# Session 1 – CORE CONCEPTS: LAW AND LEGAL INSTITUTIONS

# What is law and what is its purpose?

* Set of rules made by a person or body recognised as having the authority to make rules that are binding on those to whom they apply and which can be enforced by the institutions of the government as a last resort (Heilbron et al [103]).
* Purpose:
* regulate human behaviour
* provide a means for resolving disputes.
* A form of social ordering – but one among many > Sally Falk Moore reading
* Distinguishable from other forms of social ordering by:
* source,
* enforcement.

# From where does law derive and what are its institutions?

* Many legal systems, many sources
* Many of these discussed by Vines (pp 18 – 24).
* Religion
* Philosophy
* Codes
* Common law**:** case law (judge-made law) + legislation made by democratically elected parliament

# What are the foundations of the legal system in Australia?

# English beginnings

# *Courts / Common Law System*

* Pre-1066: Anglo-Saxon; local custom; no commonality
* Post -1066: Normans built on existing Anglo-Saxon laws; introduced feudalism – paved way for centralised government
* Extension of King’s jurisdiction: resolving disputes around England; beginning of *stare decisis*; King’s justice ‘common’ across the kingdom
* Itinerant justices and development of the courts: King delegated power to Curia Regis and itinerant justiciars to dispense justice on his behalf; 3 common law courts develop
* Writ system: means of streamlining processes to deal with heavy demand for King’s justice; obsession with procedure
* Trial procedures: early development of jury; a means for King to have ‘local advice’ to help resolve a dispute
* Equity: response to unfairness arising from procedurally obsessed and rigid common law courts

# *Parliament/Constitutional Structure*

* Pre-13th century, no recognisable ‘parliament’ - early statutes simply Royal Decrees
* Magnacarta **-** King John’s (forced) concession to the ‘Barons’ in 1215
* ModelParliament**:** late 13th century; still just advisory body to King
* Increase in power duringreign of Henry VIII
* Struggles of 17th century – the period of formalisation
* Conflict between King and Courts and King and Parliament eg:
  + *Case of Prohibitions del Roy* (1607)
  + *Case of Proclamations* (1611
  + *Case of Ship Money* (1637)
* Civil war
* Cromwell’s ‘Commonwealth’ and then subsequent reigns of Charles II and James II – no better for Parliament
* Glorious Revolution & Constitutional Settlement ***-*** Parliament sought guarantees as a condition to allowing William and Mary to assume the throne. Recorded in the *Bill of Rights 1689* and further refined in 1701 with the *Act of Settlement*.
* Two key principles underpinning the new structures:
* **Rule of law** – supremacy of government *by law* (not arbitrary fiat); government can operate if they have *specific legal authority* to do so (‘principle of legality’).
* **Separation of powers** – centuries of development > fragmentation of the Crown’s power. Now recognised as a desirable structure for government.

# Reception of English law into Australia

* 3 different recognised methods for acquiring new territory
* Different results flowed for what laws would be in place in new occupied territory
* *Terra nullius >* acquisition by settlement > doctrine of reception: English law in place, with ‘proviso’ that it applied only so far as applicable to the new situation and condition of an infant colony.
* Early days - ‘proviso’ in the doctrine of reception quite significant - basically under military rule of Governor Macquarie.
* Road to judicial & legislative independence***:*** occurred gradually. Some key developments:
* 1823 Act: *New South Wales Act*
* 1828 Act:*Australian Courts Act*
* 1842: *Australian Constitutions Act (No 1)*
* 1865: *Colonial Laws Validity Act*
* 1900: *Commonwealth of Australia Constitution Act 1900* (Imp)
* 1931: *Statute of Westminster*
* 1968: *Privy Council (Limitation of Appeals) Act* (Cth)
* 1975: *Privy Council (Appeals from the High Court) Act* (Cth)
* 1986: *Australia Acts*
* Interaction with the Indigenous population.
* *Mabo****:*** overturned erroneous factual assumptions on which English settlement was based; meant that common law not restricted to consequences based on those erroneous assumptions
* Subsequent system of native title: how satisfactory?
* 1967 Constitutional referendum
* 1991 Royal Commission into Aboriginal Deaths in Custody
* Indigenous sentencing courts
* Customary punishment
* Proposed Constitutional recognition

# How is law classified and what purpose do classifications serve?

# Some common classifications

* International law and municipal (domestic) law
* Private international law and public international law
* Public law and private law
* Criminal law and civil law
* Statute law and common law
* Common law and equity
* (and in terms of legal systems) Civil law and common law (inquisitorial and adversarial)

# ‘Common law’ nuances

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| ***Term*** | ***Meaning/Context*** |
| ***Common Law system****?* | *Legal system derived from UK common law (rather than civil code). Examples include: UK (excluding Scotland – it is a hybrid), Australia, NZ, Hong Kong, USA, Canada (Contrast to civil legal system)* |
| ***Development of the common law****?* | *Development of body of legal principles over time through judge-made law (case law, the courts) rather than via the parliament (legislation)* |
| ***The common law****?* | *As opposed to legislation – maybe no real difference from the one immediately above… except it is just the product of that process …* |
| *An* ***area of common law****?* | *A subset of the common law - such as torts and contracts which originated in the common law court in common law countries.* |
| ***Common law when*** *compared to … ?* | *Contrast to equity say – originated from a different branch of English courts (as just discussed)* |

# What purpose do classifications serve?

* They help us navigate a complex system
* They tell us who is (or can be) involved
* They tell us which court/tribunal to go to and the procedures that need to be used
* They tell us where to find the legal rules applicable (sources)
* They tell us the outcomes that are possible.