THE UNIVERSITY OF YAOUNDE II - SOA

FACULTY OF LAWS AND POLITICAL SCIENCE

FIRST YEAR LAW AND POLITICAL SCIENCE

COURSE

INTRODUCTION TO ENGLISH LAW

COURSE MASTER

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COURSE OBJECTIVES AND OUTCOME

The objective of this course is to acquaint students with the theories underpinning the concept of law, the validity and the origin of law – from the period before Christ to the Greek city states. They should be acquainted with the history and development of the judicial system in England and how it may be distinguished from the Romano-Germanic legal system both of which are applicable in Cameroon. They should also understand the

standing order of courts and the decisions rendered by them (*stare decisis*) as well as the very important doctrine of binding precedent. The students should equally know and be able to exploit the techniques employed by judges in England and Anglophone Cameroon in interpreting and constructing ambiguous or uncertain statutes. They must also be acquainted with such concepts as trust, bailment, etc. and remedies (rescission, discovery, equity of redemption, etc.) developed by the courts of Equity and how the English lawyer proceeds in his arguments to persuade the court to reach a decision in a matter pending before it.

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A - LEGAL THEORIES

The understanding of law is only meaningful if attention is focused at the origin and validity of legal theory as well as what accounts for the validity of law. However, opinion is divided as to whether its existence is justified. So, to some people law is positively evil, unnecessary and expendable and should be rejected and this is especially so when it is examined in relation to human rights. But we live with it and talk about it. Besides, most people agree that law is vital to society's existence, peace, progress and cohesion. Still, what is law? What is its nature? What are the characteristic features of law? Law therefore defies an adequate definition, even though it can be recognized by everybody. This is seemingly why some theories have been developed to explain the phenomenon of law that which themselves are not free from criticisms.

a) Law and Metaphysics: Natural Law Theory

Early in the history of mankind, that is the ancient times, man made no distinction between the natural world and the world of human beings. It was believed that everything in the entire universe including the conduct of human affairs on earth were governed by forces and powers directed by gods and supernatural spirits. From this belief grew the natural law theory that there is a law of divine or natural origin (sometimes called law of God, law of mankind, law of nature, and law of reason) which governs all things: human actions, animal behaviour, motion, and gravity, physical and chemical reactions. According to this theory, since this law is of divine origin, it is superior to and different from, mere positive or man-made laws.

Natural law doctrine gives a prominent place to morality. It asserts that natural law contains a guiding principle to which man-made laws ought to conform. This guiding principle is the element of morality. So, to be valid it is not enough that man-made laws should be properly made; they must in addition be morally just or acceptable; positive law in the eyes of natural law theorists is consequently valid only if it is consonant with morality. When law and morality cease to be in consonance then the law in question becomes invalid. The moral test is therefore a criterion for measuring the validity if positive laws.

Naturalists see this as a crucial test because fidelity to laws is enhanced by their moral character. In other words, the obligatory force of positive laws stems primarily from the fact that they are morally acceptable. A positive law denuded of any moral content is therefore defective as law. This does not, however, mean that positive law must be a mere copy of natural law or an emanation from it. Positive law is needed because natural law does not itself provide all or even most of the solutions to the organization problems of communal life.

b) Greek and Roman Beliefs

Both Greek and Roman philosophers derived natural law from universal nature. Greek philosophy and religion certainly contained elements of mysticism, irrationality and fate. But under the influence of **Aristotle** (384-322 BC), **Plato** (429-347 BC) and the **Stoics**,

the Greek came to believe that the universe was rationally ordered and that it was governed by intelligible laws capable of being ascertained by rational investigation. This belief in the power of rationalism led Plato to present justice in his famous work, The Republic, as *a kind of absolute concept which can be apprehended only by the philosopher and can be fully realized only in an ideal state ruled by philosophers – kings*. But Plato did not conceive justice as a form of law decreed by God to which man-made law was subordinate. Here emerges one contrast between the Platonic and the Aristotelian positions. Aristotle was a pupil of Plato. But he later rejected his teacher's idealist philosophy. *Aristotle recognized that justice might be conventional, varying from state to state according to its history and need; or natural, that is common to all mankind*.

Aristotle saw man as a part of nature, a part of matter. He however argued that *man is endowed with the distinguishing faculty of reason*. It is this faculty of reason, he went on, that makes man special and gives him prominence in the general order of things in the universe. The Stoics added the argument that the *entire universe including man is governed by reason*. Stoicism stressed the universality of human nature and the brotherhood of man. It held that these were a universal law of nature ascertained by reason and from which the justice of man-made laws can be determined. Thus the Greek came to believe that man's reason is shared in the rational order of the universe and is capable of understanding the universe. Indeed, modern belief in scientific laws stem from this approach. Since the universe is itself ordered rationally, reason requires the acceptance of rules which stand the test of rationality. The Greeks, however, strongly felt that *a man was morally obliged to obey the law of the state even when he believes it to be wrong or immoral*.

