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## Australian Legal System and Sources of Law

### Structure of Australian Legal System – LDL Ch1

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| <b>The law consists of</b>     | <ul style="list-style-type: none"> <li>• Acts passed by the Federal Parliament</li> <li>• Ordinances made in respect of the Territories</li> <li>• Acts passed by State Parliaments and the Legislative assemblies of NT, ACT and Norfolk Island</li> <li>• So much of the common or statute law of England that was received, still applies to Australia and remains unrepealed</li> <li>• The Australian common law, developed from English law and interpreted/modified by the courts</li> </ul>                          |
| <b>Parliamentary system</b>    | <ul style="list-style-type: none"> <li>• 6 states</li> <li>• 10 territories (directly subject to Commonwealth lawmaking powers, but ACT, NT and Norfolk have large degree of autonomy)</li> <li>• Parliament consists of Queen, Senate and House of Representatives</li> <li>• People in each state elect same number of senators (12)</li> <li>• HoR number of members depends on size of State's population (guaranteed 5 seats, NT represented by one HoR member and two senators, ACT 3 HoR and two senators)</li> </ul> |
| <b>Australian Constitution</b> | <ul style="list-style-type: none"> <li>• Passed as a part of British Act of Parliament in 1900</li> <li>• Took effect 1 January 1901</li> <li>• Drafted by Australians</li> <li>• Terms were approved by the people of the 6 states</li> <li>• Section 128 – any change must be approved by the people of Australia</li> </ul>   |
| <b>Separation of powers</b>    | <ul style="list-style-type: none"> <li>• Only the Parliament can pass Acts, but these Acts often confer the Commonwealth Executive the power to make regulations, rules and by-laws</li> <li>• Both houses of parliament can disallow any regulation made by the Executive</li> <li>• Government Ministers (Executive) must be members of, and accountable to, Parliament (responsible government)</li> </ul>  |

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| <b>Governor-General</b>                | <ul style="list-style-type: none"> <li>Appointed by Queen with advice from Prime Minister</li> <li>Acts in accordance with advice of Government Ministers</li> <li>The Crown acts on the advice of its Ministers who are in turn members of Parliament, section 64 of Constitution</li> <li>Has 'reserve powers' - appoint and dismiss a Prime Minister</li> <li>Must appoint the parliamentary leader of the party or coalition of parties which has a majority of seats in the House of Representatives</li> <li>e.g. John Kerr blocked passage of Supple Bill in attempt to deprive Whitlam Government of the funds needed to govern, some say that he breached the convention that a person who retains majority support of the House of Reps can remain PM</li> </ul> |
| <b>Representative government</b>       | <ul style="list-style-type: none"> <li>Sections 7 and 28 of Constitution require regular elections of House of Reps and Senate</li> </ul>  |
| <b>Commonwealth legislative powers</b> | <ul style="list-style-type: none"> <li>Listed in sections 51 and 52</li> <li>Taxation, defence, external affairs, marriage and divorce, trading, immigration, bankruptcy</li> <li>Does not refer to important subjects like the environment, roads, education and criminal law, Commonwealth can still influence them</li> </ul>   |
| <b>State legislative powers</b>        | <ul style="list-style-type: none"> <li>States have their own constitutions but are bound by the Australian one</li> <li>Cannot impose duties of customs and excise (section 90)</li> <li>Cannot raise defence forces without consent of Parliament (section 114)</li> <li>Section 109 – if a valid commonwealth law is inconsistent with a state law, the commonwealth law operates</li> <li>Traditionally haven't raised enough revenue to perform all their functions, receive grants of financial assistance from the Commonwealth</li> <li>Section 96 allows commonwealth to make conditional grants of money to the States, allows commonwealth to exert control over things like universities</li> </ul>   |
| <b>Australian common market</b>        | <ul style="list-style-type: none"> <li>Constitution created with purpose of free trade between states</li> <li>States can't pass legislation that discriminates against the products of other states (section 92)</li> </ul>   |
| <b>Rights</b>                          | <ul style="list-style-type: none"> <li>Bi equivalent of the Bill of Rights which prevents a legislature from passing laws that infringe certain basic freedoms and rights such as freedom of speech</li> <li>Some protections given by Constitution (section 51(xxi)) acquisition of property must be on just terms, section 80 trial by jury required for some criminal offences, section 116 a right exists to exercise any religion</li> <li>e.g. in 1992 High Court declared invalid a Commonwealth law which attempted to restrict the broadcasting of political advertising, saying it infringed on the right to freedom of communication on political matters</li> </ul>  |
| <b>Process of law-making</b>           | <ul style="list-style-type: none"> <li>Passed by parliament, then need Royal Assent</li> <li>Governor General can create subordinate legislation, such as regulations without introducing into Parliament, but Parliament can disallow it</li> </ul>   |

