe malapportionment of voting power. For this system to be fair, the larger electorate should be divided into two, and the new electorate should have one MP – then three electorates would each have 100,000 electors and one MP each
- Australia has very little malapportionment in the House of Representatives electorates. The Commonwealth Electoral Act 1918 requires that electorates be within 10% of the average elector population within a state or territory and a redistribution will be triggered if more than 1/3 of the divisions in the state deviates from the average enrolment plus 10%.
- Electorate populations change due to births, deaths, inward migration, and outward migration.
- The average House of Representatives' electorate size is calculated in the following way:
 - Total number of enrolled electors in a state or territory divided by the number of electorates in the state or territory equals the average electorate size for the particular state or territory
- A number of triggers will cause the AEC to redistribute electorates, If:
 - The last redistribution was more than seven years ago
 - A state or territory becomes entitled to more or less representatives
 - A state or territory's electorates' eligible population sizes changes beyond a certain threshold
- The AEC will redistribute electoral divisions within a state or territory. Sometimes, state populations change enough that a state may gain or lose electorates.
- Tasmania electors in the state's 5 lower house electorates are overrepresented because section 24 of the constitution guaranteed the original states a minimum of 5 seats. Each Tasmanian electorate has significantly less then the 107,000 average enrolled electors.
- The Senate is a very different matter in that the constitutional requirement for equal state representation conflicts with equality of political rights and the principle of one vote, one value.
- States vary significantly in population however each state gets 12 senators regardless. Malapportionment is a severe criticism of Senate representation.

Some states' upper houses, including the **Western Australian Legislative Council**, have malapportionment similar to that in the Senate. The Legislative Council's three regional electorates are represented by six members of the Legislative Council (MLCs), and the three city based electorates also have six MLCs. Despite Perth's metropolitan area containing

approximately 65 per cent of the state's population it has the same number of MLCs as the regions, which have only 35 per cent of the population.

Before the 2005 electoral reforms, WA's **Legislative Assembly** electorates had a rural bias. Allocating too many electorates to rural regions relative to Perth maintained the bias. In effect, rural electorates had about half the number of enrolled electors compared to city electorates, giving country electors twice the voting power and representation than city dwellers. A 2005 reform removed the rural bias in Western Australian lower house elections.

On balance, Australia does well to maximise the principle of 'one vote, one value' within the constraints imposed by constitutional law and the realities of population distribution.

Gerrymanders

- A gerrymander is a deliberate drawing of electoral boundaries to disadvantage a political party. By concentrating the vote of an opposition party into fewer seats, a governing party can reduce its rival's chances of winning a majority in the representative legislative chamber
- Gerrymandering deliberately denies equality of political rights and undermines majority rule with the aim of maintaining the over-representation and power of a minority.
- Gerrymandering is much more likely to occur when those with an interest in winning elections have the power to draw electoral boundaries.
- Section 60 of the Commonwealth Electoral Act 1918 gives the AEC the power to appoint a Redistribution Committee, with the Australian Electoral Commissioner being a member of that committee. The AEC is independent of political parties and has no interest in who wins elections
- Gerrymandering is common in US Congressional electorates and results in unfair electoral representation. Many electorates have extraordinary distortions with varying degrees of compactness.
- Some electorates in the state of North Carolina, for example, are most gerrymandered in the US. Gerrymandering occurs because party-controlled US state legislatures draw the boundaries of their state's federal electorates. They use their law-making powers to disadvantage the other major party in federal elections

In Figure 9.24 Fitnessia's democratically minded leaders have created electoral divisions in a fair way. An election using FPP or PV would result in three electorates representing runners and two representing cyclists. There would be a Runners' Party government because they would have a three to two majority in the parliament.

However, sometime governments use their power to exert influence on the electoral process by manipulating electoral boundaries. In our scenario, in the great cyclist revolution of 2035, cyclists seize power. They use their power to redraw electorate boundaries as shown in Figure 9.25. The distribution makes sure there will be a three to two Cyclist Party majority in parliament and a Cyclist Party government. Cyclists now have a firm grip on power and will use the parliament to make electoral laws to disadvantage the Runners' Party in future elections.