To the basic framework of the law of nature, as propounded by Aristotle, the stoics had added the elements of religion: the way man ought naturally to behave was to be found in divine reason and not in man's individual reason. Now, thanks to the eloquence of the famous roman advocate Cicero (106-43 BC), this Stoic form of the law of nature took root in the philosophy of the Romans. Natural law (*jus natural*) became for the Romans a higher, absolute and unalterable law against which the validity of human positive law could be measured. Indeed, Roman lawyers came to distinguish between three types of laws: *Jus natural*: an ideal, immutable and universal law; *Jus gentium*: the law applicable by the Roman state both to the Romans themselves and to foreigners; and *Jus civile*: the positive law of a given state.

c) Judeo-Christian doctrines

After their enslavement in Egypt and deliverance by God, the Jews were determined to set up a society in which Pharaohs had no place, a society owing allegiance solely to Yahweh and governed by his laws. They rejected polytheism. They embraced monotheism in which God's will dictates the moral pattern for all mankind. Hebrew prophets reiterated the imperative character of God's law and spoke of the punishment that God would inflict upon those who disregarded his laws. Kings could make earthly laws; but such laws could never prevail over God's law. In fact, earthly laws were mere

evils arising out of man's sinfulness which derived from the fall of man. God's will was discoverable in the divine scriptures. And where this could not be done directly, it was declared by prophets.

This *Judaic concept of divine law resulted in equating law with morality*. The only true law was that which embodied the decrees of God's will. Man-made decrees were not entitled to rank as law at all. Law meant the moral religious law laid down by God or developed by divinely inspired human beings. Man must therefore submit lovingly to the divine will even if it passes all understanding for God's ways are mysterious.

Later, *Christian philosophers came to identify the God of the Christian religion as the source of the power of divine reason*. This facilitated the element of revelation. Part at least of the specific content of the divine law could now be found in the revealed scriptures and in certain fundamental tenets and sources of guidance such as the Ten Commandments. Natural law was thus equated with divine Law, partly miraculously revealed, and partly ascertained by divine reason.

The most prominent mediaeval Christian philosopher was Thomas Aquinas (1225-1274 AD). His philosophy is known as Thomism and his followers were called Scholastics. *Thomism postulates that all things and being, including man, strive to reach their own perfected nature which has been stipulated by divine ordinance*. The law of nature thus becomes closer to the law of God.

Scholastics distinguished between the eternal law and the natural or divine law. The eternal law is the law of God, a perfect law that reigns in God's kingdom. Divine law, on the other hand, is a partial revelation directed to man via the church to govern mankind so long as our sinful earthly existence endures. It stands in a partial discovery of the eternal law by man's application of reason to his natural inclinations.

d) Grotius: Natural law and International law

Hugo Grotius (1583-1645) was one of the leading exponents of the law of nature. He was the *founder of international law on a natural law basis*. Grotius did embrace the scholastic conception of the divine will as the supreme source of law. He however *concentrated rather on the rational nature of man, on his capacity to reason and arrive at reasoned judgments*. Grotius *put emphasis not just on reason but on right reason*. He believed that natural law was rooted in the nature of man, and would exist even if there were no God. This did not mean that Grotius denied the Deity. All he was asserting is that natural law is independent of God and a quality of men.

Grotius sought to explain why different societies adopt different forms of government. Reason impels man to seek society. The state originated in a contract by virtue of which each individual surrendered his sovereignty to a ruler. The group is free to choose the order it prefers.

e) Natural law and Natural Right

Early natural law theories advocated total obedience to monarchs. They did so because they regarded kings as 'natural or divine rulers' who enjoyed authority by reason of a natural order decreed by God himself. Thomas Hobbes (1588-1679) justified

absolute sovereign power by *postulating an imaginary contract between rulers and ruled.* He believed that man's life in a state of nature was one of fear and selfishness. The life of man, he said, was 'solitary, poor, nasty, brutish and short'. To escape from this state of affairs men entered into the social contract whereby they surrendered their rights to a sovereign ruler. In return for absolute subservience to him, the sovereign ruler guaranteed peace and granted security to each than he might otherwise have had. In this way natural law theory came to support absolute power.

But the notion soon began to gain grounds that man possessed certain fundamental rights in a state of nature. These rights were not lost when man gained civil status in civil society. They remained protected by natural law. Thus the Englishman John Locks (1632-1704) was able to challenge the mythical social contract theory to protect the ruled from the menace of the ruler.