## Key jurisprudence concepts

| <i>Definitions</i>       |  |
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| <i>Natural law</i>       | The law of nature; laws as the emanation of the Divine Providence, rooted in the nature and reason of humankind  |
| <i>Positivism</i>        | The theory that law is what humans declare it to be  |
| <i>Feminism</i>          | The view that while law may provide nominal equality, it has been constructed by men, is under the control of men and favours the interests of men, and should therefore be reconceived to pursue genuine equality                       |
| <i>Palm tree justice</i> | Ad hoc legal decision-makings, making rulings based on common sense rather than legal principles or rules  |
| <i>Public law</i>        | The law governing relations between individuals and the state  |
| <i>Private law</i>       | The law governing relations between individuals, including organizations   |
| <i>Civil law</i>         | <p>The law of private disputes</p> <ul style="list-style-type: none"> <li>• Successful civil actions most often result in the payment of compensation</li> </ul>   |
| <i>Criminal law</i>      | <p>The standards of conduct that are viewed as having such importance that their breach may result in punishment</p> <ul style="list-style-type: none"> <li>• Criminal actions are brought by the representative of the state</li> </ul> |

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| Civil law countries                           | <ul style="list-style-type: none"> <li>- laws contained in documents called 'codes' that are heavily influenced by principles derived from Roman law</li> <li>- rules emerge from deduction of code principles</li> </ul>   |
| Roman empire spread their laws through Empire | <ul style="list-style-type: none"> <li>• collected and organised by Emperor Justinian into texts which came to known as <b>Corpus Juris Civilis</b></li> <li>• Disintegrated with roman empire</li> <li>• Found again in late 11<sup>th</sup> century in Italy, became focus of scholarship and formed basis of contemporary civil law</li> </ul> |
| Common law history                            | <ul style="list-style-type: none"> <li>• Common law developed by way of decisions of English courts</li> <li>• Began in late 11<sup>th</sup> century</li> </ul>   |
| Civil law history                             | <ul style="list-style-type: none"> <li>• Civil law on the basis of the principles of Roman empire, combined with custom, canon law, local usage and royal decrees</li> <li>• Only in 19<sup>th</sup> century were most countries stable enough to develop wide-reaching complex legal systems</li> </ul>  |

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|   | <ul style="list-style-type: none"> <li>Code Napoleon drawn up in 1810, apply to whole empire, spread through Europe</li> </ul>   |
| Taxonomy is essential for true justice                            | <p>Classification</p> <ul style="list-style-type: none"> <li>Laws need to be 'closely and cogently reasoned' (Peter Birks), states as to 'facilitate prediction and advice'</li> <li>Law which is intellectually disorderly plays into the hands of the rich and powerful</li> <li>Need to find balance between flexibility and consistency</li> </ul>   |
| Are laws inherent (natural law) or created by humans (positivism) | <p>Natural law</p> <ul style="list-style-type: none"> <li>Basis of French and American revolutions, 'self-evident' truths</li> <li>Current human rights</li> <li>Reintroduced to Western legal thought by Thomas Aquinas, (13<sup>th</sup> century philosopher), argued that natural law is universal and founded on the basis that certain values and rights are inherent in human reason</li> <li>Lon Fuller (1958 Harvard Law Review) argued that morality is intrinsic to law and is the source of its binding power or validity <ul style="list-style-type: none"> <li>- obligation of fidelity to law arises from bond of reciprocity between govt and citizens – when ruptured by govt through creation of immoral laws, citizens' duty to obey is broken</li> </ul> </li> </ul> <p>Positivism</p> <ul style="list-style-type: none"> <li>HLA Hart (1958 Harvard Law Review) argues that morality and law are separate, even 'bad' laws are valid – laws left over from Nazi Germany should remain valid (but should be disobeyed)</li> </ul> |