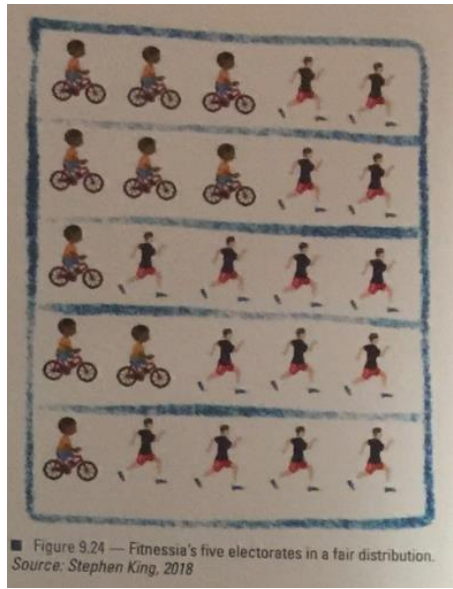


Figure 9.24 — Fitnessia's five electorates in a fair distribution.
Source: Stephen King, 2018



Figure 9.25 — Fitnessia with three gerrymandered electoral districts, guaranteeing the Cyclist Party wins elections and forms government.
Source: Stephen King, 2018

Chapter 11 Notes

Syllabus Points:

- Political representation with reference to the role of political parties and pressure groups

Key words to look at the glossary for:

Parliament – Our Representative Assembly

Australians elect the Commonwealth Parliament juhn

Chapter 13 Notes

Syllabus Points:

- Key processes of at least one non-common law system
- Strengths and weaknesses of the processes and procedures of at least one non-common law system
- Strengths and weaknesses of Western Australia's adversarial civil and criminal law processes

- **Essential to the understanding of representation and justice are the principles of natural justice**

Key words to look at the glossary for:

Introduction

- A trial is a procedure for the discovery of truth
 - The adversarial trial assumption that truth is revealed through a contest between the parties presenting evidence before a passive adjudicator
 - The inquisitorial trial assumption that truth is discovered through a vigorous investigation leading to the discovery of evidence by an active inquirer

Civil law – Codification

- Complete codification of the law is a dominant feature of civil law.
- Although precedent has a minor role, the development of a formal body of law by the courts (as in English common law) is not a feature of civil law. There is no doctrine of precedent, no principle of stare decisis, and no binding and persuasive precedents.
- Codification is the systematic collection and recording of laws and rules into written codes. Civil law codes are equivalent to statute.
- In contrast, Australian common law is found in ratio decidendi the reasoning of judges. It is not gathered up and written in special codes, instead it is found in published Law Reports (case laws)
- Case law is complicated and located in many resources therefore encourages reliance on expensive legal expertise.
- A key advantage of the codification of law is transparency.
 - it is easy for lawyers and citizens to know the law because there is a single source published in written codes accessible to everyone. A positive outcome is less reliance on expert legal knowledge, reducing the role of lawyers in providing advice to parties. Costs are reduced as a result.
- In Australia there is a statute and common law – 2 bodies of complementary law
- In France there are only statutory codes – one body of law
 - This is important difference in Inquisitorial trial system which is heavily dependent on written codes.
 - There is also less emphasis on the spoken testimony of witnesses in inquisitorial trials, evidence is mostly written and presented in a file.

The French Inquisitorial Trial

- It deals with both minor (summary) offences and serious (indictable) offences

Parts of the French Inquisitorial System

- The four main parts to the French system of inquisitorial trial are:
 1. The prosecution (called parquet)

2. The defense
 3. The investigating judge (called juge instructeur) and other specialist judges
 4. Evidence of 'proof by any means'
- The other factors include:
 - The onus or burden of proof
 - The standard of proof
 - The rights of the accused

Parquet – Standing judges and prosecution

- (The Public Ministry) is composed of a department of experts trained as investigating judges. It is also called the standing judiciary.
- Despite the name (standing judiciary) members of the parquet are not trial judges or part of the judicial arm of government.
- Rather it is a branch of the French executive trained in the initial investigations and subsequent prosecution of criminal trials.
- Similar to Department of Public Prosecution in WA criminal system

