1 – INTRODUCTION TO ILJ & AUSTRALIA'S LEGAL SYSTEM

NATURE & ORIGIN OF LAW

The law is the cement of society & an essential medium of change. It is the business of preventing, settling & resolving disputes. The law operates on 2 levels:

- Black letter law – a body of rules regulating society & enforced by the state
- Jurisprudence – the study of the science of the law

Characteristics of law:

- Does not offend fundamental justice
- Usually carries sanctions
- A majority of citizens obey these laws

Law originates from communities with common goals e.g. protection from outsiders, share work to survive, improve material welfare, fulfil common ideals (religion) → need an authority figure!

THEORIES OF LAW

Natural Law Theory

- Emphasises morality and justice → laws apply universally (e.g. murder), unchangeable, superior to human made laws
- J Locke: people have the right to revolt where the supreme authority fails to protect natural rights to life, liberty & property

Legal Positivism

- Refuses to recognise natural law & rejects any religious/humane basis for laws (validity of law doesn't depend on moral values)
- Law is the command of a political superior (man). T Hobbes: law is the command of the person that has legislative power.

This theory has fallen from favour (holocaust) & natural lawyers are more prominent. Ultimately, the people have the power – the polling booth is our best weapon.

Social Contract Theory

- Political authority established by a social contract – people surrendered their political power to a ruler for assurances that their rights be protected
- Law is only valid when it reflects the principles by which we should live → J Locke (see above)
- Courts
  - Public custodian of morality Shaw v DOO
  - Custodian of the rights of the individual Re D [1976] Fam 185

Sovereignty: J Austen

- Bulk of society habitually obeys the sovereign
- The sovereign is not in the habit of obeying anyone + its power cannot be legally limited
  - Not true in our system – theoretically how it used to be in England (see week 3 - the common law & the kings battle)
    - Kings thought they were above the law
- Rejected view that the law should be concerned with morals, ethics or justice
- Exceptions to J Austen's view on Sovereignty:
  - Law can exist in the absence of an illimitable sovereign
  - Conventions of international law do not emanate from 1 supreme body
  - Primitive cultures are built on customs that do not fit the theory

Rule of Law: AV Dicey

1. No person is punishable except for a breach of the law established in the ordinary legal manner
2. All persons are equally subject to the ordinary law of the land - accessibility
3. 5 basic freedoms which the courts have recognised and the legislators continue to whittle away
   a. Freedom of the person – e.g. walk through a park late at night if I so with – comes back to resources
   b. Freedom of opinion / public assembly / of contract / of property

Government should be through the law as opposed to the exercise of arbitrary power

AUSTRALIA'S SYSTEM OF GOVERNMENT AND LEGAL SYSTEM (3-16)

Distinctiveness of Australian Law

***Henry & Susannah Kable* – Australian Law Immediately distinct from English Law**
Australian law was ***immediately distinct*** from English law: • The Kables were prisoners being transported to Australia • Deposited money with their ship's captain but the money disappeared • Under English law, the Kables were 'civilly dead' or 'attainted' (unable to sue people in civil matters) because they were prisoners (and prisoners lose that right). • However, they were allowed to sue in Australia, because the Australian authorities realised that this law of 'attaint' is impractical in a new penal where everyone is a prisoner. This was the first civil case in Australia • In this way, Australian law first became distinct from English law.

Australian Parliamentary Sovereignty (Usually Bicameral)

Commonwealth	NSW

• House of Representatives – 150 – 3 years (Federal Election)
  ○ Preferential – candidate secures absolute majority
  ○ Majority forms government
• Senate – 76 – 6 years (every 3 years vote)
  ○ Proportional – allocate seats in proportion to overall vote
	• Legislative Assembly – 93 – 4 years
	• Legislative Council – 42 – 8 (every 4 years)

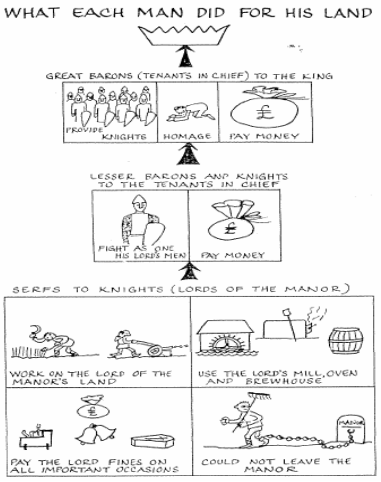
Australia's Legal System

✓ 	✗ 

• ***Representative democracy***: people vote for representatives who then sit in parliament
• **Written Constitution** only altered by a double majority
  ○ Concurrent & exclusive powers
  ○ Separation of powers
• ***Informal Solicitor/barrister division***:
  ○ ***Solicitors***: advise clients & manage their affairs
  ○ ***Barristers***: advocacy in court
• ***Common law system***:
  1. ***English legal system***: common law as opposed to Civil law (Europe)
  2. ***Source of law inside legal system***: case law
  3. ***As classification inside source of law***: within common law 'source', law is divided into two classifications: common law and equity (law by judges of equity)
	• ***Federal system***: federation of several states & territories making up the Commonwealth – structure divides power between state & Cwth parliaments
	