## Lecture 1

- Law as an organizer of society, seek to be more just, not let Darwinian rule of the jungle prevail, where our rights come from
- Most disputes resolved before ever reaches court, work out who has the right
- Economic organisation mirrors social organization, governs and influences it
- Law limits power through equalizing processes
- Law as political instrument, also changeable
- Common law drawn from Norman England - law of common people and Curia Regis (law of the court), in French and Latin (not spoken by majority of common population, start of law as removed from the population, jargonism)
- Procedural law becomes substantive law
- Equity as response to the failings of common law, English is the language of these courts
- Dual system of Courts of Chancery (equity) and common law, combined in Judicature Acts 1870s (Aus in 1970)
- Legislation is now most important source of law, comes from King originally and now Parliament (Magna Carta first to limit King's law)

|                 | Authors, Definitions, Examples, Questions, Interesting Stuff  |
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| habeas corpus   | Latin for "you have the body," it is a writ (court order) which directs the law enforcement officials (prison administrators, police or sheriff) who have custody of a prisoner to appear in court with the prisoner to help the judge determine whether the prisoner is lawfully in prison or jail. The writ is obtained by petition to a judge in the county or district where the prisoner is incarcerated, and the judge sets a hearing on whether there is a legal basis for holding the prisoner. Habeas corpus is a protection against illegal confinement, such as holding a person without charges, when due process obviously has been denied, bail is excessive, parole has been granted, an accused has been improperly surrendered by the bail bondsman or probation has been summarily terminated without cause. Historically called "the great writ," the renowned scholar of the Common Law, William Blackstone, called it the "most celebrated writ in English law." It may also be used as a means to contest child custody and deportation proceedings in court. The writ of habeas corpus can be employed procedurally in federal district courts to challenge the constitutionality of a state court conviction. |
| substantive law | law which establishes principles and creates and defines rights limitations under which society is governed, as differentiated from "procedural law," which sets the rules and methods employed to obtain one's rights and, in particular, how the courts are conducted.  |
| procedure       | the methods and mechanics of the legal process. These include filing complaints, answers and demurrers; serving documents on the opposition; setting hearings, depositions, motions, petitions, interrogatories; preparing orders; giving notice to the other parties; conduct of trials; and all the rules and laws governing that process. Every state has a set of procedural statutes (often called the <i>Codes of Civil Procedure and Criminal Procedure</i> ), and courts have so-called "local rules," which govern times for filing documents, conduct of the courts and other technicalities. Law practice before the federal courts operates under the <i>Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure</i> . Procedural law is distinguished from "substantive" law, which involves the statutes and legal precedents upon which cases are tried and judgments made  |
| equity          | a venerable group of rights and procedures to provide fairness, unhampered by the narrow strictures of the old common law or other technical requirements of the law. In essence courts do the fair thing by court orders such as correction of property lines, taking possession of assets, imposing a lien, dividing assets, or injunctive relief (ordering a person to do something) to prevent irreparable damage. The rules of equity arose in England where the strict limitations of common law would not solve all problems, so the King set up courts of chancery (equity) to provide remedies through the royal power. Most eastern states had courts of equity or chancery separate from courts of law, and others had parallel systems of law and equity with different procedural rules. Now most states combine law and equity and treat both under "one cause of action."  |

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|  | <p>The term common law is confusing as it has different meanings depending on the context. So it could be used to refer to law crafted by judges when they decide cases, this is what we refer to as "case law" and this is in contrast to law established by legislation, by the legislature enacting legislation, also known as "statutory law". It can also be used to refer to law that is not equity. And, finally, it can be used to describe the law of countries which follow the common law, like the United States and England as opposed to countries that follow Roman law or French law or the civil law tradition. In this sense it means the entirety of the law including legislation, case law and equity.</p> <p>equity is the name that we give to the set of rules that traditionally supplemented the common law where the application of the common law would have operated too harshly. This was done to achieve what is sometimes referred to as natural justice, or more simply speaking, fairness.</p> <p>Today, equity has merged with the common law to become a branch of the law dealing with, among other things, trusts and certain remedies such as injunctions.</p> <p>Common law and equitable right has two different function in that, common law establishes general rules which provide certainty, while, equitable rights acts as a check and balance of common law.</p> |
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## Development of the Australia Legal System

### History of the English Legal System – LDL Ch2

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| Feudalism                    | <ul style="list-style-type: none"> <li>- introduced into England by Norman conquest</li> <li>- a system of land ownership based on a formal social hierarchy</li> <li>- mutual promise - swear allegiance to the rank above you, provide share of crops, in return higher rank assists in times of need</li> <li>- feudal system of land tenure formed the basis of British property law until 1921</li> </ul>     |
| Common law in feudal England | <p>Made up of Common Pleas (heard disputes of commoners), the Exchequer (disputes involving royal revenue) and the King's Bench (disputes involving the king or royal interests)</p> <ul style="list-style-type: none"> <li>- writ system</li> <li>- 1258 Provisions of Oxford: no new types of writ be issued without the express authorisation of the crown</li> <li>- roots of emphasis on procedure</li> </ul> |

