# Foundations of Law 70102a Exam Notes

## Table of Contents

- Rule of Law: (Matthew Stevenson, Rule of Law as a Goal of Development) ........................................ 3
  - Formal Definition: ..................................................................................................................... 3
  - Substantive definition: ............................................................................................................... 3
  - Functional definition: ............................................................................................................... 4
- Legal System: Indigenous History and Law .................................................................................. 4
  - (Inga Clendinnen, Dancing with Strangers, 2003)................................................................. 4
  - (Behrendt et al 2009, Indigenous Legal Relations in Australia)............................................. 4
- The Legal Process of Dispossession (pg. 6-7) ........................................................................... 4
- Context of Colonisation (pg. 8-9) .............................................................................................. 5
- Contested Sovereignty (pg. 8) ................................................................................................... 5
- The Rule of Law (pg. 9) ............................................................................................................ 5
- Dispossession by law (pg. 13) .................................................................................................. 6
  - (Patrick Parkinson AM, Tradition and Change in Australian Law 2013) ......................... 7
- Aboriginal Peoples and the Myth of the Empty Continent ..................................................... 7
- English Law in Australia (pp 134-135) .................................................................................... 8
- The Relationship between Colonial and English Legislation (pp 136-137) ......................... 8
  - (Bruce Kercher, An Unruly Child (1995) pg. 5-12).............................................................. 9
  - (Michelle Sanson and Thalia Anthony, Connecting with Law, 2014, pg. 368): .................. 9
- How English Law and Constitutional History Applies in Australia ........................................ 9
  - (Behrendt et al 2009, Indigenous Legal Relations in Australia) ........................................... 10
- The Protection Era and the Intensification of Control (pg. 21-25) .......................................... 10
- The Right to Vote ..................................................................................................................... 10
- Citizenship and Recognition ..................................................................................................... 11
- 1967 Referendum and the Census ........................................................................................... 11
- The Power to make Laws about Aboriginal People .................................................................. 11
- Stolen Generation and Genocide ............................................................................................. 12
- Constitution and Indigenous Recognition: .............................................................................. 13
  - (Chris Graham, 2014) Stolen Wages .................................................................................... 13
  - (Chris Graham, 2012, pg. 2) Understanding Indigenous Culture ......................................... 13
  - (Lisa Streltein, Compromised Jurisprudence, 2009) .............................................................. 13
- Before Mabo ............................................................................................................................. 14
(James and Field 2013): Judicial Activism ................................................................. 26
(James and Field 2013) CLS .................................................................................. 26
(James and Field 2013) Postmodern Legal Theory ..................................................... 26
(James and Field 2013) CRT .................................................................................... 27
Meyerson (2011): Critical Race Theory ................................................................. 27
Feminist Legal Theory ......................................................................................... 27
(James and Field 2013) Types of Feminism (see pg. 397-98) .................................... 27
(Thornton 2003): Anachronistic law ..................................................................... 28
(Leiboff and Thomas): Marxism and Law ............................................................. 29
  Marxism ........................................................................................................... 29
  Marxist Classes ............................................................................................... 30
  Capitalism: .................................................................................................... 30
  Law and Superstructure: .................................................................................. 30
Ideology and Law ................................................................................................. 30
Marxist Law analysis ............................................................................................ 31
Critical Response to Marxist Theory .................................................................... 31
(Douglass et al): ............................................................................................... 31
  Wealth Distribution: ....................................................................................... 31
Judicial Reasoning ............................................................................................... 32
  Louth v Diprose? ............................................................................................. 32
  Legal leeway and choices in judicial reasoning............................................... 32
Anthropocentrism and the law ............................................................................ 33
Animal ethics and law ........................................................................................ 35
Ecocentrism and the law ...................................................................................... 36
Environmentalism in law...................................................................................... 38

Rule of Law: (Matthew Stevenson, Rule of Law as a Goal of Development)

Formal Definition:
- Formally independent and impartial judiciary; laws that are public; the absence of laws that apply only to particular individuals or classes; the absence of retroactive laws; and provisions for judicial review for government action
  - The conformity of the legal system to these explicit standards

Substantive definition:
- Driven by moral visions of justice and fairness, however this definition is vague, and it is possible to have a society which has “unjust law... yet achieved substantiative justice”
**Functional definition:**
- Focuses on how well the law and legal system perform certain functions e.g. constraint of government discretion, especially with regards to legal decisions or both *(Hayek 1960)*