Roles of the parquet

- The parquet fulfils the role of prosecutors and magistrates for minor offences. Minor criminal offences, similar to summary offences in Australia, can be dealt with entirely by the parquet.
 - The parquet performs a combined judicial and executive function when resolving minor criminal cases. There is a lack of an effective separations of powers and judicial independence in this system of summary trial.
- The process is different for serious criminal offences. There is stronger separation of the executive and judicial powers, and the judge is more independent.
 - The parquet is responsible for initiating a trial for a serious offence. As the accusing party, a member of the parquet must conduct an investigation to see if a case should be referred to a judge instructeur for a trial to start.
 - An investigating judge, who is responsible for seeking the truth in a formal procedure acting on advice of the parquet. Actions of the judge can be appealed by the parquet, but the trial is independent from parties is with the judiciary. Even an admission of guilt by the defendant will not end the trial like in an adversarial system.
 - This system lacks a clear separation of powers and judicial independence, particularly in minor cases.

Defence – The accused

- The defence is the accused person.

Role of the defence

- When the case is with the parquet the defence role is limited. Once a case has been referred to the juge instructeur the defence has more power.
- It request investigation, interviews and confrontations. A confrontation is a meeting of the accused and the victim for a discussion.

- The defence can request only the judge to investigate - it cannot do its own investigation and, thus, is reliant upon the independence and competence of the judge in gathering the evidence supporting its case.
- A major difference from the adversarial trial is in the pleading. There is no plea of 'not guilty'.
- A defendant can plead guilty 'appearance on prior recognition of guilt', but pleading guilty is limited in the following ways:
 - defendants under 18 years of age cannot plead guilty.
 - defendants accused of certain crimes (such as breaching press laws, manslaughter, and political misdemeanours) cannot plead guilty.
 - a guilty plea can only be made with the agreement of the prosecution (the parquet); the juge instructeur does not have to accept a guilty plea.
 - a rejected guilty plea is not recorded in the dossier and, thus, cannot be used as evidence in the trial.
 - a successful guilty plea does not necessarily end the trial-the investigation may continue until the juge instructeur is satisfied sufficient evidence has been gathered and is presented in the dossier.

Rights of the accused

- The accused has certain rights, such as
 - a right to assistance by a lawyer, a right to silence, a presumption of innocence and a right to know the allegations against them.
- The right to legal assistance can be temporarily suspended (12 hours for a minor offence or 24 hours for more serious offences) by the parquet if considered necessary because of an urgent need to gather evidence or to prevent another offence.
- The right to silence is not as robust as it is in the adversarial system and, in certain cases, remaining silent can actually damage a defendant's case. In the adversarial trial, the silence of the defendant cannot be interpreted as an admission of guilt or a reluctance to incriminate themselves.
- Since 2001, the power to detain a defendant resides with the Judge of Freedoms and Detentions. The removal of this power from the juge instructeur has improved the rights of the accused to retain their liberty prior to conviction.

Juge instructeur-Trial judge and investigator

- The judge is critical to the inquisitorial trial.
- The parquet must initiate a trial by seizing a judge, but once that occurs the judge is in full control of the trial. This is **a major difference** between the inquisitorial and adversarial trials; a juge instructeur may control trial processes that are fixed by strict rules and procedure in the adversarial trial.
- The judge's inner conviction and belief (intime conviction) is the equivalent of the standard of proof. His or her firm conviction based on the evidence is what decides guilt or innocence.
- A juge instructeur is a member of the separate judiciary.

- The parquet is part of the executive branch and prosecutes, whereas the juge instructeur is part of the judicial branch and investigates and adjudicates.
- The investigative role is assigned to the judiciary, which directs the police, not the police alone as is the case in the adversarial system.

