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## Week 1-3 Introduction to the Australian Legal system I

### Chapter 1 – Laying the foundations pg 5.

Legal systems.

**Customary Law:** The systems and practices of indigenous populations which have developed over time.

**Common Law:** Legal system based on English legal system. Australia, NZ, Canada, USA.

**Civil Law:** The law is held in documents called codes which are strongly influenced by roman law. i.e. a lot of European countries and south American countries.

**Civil v common:**

- Rules of civil law come from the principles in the codes vs common law which is decided by cases decided through the courts.
- Both systems rely on precedent.
- Common law countries rely on precedent more.

**Some countries have a hybrid system due to their relationships with both English and roman systems.** i.e. Scotland; had a long relationship with France and thus has a mixed system with common and civil features.

The Western Legal Tradition.

- Romans created law which was spread as their empire grew.
- Roman law was influenced by Greek and Christian legal principals and was collected into texts called *Corpus Juris Civilis* by the roman emperor Justinian.
- One roman empire had fallen, the law records were lost, and the citizens left behind had only customary law or adhoc local laws to fall back on.
- 11<sup>th</sup> century- missing Justinian texts located.
- The texts, combined with the Bible and the writings of Greek philosophers became the focus of an intensive study by scholars until they slowly developed into the basis of contemporary civil law.
- This civil law started replacing the old customary laws.
- That point was the turning point for the development of civil and common law; from then on they started developing separately; common law followed the route of procedure, methods and decisions spun down by the English courts, and the civil law followed the basis of the roman legal principles which included custom, canon law, local usages, royal decrees and judicial annotation.
- The common heritage of the of the common and civil law is known as the western legal tradition.
- Common law and civil law were both influenced by Natural Law.

- **Natural law:** some apparently considered it to be more superior to other laws up until the 18<sup>th</sup> century. It is the law of nature, a body of rules prescribed by an authority more superior than the state.

### Legal theory.

The broad concept of the relationship between the law and those governed by it and those making it.

#### Some common legal theories include:

- **Positivism:** The theory that the law is what humans declare it to be. That morality and the laws are separate.
- **Legal formalism:** Legal rules are separate from social and political institutions.
- **Utilitarianism:** The most ethical choice is the one that will produce the greatest good for the most amount of people.
- **Feminism:** Feminism is a range of political movements, ideologies, and social movements that share a common goal: to define, establish, and achieve political, economic, personal, and social equality of sexes.

### The Civil law.

Napoleon Bonaparte was responsible for the creation of a civil code which was applied to all of France from 1789. By 1810, the Civil Code, the Code of Civil procedure, the Commercial Code, the Code of Criminal Procedure and the penal code (combined known as the Code napoleon) had become law.

The use of this code spread across Europe, and it formed the basis for the codes of many other countries. This code had a strong influence on the legal systems of current civil countries.

Civil law systems have a strong influence on countries with a common law system through instruments such as treaties or agreements, but also through international trade and international criminal cases. With Brexit; the influence of common law on the EU will be diminished.

### The Common Law.

- Sources:
  - Cases
  - Legislation
  - Policies

Developed through principles derived from cases.

#### Earliest reports of cases were in two forms;

**Rolls:** Court records which contained the notes of the dispute and the final outcome but didn't have any of the judges reasoning.

**Yearbooks:** Included the judges reasoning for decisions.

By the mid 1500's, Yearbooks were replaced by a complete and formal set of reports called the **Nominate Reports**.

**Nominate Reports:** Continued until 1865 then replaced by the series of officially sanctioned reports that are still used in England today.

### Why legal rules aren't always certain. Pg 12

- Legislation is expressed generally and usually requires the application of discretion in applying them.

- Society develops and what is considered reasonable and moral at the time a piece of legislation was written or a precedent developed may not be considered reasonable and moral according to society now. i.e. gay marriage.
- The English language itself can be deceiving. Words can have multiple meanings and interpretations depending on how they are applied. Statutory interpretation itself is an art form and those who are drafting the legislation vs those who are applying and interpreting it in court can arrive at different conclusions.
- *“an individual’s idea of justice relating to a particular dispute is subjective; it is informed by that person’s own moral and social beliefs”*. – pg 12 text book.
- The law, and the people who administer the law are expected to be objective; to remove any personal or empathetic notion to the case and apply the facts of the case to the relevant case law and legal principles and arrive at a just and rational decision.

### Categories of law.

- **Public law:** Governs the operation of the state and the relationship between the state and its citizens. i.e. someone has been accused of a crime, or a tax dispute.
  - **Private law:** The relationship between citizens. i.e. relationship break downs, commercial disputes.
  - **Civil law:** Private disputes. i.e. sums of money owed between parties, or who should bear the cost of a loss or injury. Usually results in compensation being paid.
  - **Criminal law:** standards of conduct or behaviour expected of people being broken. Usually results in criminal charge or prison or fine. Brought by a rep of the state (i.e. district attorney).
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## Chapter 2- An Introduction to Legal History pg 19.

### Roots of English law.

Year 1066:

- William the Duke of Normandy (France) conquered England.
- William kept the original Anglo-saxon legal system.
- Prior to the conquest, the legal customary system across England was based on the local custom of the different areas in England. This was because England had been subject to so many invasions that there were so many different customs across the land and thus there was no unified set of rules of customs that applied to the country as a whole.

Feudalism.

- William the conqueror and the Normans were the start of this.
- William didn’t abolish the current system of law in place, but built on what was already there.
- A hierarchical structure in where the king disseminates land to his nobles in exchange for their military support during times of need. Underneath these nobles were further sub-nobles who had land handed down to them after they had sworn allegiance to their lord.
- Feudalism survived on a system of mutual loyalty. The Lords promised to help their lord, and vice versa.



- The king in England didn't have enough resources to technically police the whole land, so the feudal system was employed as another form of governance.