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|                            | <ul style="list-style-type: none"> <li>- trials by ordeal: somewhat effective (guilty party would reveal their guilt, priest administering the ordeal would manipulate matters to avoid the innocent defendant suffering)</li> </ul>   |
| Juries                     | <ul style="list-style-type: none"> <li>- defendants could produce witnesses that would swear support for their version of the facts</li> <li>- witness would produce local people who would swear that they believed this statement</li> <li>- these men became known as the jury</li> </ul>   |
| Emergence of equity        | <ul style="list-style-type: none"> <li>- courts became too large, slow and unwieldy, methods of proof were primitive so came to emphasise form over proof</li> <li>- people came to see it as unjust, sent complaints to the King, who delegated the task to the Chancellor (who issued writs)</li> <li>- trained as priests, grounded their judgements on Christian beliefs</li> <li>- their law became known as equity, prevails over common law</li> </ul>  |
| Constitutional principles  | <ul style="list-style-type: none"> <li>- role of Parliament and constitution underwent major change in the 17th century, following English Civil War, the Glorious Revolution of 1688 (end of any basis of the claim that English monarchs ruled by anything other than parliamentary consent)</li> <li>- monarch's role came to be limited to formal signature on legislation</li> </ul>  |
| Change during 19th century | <ul style="list-style-type: none"> <li>- courts became slow, costly, rigid</li> <li>- Acts passed to simplify and generalise writ system</li> </ul> <p><u>Judicature Acts of 1873 &amp; 1875</u></p> <ul style="list-style-type: none"> <li>- merged three common law courts with the Court of Chancery (High Court and civil Court of Appeal) // no right to appeal against criminal conviction until 1907</li> <li>- concurrent administration of law and equity</li> <li>- Australian states followed suit</li> </ul> |

## History of Australian Legal System – LDL Ch3

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| Origins in penal law                         | <ul style="list-style-type: none"> <li>- 160,000 prisoners sent to Australia from England, didn't stop until 1840 (1868 in WA)</li> <li>- criminal trials being conducted along the lines of military courts-martials</li> </ul>  |
| Early settling                               | <ul style="list-style-type: none"> <li>- Blackstone 'Commentaries' "carry with them only so much of English law as is applicable to their new situation and the condition of an infant colony"</li> <li>- <u>nsw Courts Act 1787 (Imp)</u> founds civil and criminal jurisdictions, Letters Patent (First Charter of Justice) 1787 established two courts - basis for conflict between Ellis Fent (barrister) vs Lachlan Macquarie (military)</li> <li>- <u>Australian Courts Act 1828</u>, English law applies in Australia, courts can decide which laws applicable, degree of self-government</li> <li>- enactments of <u>Australian legislature not permitted to be repugnant to the laws of England</u></li> </ul> |
| Transition from military to civil government | <ul style="list-style-type: none"> <li>- new south wales Act (1823) established Supreme Courts, however did not entrench trial by jury - first Chief Justice Francis Forbes</li> </ul>  |

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|                                  | <ul style="list-style-type: none"> <li>- created Legislative Council consisting of members nominated by the crown (Governor had to initiate legislation)</li> <li>- Governor Darling, 1825, est. Executive Council which had to advise or consent on Governor's decisions</li> <li>- 1828 Australian Courts Act, a majority of Legislative Council can veto a proposed law</li> <li>- <u>Australian Constitutions Act 1842</u> (Legislative Council needs to reject or approve laws), established <u>three separate branches of government</u> due to Governor no longer being part of legislature</li> <li>- by time of Federation colonies had Supreme Courts, District (intermediate civil and criminal court), magistrate's courts</li> </ul>   |
| <b>Privy Council</b>             | <ul style="list-style-type: none"> <li>- roots in king's court, curia regis</li> <li>- held jurisdiction to entertain <u>petitions to the King for justice filed by people in the colonies</u></li> <li>- was popular due to being seen as <u>more just, free of local prejudice</u></li> <li>- very expensive, influenced by English perceptions of right and wrong</li> <li>- appeals to Privy Council eliminated in 1986, <u>last case heard 1987</u></li> </ul>   |
| <b>Federation</b>                | <ul style="list-style-type: none"> <li>- colonial rivalry, NSW and VIC disagreed on trade</li> <li>- shared fear of German and French expansion in the South Pacific</li> <li>- system combining Westminster style parliamentary democracy with a bicameral federal legislature comprising a 'states' house' and a people's house, <u>modelled on the US</u></li> <li>- states given power to legislate for the 'peace, welfare and good government' of the state</li> </ul>  |
| <b>Independence</b>              | <ul style="list-style-type: none"> <li>- Colonial Laws Validity Act 1865 reiterated supremacy of English law, however in s3 provided that <u>no colonial law was to be invalidated on the basis of repugnancy</u> unless it was inconsistent with Imperial legislation that extended to the colony</li> <li>- power given to colonial Parliament to make its own constitutions</li> <li>- Imperial Conference 1926, decided that Governor-Generals should act on the advice of the locally-elected governments rather than the Crown</li> <li>- <u>Statute of Westminster 1931</u>, <u>English Parliament would not pass legislation applying to any colonies</u> unless the colony requested, repealed repugnancy rule</li> <li>- states did not want to sever direct constitutional links with Britain due to being engaged in a dispute with Commonwealth over financial power, excluded from Statute</li> <li>- 1985 states passed <u>Australia Acts (Request) Acts</u> to cut final direct constitutional links with UK</li> <li>- Australia (Request and Consent Act) passed by Parliament requesting that the UK give up whatever power it had in Australia</li> <li>- <u>Australia Acts</u> passed by <u>UK and Aus parliaments on 3 March 1986</u>, fully independent</li> </ul> |
| <b>Human rights in Australia</b> | <ul style="list-style-type: none"> <li>- inherited Bill of Rights Act 1689 (crown has no power to suspend the operation of law, taxation can only be levied by consent of Parliament, Act of Settlement 1701 (provided security of tenure for judges))</li> <li>- <u>supplement domestic law with norms developed internationally</u></li> <li>- statutory protections contained in <u>state and territory anti-discrimination and human rights legislation</u></li> </ul>  |