Role of the juge instructeur

- The judge is instructed by the parquet to discover the truth. Once instructed a juge instructeur has a wide range of resources and powers at his or her disposal to discover the truth through investigation. The juge instructeur can:
 - direct the police to investigate and gather evidence.
 - direct the gendarmerie' to investigate and gather evidence.
 - interview witnesses and take their statements in written form.
 - order a 'confrontation' (a meeting) between the accused and the victim.
 - interrogate the defendant in camera and not under oath, but with the defendant's legal representative present.
 - decide if the defendant has a case to answer.
 - issue warrants to facilitate the collection of evidence.
 - order expert reports (from medical and psychiatric experts for instance.)
 - select evidence for inclusion in the dossier.
 - widen the scope of the inquiry as long as it is related to the parquet's instructions.
- All of the above resources and powers are used at the discretion of an active juge instructeur. The parquet may appeal the judge's actions, but it cannot stop the process.
- In the adversarial system judges do not instruct the police or the Department of Public Prosecutions (DPP) to gather evidence; they only make judgments about the evidence gathered by them.
- **Until 2001** juge instructeurs had the power to detain a defendant. However, reforms were introduced, and that particular power was removed and given to the newly created position of a judge of freedoms and detentions juge des libertés et de la detention. This reform addressed the inquisitorial system's lax protection of the rights of the accused.

Juries can assist judges

- In very serious criminal trials there may be a panel of six jurors. The jury is a random selection of citizens who sit with three juge instructeurs (one of whom is the judge in charge) and assist in determining guilt by intime conviction.
- Jurors have equal rank with judges in assessing evidence, but only judges can decide on trial procedure. Jurors and judges have equal power in sentencing, with voting on a verdict being secret.

Evidence 'Proof by any means'

- In France "evidence" is "obviousness" is a less demanding definition. It implies a strong suggestion of proof rather than rigorously convincing proof.
- Note the different attitude to the quality of evidence suggested by this definition as adversarial system's requires only high-quality evidence, the inquisitorial admits any relevant evidence.

- Evidence is gathered by the parquet in the first instance and then, once an investigating judge is 'seized' and they take over the case and dossier, it is gathered by the police or gendarmerie on instructions of the juge instructeur.
- All the evidence in the dossier is selected, assessed, and weighted by the juge instructeur. The only rule of evidence is relevance. There is rules to exclude poor quality evidence.
- The openness of evidence places a burden on the judge to weigh evidence according to its quality, another key difference from the adversarial trial.

Witnesses

- Oral testimony from the dossier. witnesses can also be used as evidence, especially in Assize Courts.
- Witness testimony is in the form of 'telling their story', rather than 'answers to questions' as occurs in the adversarial trial.
- Witnesses tell their story uninterrupted by questions from the parties or the juge instructeur.
- Witness evidence is not subject to rigorous testing through cross- examination by the parties.