**Legal System: Indigenous History and Law**

*(Inga Clendinnen, Dancing with Strangers, 2003)*
- *(John White, 1789):* described the relationship between the British and the Indigenous people as “a kind of cautious friendship”

*(Behrendt et al 2009, Indigenous Legal Relations in Australia)*

**The Legal Process of Dispossession (pg. 6-7)**
- Under English law, a legal distinction is made between the acquisition of territory and the acquisition of land, which allowed the High Court to recognise Indigenous people’s rights to native title without fundamentally reviewing the legitimacy of Australia’s colonisation. *(Mabo (No. 2), High Court of Australia)*
  - While this distinction is technically legal, the legitimacy of Australia’s colonisation is questionable
  - Whether the parallel presumption of Indigenous Australians with respect to the acquisition of sovereignty
  - Common law retains a distinction between territorial sovereignty and land acquisition, Indigenous laws and social structures do not.
- English law gave the Crown prerogative to acquire new territories without compliance with international law.
  - In conquered or ceded territories, local law remained in place to the extent that it was not “unconscionable” or incompatible with acquired sovereignty
    - The Crown had the power to create laws which were compatible with existing laws until a legislative assembly was established
  - In settled colonies which were classified as uninhabited or virtually uninhabited, English law accompanied colonisation to the extent that it was suitable to the local circumstances *(McNeil 1989: 109-133)*
- Australia: initially a mix of customary and English law for the first 40 years of settlement
  - The relationship between the common law and customary law still remains contested and ambiguous as is evident in the development of native title law, the controversy surrounding the revocation of customary law considerations in sentencing in criminal matters and the development of alternative court and decision making processes with respect to dispute resolution relevant to Indigenous people in the criminal justice system
- “Uninhabited”:
  - One of the clearest indicators used by the colonial courts was the lack of an established system of law as understood by colonial courts
    - *(Lord Watson, Cooper v Stuart (1889)) “... (a) colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at a time when it was peacefully annexed to the British dominions. (NSW)*
    - Made on false presumptions about Indigenous society
- Whether Indigenous law continued to operate once British sovereignty had been declared has been categorically rejected by the High Court in cases before and after **Mabo (no. 2)**
Context of Colonisation (pg. 8-9)
- Disregard for ABTSI people’s occupation of Australia at the time of colonisation appears to be founded in a combination of expedience and racist philosophical and political ideas (which contributed to colonial expansion)
  - 1750s racial theories ostensibly based on scientific evidence developed typologies which divided people into races
    o The notion of barbaric and civilised races which formed a chain of human hierarchy, placing indigenous peoples in a “state of nature”.
  - (Cook and Banks) few indigenous people lived along the coast and even fewer inland
  - (John Locke) influenced understandings of property ownership.
    o Ideas provided justification for the imperial project which required the dispossession of Aboriginal people
    o No sign of agriculture -> Indigenous people are still living in a state of nature
- (Sir William Blackstone, Commentaries on the Laws of England, (1807)) Two types of Colonies:
  o Deserted and uncultivated: discovered and occupied by colonial powers
  o Cultivated: gained through conquest or ceded by treaty to colonial power
- While Australia was classified as settled, in practical terms, it was recognised that Aboriginal people had a system of laws which governed relations between them

Contested Sovereignty (pg. 8)
- The idea of a single body of law applying to indigenous and other Australians has been contested in courts since 1828 (R v Ballard)
- Contemporary judiciary’s obsession with a singular sovereignty highlights an outdated understanding of nation states as operating almost exclusively autonomously
  o defies the development of international law which attempts to balance the human rights of individuals with the recognition of state’s autonomy and independence which through jurisprudence balances individual and collective minority Indigenous people’s rights with state rights

The Rule of Law (pg. 9)
- the position of Aboriginal people as British subjects at the time of colonisation is ambiguous
- two basic tenets of the rule of law have been denied to ABTSI people consistently from the time of colonisation; 1) laws should not be exercised arbitrarily, 2) law should sustain a normative order and thereby contribute to the maintenance of law and order within communities
- evidence of frontier violence and the role of police in this violence is evidence that laws were arbitrarily applied to ABTSI communities especially within the Protection Era
- (R v Murrell (1836)) (Wik v QLD 1996) The failure of the courts to recognise Aboriginal law and custom has denied Aboriginal peoples a fundamental way of maintaining social cohesion and reinforcing understood community standards of behaviour
- Ongoing repercussions for indigenous peoples in terms of their right to equality and law and order within their communities
- Colonial Office in Britain distinguished Aboriginal people from “our subjects” but required Governor Phillip to provide legal protection to ABTSI people.
  o A combination of attempts to manage and pacify Aboriginal resistance towards taking of Aboriginal land and violence against Aboriginal people
Instructed to “endeavour by every possible means to open an intercourse with the natives and to conciliate their affections” (Patrick Parkinson AM, Tradition and Change in Australian Law 2013)

Royal Commission into Aboriginal Deaths in Custody (Johnston 1991, 13):
- “In 1797, Governor Hunter declared Aboriginal people a danger and sent out armed parties to pacify them”
- “In 1816, Governor Macquarie martial law style proclamation banning Aboriginal meetings, carrying of weapons, their systems of punishment, reconciliation and law.”