	• ***Recognition of indigenous law***: there is (limited) recognition of Indigenous customary law in Australia ever since Mabo v Queensland (No 2). In ***R v Wedge*** (which was before Mabo):
	  ○ Decided that NSW was a 'settled' colony, and therefore the English law was immediately transferred to it and to all its inhabitants
	  ○ English law is the only law in Australia, and applies to Aboriginals as well

WEEK 2B – THE ROYAL COURTS & DEVELOPMENT OF COMMON LAW

The CL was developed in ENG by a series of courts established under royal authority in period after Norman Conquest of 1066.

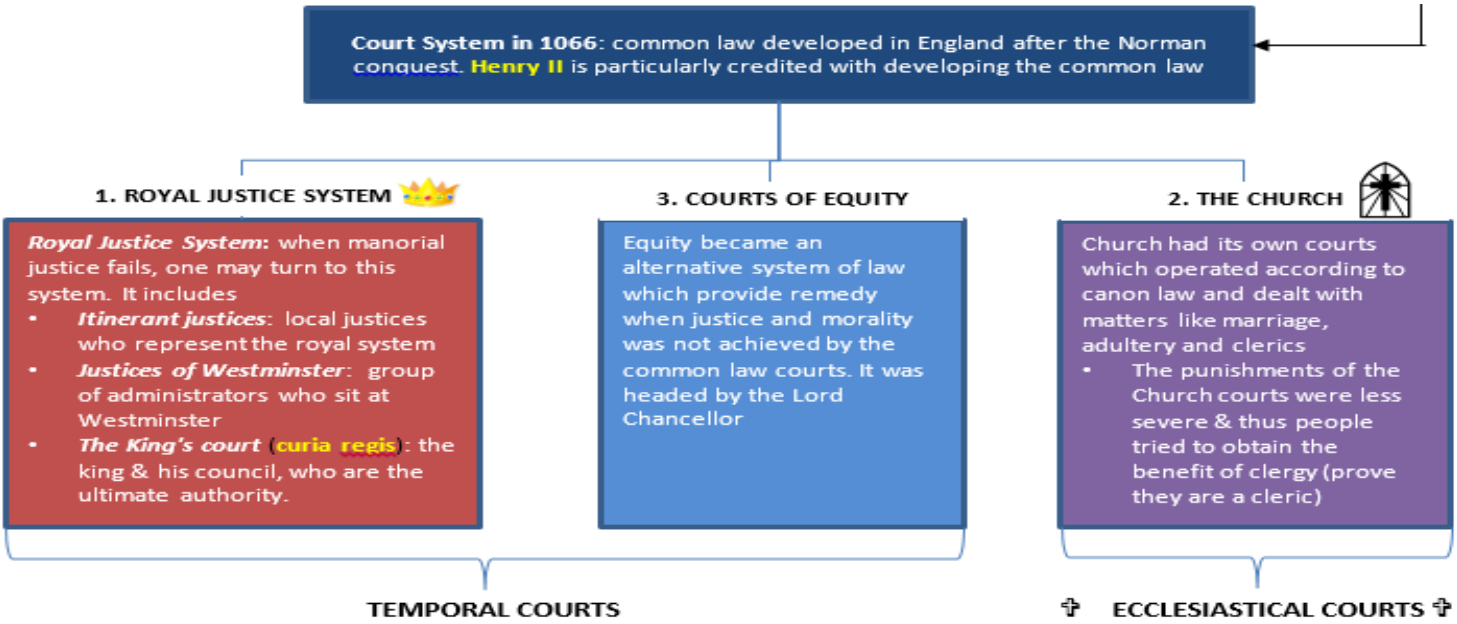


Pre 1066, Anglo Saxon Law

- **The Writ** – doc that begins a legal action (either requesting an action or stopping an action)
- **Shire-reeve** – assist in the detection & prevention of crime (now a court officer)
- **Written Laws** – a body of written rules & customs (however most were customary & local)
- **King & all subject to the law**
- **The Kings Peace** – peace was thought of as the rule of an authority within a specific region, still an offence 'breaching the peace' (early criminal law)
- **Moots** – gathering of prominent men in a locality to discuss matters of importance

Feudalism – Norman Conquest: William owned the land & kept control of administration, politics, military, marriage & succession – could levy fees