Burden of proof

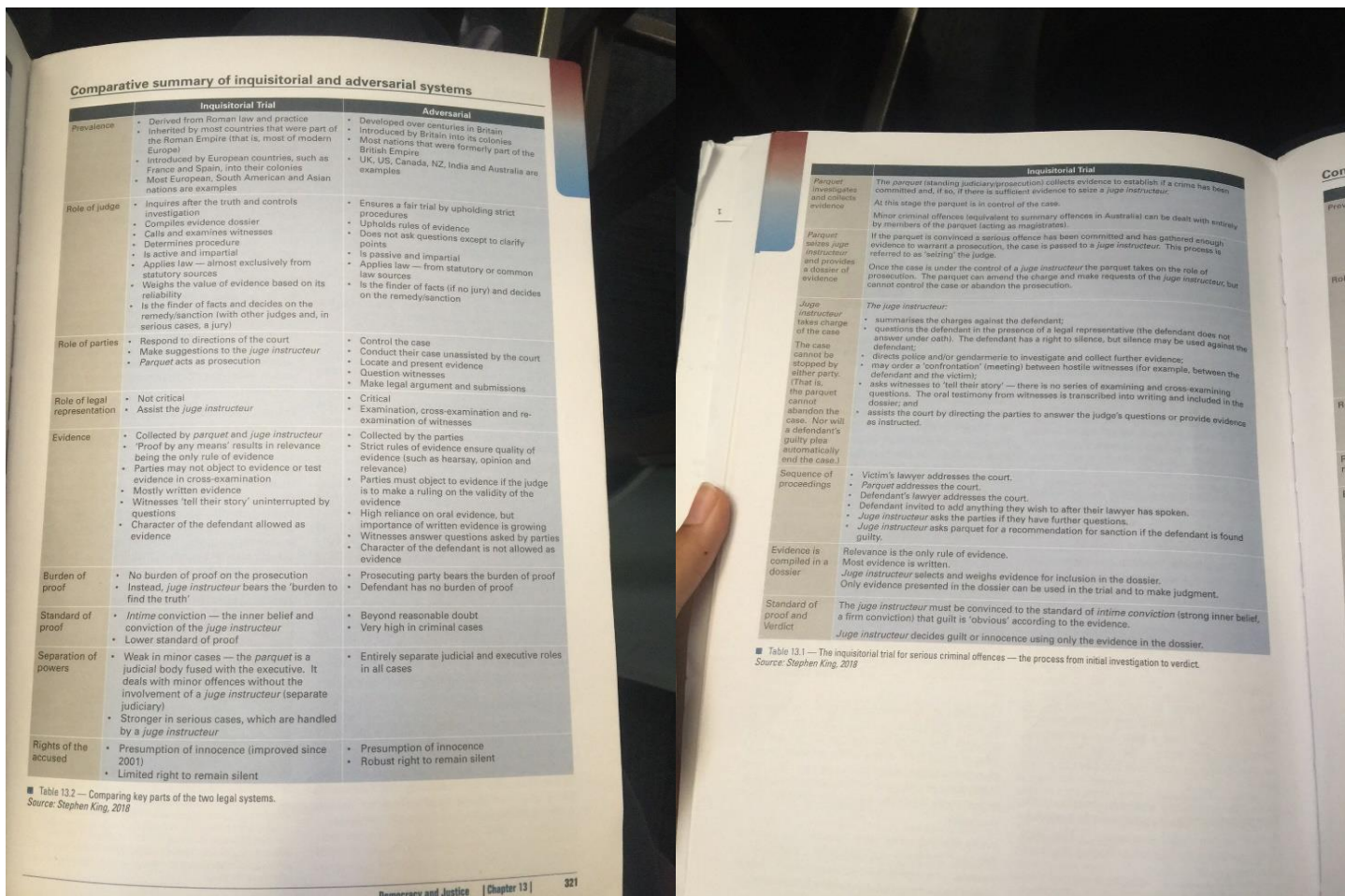
- There is no formal burden of proof in the inquisitorial trial, the prosecuting parquet does not have to prove guilt.
- Instead, the overriding aim is to find the truth. The person with responsibility for the discovery of truth is the juge instructeur. The juge instructeur bears the burden of finding the truth, not proving guilt.
- The accused has a presumption of innocence, and this makes it harder to prove guilt.

Standard of proof

- The juge instructeur must be convinced to the level of a firm and strong personal belief. An inner conviction is a profound sense of certainty. An intime conviction must be based on evidence contained in the dossier as weighed by the judge, or the judge and jury in very serious Assize Court criminal cases.
- Students should appreciate that to be convinced of something to the level of a 'strong belief or inner conviction' is a lower standard than to be convinced 'beyond reasonable doubt. It means that guilty verdicts are easier to obtain in the inquisitorial trial than the adversarial trial.

Trial procedure

- Whereas the adversarial trial is highly procedural to ensure a fair trial (procedural fairness), the inquisitorial trial has more relaxed procedural rules.
- The judge in an adversarial trial is the referee of strict procedure that is how fairness is assured. The claim that a judge did not uphold 'proper procedure' is one of the greatest causes of appeals in the adversarial system. The juge instructeur in charge of an inquisitorial trial has much more flexibility to decide how the trial proceeds.
- While the following table outlines the general process, students are reminded that this is flexible. The juge instructeur is actively in charge of trial procedure and it may vary because of the judge's active involvement.



	Evaluating Inquisitorial Trial	Evaluating Adversarial Trial
Strengths	<p>Bring forth evidence.</p> <ul style="list-style-type: none"> The relaxed rules of evidence and the inability of parties to hide (or withhold) evidence against their own case means more evidence comes before the court. The parties cannot strategically select evidence beneficial to their case. More evidence is a positive because it helps find the truth. A judge is required to weigh the value of each evidence by quality. All evidence contributes to the judge’s (and jury’s) reasoning for his/her <i>intime conviction</i> on the extent of its quality 	<p>An impartial judge (and jury)</p> <ul style="list-style-type: none"> The passive judge does not investigate, question witness, introduce evidence, compile a evidence dossier or direct the trial. They are neutral who oversees the contest between the competing parties making sure they are strict to processes to ensure fairness. A judge must explain the reasons for their decisions (<i>ratio decidendi</i>) making judicial thinking transparent and subject to appeal. Juries are independent of the parties, judge and are not in any branches of gov, they are citizens like the accused and are there to be fellow citizens who judge the accused justly
	<p>Less biased witnesses</p> <ul style="list-style-type: none"> All witnesses are called and questioned by an impartial judge 	<p>High quality evidence</p> <ul style="list-style-type: none"> The rules of evidence in the adversarial trial are designed to ensure that low quality evidence

