

# T4 LN Case law & Doctrine of Precedent

## Classifying Law:

### *Types of law*

Laws can be made by parliament (acts) or made by courts (principles resulting from cases). They are enforceable, which means that there is some kind of ramification for not following these laws. Laws are not optional. In Australia, common law bind lower courts to the decisions. These are also known as precedents.

Note: difference between common law and civil law:

Common law- parties bring their own evidence

Civil law- judges will seek evidence to make a decision

## Substantive vs Procedural Laws

- Substantive: written law, found in common law/statute. Sets out rights, obligations, duties.
- Procedural: administration of the law, these are the mechanisms in place to make these laws enforceable.

## Precedent:

At the heart of the doctrine of precedent, sits the concept of 'Stare Decisis', which in translation means 'to stand by things decided'. It is about setting consistent expectations, and that like cases should be treated alike. Justice requires that similar decisions should be made for similar cases. SD is still prominent today.

In the case of Telstra Corporation v Treloar (2000), the doctrine of precedent was referred to and a rationale was provided. This rationale explained the doctrine of precedent to comprise of 4 distinct things:

- a. Certainty- the setting of clear and consistent expectations
- b. Quality- Treating cases alike. Similar situation, similar outcome.
- c. Efficiency- no need to spent time on decisions when outcome can be based upon prior decisions. Using time wisely.
- d. Appearance of justice- creating impartial rules of law. These rules are not to be biased by personal views of the judge. (Can refer to Finkelstein reading here about justice – role of judge is not about imposing bias, but applying the law).

Each of these will help to foster impersonal and reasoned judgments.

## Precedents can be a number of things: Binding, Persuasive or Largely Irrelevant

Ratio or Obiter? (binding or persuasive)

Applied or Distinguished? (used as a precedent or not applied)

\*NB **binding** means the Court is bound to follow previous decisions.

\*BUT a court cannot be bound by a court in its own jurisdiction: it is **persuasive**, not binding

\* international jurisdictions are **largely irrelevant**, but can be argued as **persuasive**

- Ratio Decidendi:
  - Binding under doctrine of precedent
  - Judges reason for the judges decision
  - Ruling on a point of law
  - Binding under the doctrine of precedent
- Obiter Dicta:
  - Not binding under doctrine of precedent
  - They are (highly) persuasive views, opinions, remarks, statements

**Avoiding precedents:**

- if cases were wrongly decided
- if precedents no longer apply eg R v L rape in marriage, now this is accepted as true (and can happen- previously wasn't recognised)
- material differences

**The role of the judge: (with regard to the SOP & traditional/modern approach)**

There has been much debate around the topic of whether judges declare the law? Or whether they make law? This is a highly debated topic, as under the separation of powers doctrine, the judge's role is declaratory. This traditional approach means, that under a strict application of the separation of powers, judges do simply declare the law. It is the legislature who makes law through parliament, and the executive administers the law. Each arm of authority under this doctrine operates independently of one another. This narrow view however is contentious, as in practice their role is much wider in scope than this.

Finkelstein J supports this view, that the role of judges is much more than to declare the law. In his paper, he explains that a primary function of the court system is to identify whether the legislature and executive exercise their power in accordance with their authorisation under the Constitution. This was apparent in the case of Chu Kheng Lim v Minister for Immigration, the role of the court was to ensure that there was not a contravention of the Constitution. It was held that they had exercised their powers and acted within their authority. Thus, it could be said that the role of the judge is an expanding role, and this view is becoming more widely accepted.

Finkelstein also proposes that judges should not impose their opinions or make any moral or ethical determinations. Their task is purely to find and apply the correct values in the law. Another primary function of the judge, is to come to a determination on the issue before them. This may mean that in order to do this, they may need to make changes, of course within scope. Judicial activism provides for the judiciary to make law. However, this does not mean that the judge can just 'make it up as they go along', for that would offend the constitution.

Therefore, the role of the judge has moved away from the traditional approach, and has assumed a more modern approach.

## T5 LN Statutory Interpretation

**Statutory Interpretation:**

Is said to have become the single most important aspect of legal practice - Chief Justice Spigelman.

Parliament is sovereign, and is regarded as the 'most supreme' law making power. It is crucial for this reason, to ensure that the intended meaning of the act made by Parliament parallels this written equivalent when being applied in court. In essence, the act must be interpreted the way that it was intended, Modern Statutory Approach Act (Cth) & (Vic).

Each of these acts encourage that interpretation is consistent, and promotes the underlying purpose of the particular legislation, (s15AA (Cth) & s35 (Vic)).

Statutory Interpretation faces many challenges, for example words can have multiple meanings; the wording in the act may be ambiguous; errors may have been made when drafting. Due to these many uncertainties that statutory interpretation can produce, it is suggested that the act as a whole be considered and the wording not be evaluated in isolation, Metropolitan Gas Co (1924).

Both intrinsic and extrinsic materials can be used to interpret an act's intended meaning. (see lect slides T5).