- Based on a <u>system of mutual obligations</u> – landholders owed duties (e.g. military) to the lord & lord swore to protect
- William was the ultimate owner, Lords hold land for kings & lease to peasants in return for protection (judge in land)
- <u>Mechanism to control wealth & power</u>
- <u>Delegation & centralised justice</u> - each lord held court for his men e.g. Lord of the Manor for peasants – Manorial Justice



THE ROYAL COURTS & THE DEVELOPMENT OF A COMMON LAW (COURT SYSTEM IN EARLY NORMAN TIMES (1066-1154)) → <u>IE BY THE 12TH CENTURY</u>

Curia Regis: the court was the group of officials and advisers which the king had with him at the time (travelled). William delegated work to the following officials: (similar to the cabinet)

1. ***The Justiciar***: was a regent to act in his absence (judicial function)
2. ***Lord Chancellor***: was in charge of the secretarial staff (he would eventually grow in power)
3. ***Barons of Exchequer***: king's financial/legal business
4. ***Sheriffs***: were a sort of local judges, officers

- **Great Council (13C)** – King would summon tenants in chief to discuss affairs of the realm
  - Enlargement of the Curia Regis (Kings Court is within the Great Council)
  - <u>Forerunner of our modern day Westminster system of parliament</u> (ancestors of House of Lords & Privy Council)
    - <u>16C</u> – structure was King & the House of Lords & the House of Commons
- **Kings Council (Curia Regis)**

- 2 bodies emerged – Chancery (administration) & Exchequer (financial department)
- Parliament developed out of this process, ^ inner council of advisors
- Curia Regis exercised judicial powers in important matters by virtue of the kings prerogative → special powers of the crown recognised by common law & not superseded by legislation
- 1600's the Curia Regis became known as the Privy Council, lost much of its JPs except appeals from overseas

ABBOTT HENRY'S STORY

An ongoing dispute about a piece of land (particularly a marsh) caused Abbot Robert (& after his death, Abbot Henry) to undergo a variety of legal processes in the royal justice system. This included:

- An appeal to the local itinerant justice
- Holding of trial by jury
- An appeal to Westminster justices & the Exchequer
- An appeal to the King himself (twice)
- During the course of these procedures, there was use of a variety of writs and royal charters

The story highlights some important aspects of the legal system of the time:

- Failure to show up to a trial a serious crime - almost caused the Abbot to lose his land
- Itinerant justices important part of the king's control of England, while the justices at Westminster were more like administrators; they had less ability to decide on cases
- Parties had to pay money to have something tried – way for king to raise revenue

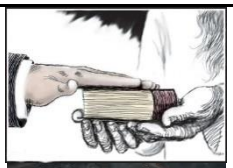
Royal justice system (Henry II)

Ordinary justice was carried out by ***manorial courts*** which decided matters according to custom. Only when manorial dispute resolution had failed would one turn to the royal courts (rare). The system developed during the reign of **Henry II**:

- ***Judges in 'Eyre'***: traveling judges investigating - examine sheriff's accounts, coroner's activities, payment of taxes etc., as well as judicial work
  - Ppl dreaded the Eyres, after complaints, Henry decided that 5 judges will stay at Westminster to hear complaints (**justices of Westminster**)
- **Consistency developed**: given consistency because same judges acted as itinerant judges/went on Eyre/sat at Westminster - a consistent set of principles and procedures such as common Law was able to develop - gave people a security which they did not have from manorial courts, which all had different customs → ***DEVELOPMENT OF COMMON LAW***

Early methods of trial in England

- Based on **belief that God would favour the just** - led to arbitrary methods of dispute resolution:

Description	*Picture*
1. By oath: witness would swear oath that the accused was of good character. If he was not punished by God, he was considered as telling the truth. An oath was worth more if it was given be a person of higher rank (nobility)	
2. By ordeal**:** different types of ordeals, but usually involved something like the accused having to put his hand in boiling water or hold a red-hot iron and then be bandaged. If there were still blisters three days later, he was guilty. Another type was throwing someone into water, and if he sinks, he is innocent and fished out, if he floats, he is guilty	
3. By battle **(Normans only):** the parties fight, and the winner is judged to be the right one because God favoured him in the fight	

DEVELOPMENT OF JURY TRIAL – "RECOGNITION"

- **1215**: Church forbade clergy to be involved in ordeals, & trial by battle was also observed as pretty arbitrary method of determining justice. **Henry II (Before 1215)** and his councillors chose the "recognition" or jury as the preferred method of proof, which has remained one of the hallmarks of common law since then
  - Jury consisted of 12 knights (**"the grand assize"**); in land dispute could view land, consult neighbours & give their verdict
- **1600s**: juries expected to weigh up the evidence and come to a conclusion based on that evidence - should be noted that use of a jury was instrumental in bringing about concept of an organised trial

- The sworn inquest of lawful men, the jury, replaced the local assemblies

The Magna Carta 1215 (enrolled state books in 1297): The Magna Carta ('Great Charter') is a foundation of the English constitution & remains part of Aus. law. Its purpose is to limit the arbitrary use of power. Sanction for breach would be revolt.