	<p>trying to find truth, not by partisans trying to win the contest.</p> <ul style="list-style-type: none"> • The result is that parties cannot filter or coach witnesses to suit their side by presenting only favourable testimony 	<p>never enters into the decision-making process of a judge or jury.</p> <ul style="list-style-type: none"> • The adversarial judge rules on the admissibility of evidence-it is either 'in' or 'out' - according to strict exclusionary rules. Evidence is not weighed by an adversarial judge. • Furthermore, the way the judge enforces the rules of evidence is transparent and can be contested by the parties through argument. • Incorrect evidence procedure can be grounds for appeal.
	<p>Lower cost for the parties</p> <ul style="list-style-type: none"> • Majority of trial costs is covered by State not the parties meaning more expensive for the French taxpayer but cheaper & more accessible for parties. • The lack of need for legal advice (essential for adversarial) is much lower as it is less important. Parties do not run the case as the judge provides the expertise. • With lower costs, it allows people to initiate and protect their rights through the legal system, as costs are less of a barrier to participation. 	<p>Parties retain control of the trial</p> <ul style="list-style-type: none"> • The prosecution (or plaintiff) and defence run the case. • They find and present evidence, call & question witnesses, test evidence through cross-examination, object to evidence that may contravene the rules of evidence, argue the meaning and interpretation of law, and open and close the case. • Either party can end the case without the consent of the judge the prosecution by abandoning the trial and the defence by pleading guilty. • The same power to end the trial exists in a civil case with the plaintiff and defendant, or they may reach an agreement to resolve the dispute out of court.
	<p>More likely to convict a guilty offender.</p> <ul style="list-style-type: none"> • Inquisitorial has higher conviction rates for serious criminal offences due to its more relaxed rule and procedures, lower standard of proof and weaker rights for the accused. • This has the advantage of achieving stronger punishment, deterrence, rehabilitation, and community protection outcomes. The price, however, is a higher likelihood of wrongful convictions. 	<p>Procedural fairness</p> <ul style="list-style-type: none"> • One of the key features of the adversary trial is its strict adherence to procedure. • There is a correct way to conduct the trial, and the judge's role is to ensure a trial happens according to these strict rules. • The procedures ensure both sides get to present their case in an equitable manner and that high quality evidence is entered and tested.

		<ul style="list-style-type: none"> • The neutrality of the judge and jury is part of the procedure, as is the public nature of the trial. In short, natural justice is assured by procedure, not the personal beliefs and values of the judge. • Strong protections for the rights of the accused
Weaknesses	<p>A less impartial judge</p> <ul style="list-style-type: none"> • Minor offences are handled entirely by the parquet which is a judicial body fused with the French executive • This weak separation of powers between the accuser/prosecutor and the adjudicator is a weakness • It compromises the impartiality of the adjudicator, a principle of natural justice, however this is mainly seen in minor offences. • For more serious offences there is stricter separation of powers. The parquet remains the prosecuting party but the juge instructeur, who is not part of the executive becomes the adjudicator. • Once the juge instructeur has taken charge of the trial the parquet loses control of the trial and becomes the prosecuting party • Assize Court trials with a jury are better as jury has citizens with equal power to judge to decide guilt and sentence and are not members of any branches. The 6 jurors outweigh the 3 judges. • (Lower quality evidence) The less impartial judge and the association between the prosecution and the judge may result in bias in the collection or weighting of evidence like giving more weight to low quality evidence from prosecution side than it deserves 	<p>Overreliance on legal expertise</p> <ul style="list-style-type: none"> • Legal advice is essential in the adversarial trial. Strict procedures, rules of evidence and laws are all quite technical and requires an expert trained in law and trial procedure. • The passive judge cannot assist a party, even an unrepresented party. • Therefore, success in a trial depends as much on the quality of legal representation as it does on where truth lies
	<p>Lower quality of evidence</p> <ul style="list-style-type: none"> • Hearsay evidence, circumstantial evidence and opinion evidence are 	<p>High cost to parties</p> <ul style="list-style-type: none"> • The truth is not enough you need a good lawyer which is very costly.