Acute awareness of indigenous resistance to their dispossession from their lands (pg. 10)

Extent to which officials recognised indigenous peoples’ prior ownership resistance to dispossession is not reflected in legal doctrine
- The role of police at the frontier and later in implementing ‘protection’ and assimilation policies have had an enduring impact on many ABTSI people’s perceptions of police and the failure of law for them (pg. 11)

Dispossession by law (pg. 13)
- Limited attempts in the nineteenth century were made to present the appearance of ABTSI people as being equal before the law, the formal status and rights of ABTSI people remain unequal
- (Reynolds 1989, 11-12) Letter to the Launceston Advertiser 1831: “Are these unhappy people... in a state of rebellion or are they an injured people whom we have invaded and with whom we are at war”
- (R v Lowe 1827 Forbes CJ and Stephen J) Aboriginal people in conflict with Europeans were subject to its jurisdiction

R v Ballard 1829: NSW Supreme Court Forbes CJ and Dowling J: (pg. 13) Whether Aboriginal people exist with their own system of laws governing relations between them
- If an Aboriginal person could be prosecuted for the alleged murder of another Aboriginal person at the Domain Sydney
- Forbes CJ [413]: “it has been the practice of the Courts of this country, since the colony was settled, never to interfere with or enter into the quarrels that have taken place between the natives themselves”
- Dowling J [414]: Until the Aboriginal natives of this country shall consent either actually or by implication to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human... which ought to justify us in interfering with their institutions
### R v Murrell 1836: NSW Supreme Court Forbes CJ, Dowling, Burton JJ: (pg. 13)

- Aboriginal defendant was charged with murder and his counsel argued that the court had no jurisdiction to try him
- Suggestion that Australia was subject to a plurality of laws: that of the whites and those of many Aboriginal tribes.
- **Justice Burton**: Aboriginal people are subject to Criminal Law; British law applied to Aboriginal people who committed offences against other Aborigines
  - *(Kercher: An Unruly Child, 1995)*: Aborigines were insufficiently strong to be recognised as independent tribes; a proclamation had laid down the limits of the colony; British gov. held rights over the colony; offences were punishable as they would be in England, if they protect the victim; Aboriginals were entitled to protection under the law.
- **Attorney-General**: the law does not recognise any independent power in a British territory, and those within the territory are subject British law

### R v Bonjon 1841: NSW Supreme Court Willis J: (pg. 14)

- **Willis [422]**: the Sovereignty legally excludes the Aborigines, destroys their existence as self-governing communities... unqualified condition of British subjects.
- Willis attempted to create new precedent and disregard *Murrell* stating that they are “dependant tribes governed among themselves by their own... laws and customs" and “...hitherto neglected, oppressed and deeply injured multitude of the human race” (Humanitarian view)

- Many Aborigines did not understand British legal proceedings
- Willis called for a treaty with Aborigines to define their rights to protection and self-government
  - Rejection of “terra nullius” theory of colonial foundation
  - Rejection of conquest and cession
  - Viewed them as dependant allies rather than British subjects

*(Patrick Parkinson AM, Tradition and Change in Australian Law 2013)*

**Aboriginal Peoples and the Myth of the Empty Continent**

- “uninhabited” or “terra nullius”
- *(Emmerich de Vattel, The Law of Nations)*: a principle of natural law, wandering tribes could only be treated as owning property when they appropriated certain portions of the earth to render them fertile and to derive subsistence from them
  - “These tribes cannot take to themselves more land than they... can inhabit and cultivate. Their uncertain occupancy of these vast regions cannot be held as... lawful taking of possession... Nations of Europe may lawfully take possession of them and establish colonies in them.” (pg 130)
- Estimated that at least ten time as many aborigines were killed by white violence as whites killed by aborigines *(Reynolds H, The other Side of the Frontier, 1982, pp 122-123)*
  - The ravages of introduced diseases resulted in considerable loss of life