- Crown was imposing excessive taxation & offended the barons, the church, traders, & landowners →uprising.
- King John forced to sign the document, demonstrating how even the king could be restrained. A new era began
  - Foundation of freedom of the individual against the arbitrary authority of the King
- The phrase "***No freeman shall be taken or/and imprisoned... except by the lawful judgment of his peers***" was first written in the Magna Carta - now interpreted as a **right to trial by jury** (though didn't mean this at the time – inferiors, own CT)

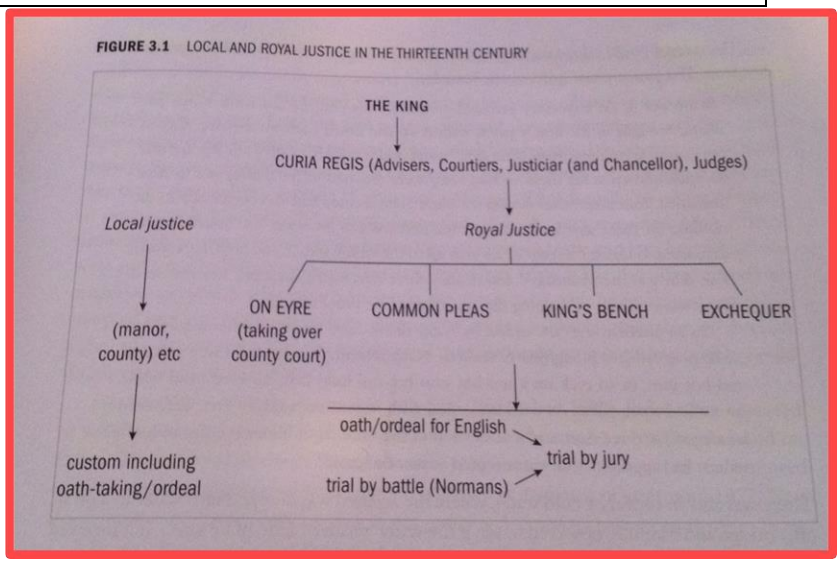
Prisoners A-XX (Inclusive) v NSW

Even in the modern age, people have attempted to rely on certain clauses of the Magna Carta. An example of this is Prisoners A-XX (Inclusive) v NSW:

- Prisoners were demanding that condoms be supplied to them; while they have already been deprived of their freedom, they are claiming this separate right to condoms. "We will sell to no man, we will not deny or defer any man either justice or right."
- However, it was decided that this did not "provide a statutory basis for saying that the denial by prison authorities of access by prisoners to condoms is unlawful," as "the applications of modern standards to ancient practice has resulted in complete misapprehension."
  - In other words, the link between something like not supplying condoms to prisoners and "we will not deny... justice or right" is simply too far - the framers of the Magna Carta did not at all mean that

DEVELOPMENT OF THE COURTS (1215)

- **Court of Common Pleas** – pleas between subject & subject
- **Kings Bench** – trespass & felonies (affecting kings peace) + judicial matters of difficulty or of interest to the king
- **Exchequer of Pleas** – royal financial matters
- **Courts of Assize** – criminal matters
- **Ecclesiastical Courts** – handles probate (wills & succession) & matrimonial matters
- **Court of Admiralty**



The Church – The Ecclesiastical Courts

The Church was closely tied to the law back in **1215** - the majority of the people were deeply Christian.

- ***Canon law***: derived partly from Roman/civil law – following codified rules in the Bible and Church Statutes. The ecclesiastical courts had jurisdiction in regards:
  - Marriage
  - Legitimacy
  - Punishment of mortal sin (e.g. adultery)
  - Divorce
  - Passing of property to children (wills)
- William separated the spiritual & temporal courts by establishing the great system of church courts
- Tried to claim jurisdiction over any cases which involved clerics, violation of an oath or church property - led to friction with the King

Constitutions of Clarendon 1164

Henry II wished to assert his supremacy with the Pope and did this by issuing the Constitutions of Clarendon in 1164, and appointing Thomas a'Becket as Archbishop of Canterbury (head of the church in England) in 1162. This was also aimed to end the jurisdictional issues with the ecclesiastical courts.

- However, a'Becket opposed Henry's claims of control over the ecclesiastical courts
- a'Becket was murdered by royalists in a church, and (fearing the wrath of God for the sin), Henry gave in to the church and renounced the parts of the Constitutions which offended them (which gave the royal courts the final say over clerics). Eventually it worked out that clerics would be tried by the canon courts for serious crimes (benefit of clergy), and royal courts for less important things.