<p>all permissibly as evidence is not subject to rigorous testing by parties e.g., no cross examination.</p> <ul style="list-style-type: none"> • Weak evidence may be included by a less competent juge instructeur in the dossier which may influence their intime conviction, with no accountability • The admission of low-quality evidence is counter-balanced by the greater quantity of evidence and the fact that it is gathered by the direction of the judge rather than biased parties <p>The judge instructeur is not required to explain how they weighted the evidence, only to reach an intime conviction. Appeals can be hampered by the lack of clarity about a how a guilty verdict was reached</p>	<p>The obvious consequence of overreliance on costly legal expertise is injustice due to lack of resources to pay for one.</p> <ul style="list-style-type: none"> • An impoverished accused may not get the quality of advice needed to defend themselves against an effective prosecutive run by state. • Legal aid provided by the government to poorer defendants although addresses this slightly, but the system is underfunded and over worked and only for criminal trials, in civil you must pay yourself
<p>Parties surrender control of the trial</p> <ul style="list-style-type: none"> • The active judge and passive parties mean the parties have little influence over the trial, neither party can end it by abandoning it (parquet) or by pleading guilty (defendant) only juge instructeur can • A guilty plea is only regarded as evidence unlike in adversarial where a guilty plea ends the trial immediately. In fact, a inquisitorial judge may choose to give no weight to a confession at all • 	<p>Potential for strategic manipulation by the parties</p> <ul style="list-style-type: none"> • Party control of the trial, reliance on legal experts, and strict rules and procedure mean clever lawyers can manipulate a case to their client's knowledge and better knowledge of the rules can be played to advantage as well • Parties can call witnesses beneficial for their trial and to other evidence as well • Witnesses cannot tell their story like in inquisitorial they can only answer questions and lawyers can construct these questions to only get the answer they want. • They can use hostile questioning in cross-examination to unsettle a witness for the other party which has been used in domestic violence and assault cases where victims are asked to retell their assault and skilled lawyers question the credibility of it
<p>The character of the defendant is included</p> <ul style="list-style-type: none"> • The previous criminal history of the defendant is admissible and can be 	<p>Winning more important than truth</p> <ul style="list-style-type: none"> • An adversarial trial assumes a contest will reveal the truth by producing the best evidence and argument.

<p>used by the juge instructeur to reach an intime conviction.</p> <ul style="list-style-type: none"> • Despite a person's character having little bearing on whether they committed the crime it can be used in trial to help the judge decide. • In adversarial system, the previous history is inadmissible unless it shows a tendency for them to behave in a particular way related to the case <p>Even then it is used in the post-trial not the actual trial as to not cause prejudice in the jury by causing them to prejudge the case</p>	<ul style="list-style-type: none"> • Each party's desire to win will almost certainly outweigh their desire to have the 'whole' truth emerge, especially if the truth is not on their side. • Truth can only favour one side; the other side will do everything it its power to prevent its discovery. • Courts hope the truth will emerge and parties strive to win
<p>Overreliance on one person's skill</p> <ul style="list-style-type: none"> • The degree of the active control makes the competence of an inquisitorial trial judge more important than in adversarial. • An adversarial judge's power is checked by parties' control of the trial and the judge is bound to strict rules and greater transparency of verdict • In adversarial system appeals may be made if a judge has made errors during a trial unlike in inquisitorial where an inattentive judge is not always sufficient grounds for an appeal. • An incompetent inquisitorial trial can impact natural justice 	<p>Jury prejudice by media, jury decisions are unaccountable.</p> <ul style="list-style-type: none"> • Jurors are supposed to make their judgements using quality evidence presented in trial and low quality one is ruled out by a judge who instructs them what evidence can be used to determine a verdict. • Jurors have smartphones and other technology and can get information from the internet which they are not supposed to do however it is very hard to regulate this. • Outside influence and media prejudice can influence the jury and if the judge finds out jurors have sought outside information, they may declare a mistrial which is expensive and denies justice. • Jurors also only produce a verdict and there is no ratio decidendi for the jury, so they never have to explain themselves which makes it difficult to appeal on the grounds that the jury made a mistake
<p>The four principles of natural justice</p> <p>Impartial adjudication</p> <ul style="list-style-type: none"> • In minor criminal cases, the parquet may carry out the roles of the executive (police investigation and prosecution) and the role of the judiciary. This can lead to 	<p>Time and Delays</p> <ul style="list-style-type: none"> • Adversarial trials are conducted in one continuous hearing and in complex cases many things can add the time it takes to reach a conclusion, complex trials can last years. • Proceeding to trail can be frustratingly slow and pre-trial