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| <b>Fill of Rights?</b>   | <p>- legislation to protect civil and political rights passed in ACT (<u>Human Rights Act 2004</u>) and Victoria (<u>Charter of Rights and Responsibilities 2006</u>), not protected against repeal</p> <p>Entrenched fill of rights</p> <ul style="list-style-type: none"> <li>- rights expressed very abstractly, rights cases that end up being litigated raise difficult moral and political issues on which a reasonable person's opinion might differ (James Allen)</li> <li>- currently moral and political issues decided by Parliament and government, Fill of Rights would hand this power to the judiciary (undemocratic, for judges do not rely on public support to keep their jobs)</li> <li>- judiciary could become politicised, lose neutrality</li> <li>- slavery was made legal under the US Fill of Rights, torture still persists</li> </ul> <p>Non-entrenched</p> <ul style="list-style-type: none"> <li>- <u>UK Human Rights Act 1998</u> (incorporated European Convention of Human Rights and Fundamental Freedoms)</li> <li>- greater resistance against subsequent inconsistent legislation than ordinary</li> <li>- judges have greater freedom in statutory interpretation to achieve compliance with the Convention "primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"</li> <li>- where it is not possible to construe an Act compatibility with the protected rights, the court may make a 'declaration of incompatibility'</li> <li>- meant to achieve dialogue between judiciary and Parliament</li> <li>- in UK, on every occasion that a declaration of incompatibility has been made, Parliament has repealed or amended the offending provision (judiciary has the power)</li> <li>?</li> <li>- validity of Victorian Charter upheld in High Court in <i>Momcilovic v R</i> (2011) but the dialogue model was found not to be possible under the Commonwealth Constitution</li> <li>- 2008 Committee recommended that a federal Human Rights Act be adopted, instead government passed the <u>Human Rights (Parliamentary Scrutiny) Act 2011</u> to establish a statutory Parliamentary Joint Committee on Human Rights which reports to both houses of parliament and scrutinises legislation for compliance with human rights treaties</li> </ul> |
| <b>International law</b> | <ul style="list-style-type: none"> <li>- <i>public international law</i> concerned with the actions of states, does not allow individuals to assert any rights on the international level</li> <li>- exceptions include individuals being held responsible for breaches of international criminal law</li> <li>- United nations Committees which allow citizens of party states to make complaints of violations of human rights, may only investigate and write 'views'</li> <li>- Committee work can lead to domestic legislation changing: e.g. in <i>Toonen v Australia</i> 1992 Tasmanian homosexual complained that the Tasmanian Criminal Code (which criminalized private homosexual behaviour) breached his right to privacy under the International Covenant on Civil and Political Rights article 17, Committee upheld his view, following pressure from Aus Govt provisions were removed from Criminal Code</li> <li>- However, government has ignored other decisions - Communication no 941/2000 upheld Mr Edward Young's complaint of being denied dependent benefits despite being in a long term same-sex relationship with a veteran under article 26. Government refused to respond</li> </ul>   |