perceptions of bias. It can also lead to actual bias.

- In serious criminal cases the juge instructeur and parquet (the prosecuting party) have a closer relationship than the juge instructeur does with the defendant.
- Assize Court jury trials are the best form of inquisitorial trial in terms of impartiality of adjudication.

Hearing both sides

- There is no procedural guarantee that the defendant will be able to present their case to the same extent as the prosecution.
- Procedure is more flexible, and the judge can control it to a great extent.
- Therefore, the degree to which both sides can make their case is controlled more by the discretion of the judge and less by trial procedures which are independent of the judge. Evidence is selected and weighed by the judge, not presented, and contested by the parties. Neither party can be certain the judge is finding evidence that assists their case.
- The impartiality of the judge is not as strong as for an adversarial judge.

Evidence based decisions

- Useful evidence must be selected for inclusion in the dossier and then weighted appropriately by the juge instructeur.
- This process puts the burden on the judge and not on well-defined rules to decide which evidence is used and how.
- Furthermore, the standard of proof is dependent entirely on the inner belief and conviction of the juge instructeur.

processes can be lengthy in both civil and criminal cases.

- Even when a case is committed for trial, the heavy workload of the courts often means backlog of older cases creating more delays.
- 2010 civil trial case management reform in WA was partially aimed at reducing time taken to finalise cases but criminal trials do not have an equivalent process for reducing delay

- In the adversarial criminal trial, the standard of proof is both higher and more transparent.
- An inquisitorial judge only has to be thoroughly convinced in their own mind and the standard of proof is highly personal- it depends heavily on the judge's character, values and attitudes. Some judges may be more easily convinced than others.

Transparency and openness

- As outlined above, dependence on the inner thinking and judgments of the juge instructeur make transparency harder to achieve.
- Trial processes are less formal and less predictable, the evidence dossier is mostly written and less accessible to court reporters and the media, and the judge is not required to explain how they reached their intime conviction. One of the keys to a good justice system is that justice is not only done, it is seen to be done. Seeing justice done is harder in an inquisitorial trial.

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Weaker separation of judicial and executive power

- As outlined above, the parquet is part of the executive, but has judicial functions. For minor cases, where the parquet deals with a case through to its end, it means the prosecutor and the adjudicator are both within the executive branch. In overly simple terms to make the point, 'the accuser and judge are the same', 12 Separation of powers and judicial independence are much stronger for serious criminal trials investigated by a juge instructeur or an Assize Court.

Weaker protection of the rights of the accused

- The accused is presumed innocent and has a right to silence, but these are both weaker in the inquisitorial.
- The right to silence in France depends on whether the case has been referred to a juge instructeur.
 - **Before** a case is referred to a juge instructeur the accused has the right to remain silent and cannot be interrogated by the parquet
 - **After** a case is referred to a juge the accused can be forced to make a statement and give evidence but not under oath. This rule ensures they cannot be guilty of lying under oath; however, the evidence can be used against them in trial if a judge decides.
- Before 2001 a juge instructeur could place a defendant under 'provisional detention' where they are free but subject to conditions imposed by the judge prior to trial,
- However, this was reformed to separate a juge instructeur's investigative and judicial functions. A new judicial position was created which had the power to detain an accused person and this judge is not involved in the case allowing for presumption of innocence