Locke argued that the state of nature which preceded the social contract was not one of anarchy as Hobbes had maintained. It was a state of liberty, not of license. Its only shortcoming was that 'property' (i.e. life, liberty and estate) was insecure as there was neither established nor impartial judge. To remedy this flaw man entered into the social contract. By so doing he yielded to the sovereign not all his rights but only the power to preserve order and enforce the law of nature. The individual retained the natural rights to life, liberty and estate for they were the natural and 'inalienable rights of man'. The purpose of government was simply to protect these rights – 'to preserve the members of that society in their lives, liberties, and possessions'. The power of government was conceded only for the public good" said Locke. So long as government fulfills this purpose its laws should be binding. But when it ceases to protect or begins to encroach on these natural rights, laws lose their validity and the government may be overthrown.

The English revolution (1688-1689) and the American Revolution (1775-1781) were strongly influenced by Locke's philosophy. Indeed the U.S Constitution is essentially a natural law document setting out the fundamental authority of the people under natural law and guaranteeing the natural rights of the citizen. Moreover, because these rights are embodied in the Constitution, they are justiciable and have a special priority which enables the courts to treat them as superior to and thus prevailing over and legislation or legal rule which conflicts with them.

In France, the social contract theory underwent yet another revision in the hands of Jean Jacques Rousseau (1712-1778). Rousseau argued that in the original contract the individuals did not surrender their right to any single sovereign, but to society as a whole, and this is their guarantee of freedom and equality. For Rousseau, natural law did not create imprescriptible natural rights in favour of individuals. It conferred absolute and inalienable authority on the people as a whole. For this purpose the people, taken together, constituted an entity known as the "general will" which differed from the mere sum of the individual wills of the citizen.

This general will was, by natural law, the sole and unfettered legal authority in the State. Any actual ruler was a ruler only by delegation and could be removed whenever rejected by the general will. Rousseau's doctrine implied that the people were the real rulers and could overthrow at their discretion any reigning monarch. In this sense

Rousseau's doctrine was more revolutionary than that of Locke. Indeed, it was in the light of Rousseau's philosophy that the French revolutionaries in 1789 ultimately overthrew the ancient regime and sought to impose the natural law of reason in its place. Rousseau's approach, however, really implied the tyranny of the majority. The recalcitrant minority, in Rousseau's ominous phrase, must be 'forced to be free'. Thus, ironically enough, Roisseauism which arose out of a faith in democracy and liberty, became an instrument of totalitarianism.

f) Modern approaches to natural law

i) Modern natural law

The nineteenth century witnessed the declined of the natural law school. Its place was taken by *legal positivism*. Many reasons accounted for this decline. In the *first place, philosophers like David Hume (1711-1776) pointed out that conceptions such as good and evil are subjective emotional reactions. Secondly, there was a general reaction against excessive individualism which natural law theories fostered and which had led to the French revolution. Thirdly, collectivist outlook on life gathered momentum in the course of the century. Fourthly, the a priori methods of the natural law philosophers were unacceptable to those nurtured in the inquiring spirit of science*.

However, towards the end of the nineteenth century and during the twentieth century natural law doctrine witnessed a revival. There are many reasons which explain this revival. Firstly, *scientists were honest enough to admit that their subjects were to some extent founded on assumptions.* Secondly, *it was realized that judicial reasoning is creative and not purely syllogistic.* Thirdly, *the world was led to decline in standards, to growing insecurity and to a quest for a moral order.* Finally, *the growth of totalitarian regimes called for the development of an ideological control.*

In these circumstances there has been a return to natural law in a new form. This new form strives to *take account not only of the knowledge contributed by the analytical, historical and sociological approaches, but also of the increasingly, collectivist outlook on life*. The new natural law doctrine emphasized a philosophy of method rather than of substances. According to this new doctrine the *content of law varies with time and place*. This has been labeled 'natural law with a variable content'. Revived theories of natural law are often divided into three categories: catholic, philosophical and sociological.

Catholic theories of natural law seek to *adapt the doctrine of Thomas Aquinas to the conditions of modern times* (hence, referred to as neo-Thomism). Neo-Thomism enjoyed a revival of some force in France, Italy, Spain and other countries where the Catholic Church exerts considerable authority. One of the principal exponents of neo-Thomism was Jean Dabin (1889-19...) who *maintained that the law of nature was a moral instinct or intuition. It prescribes broad generalizations and the detailed working out of these is left to the authority of the Catholic Church. Dabin argued that there is a moral duty to obey only those positive laws which conform to the natural law principle of promoting the common good. If a law failed to conform to this principle it might be*

legally valid but not morally binding. Dabin did not face the question whether it would be immoral to disobey even such a law.

The philosophical forms of natural law have generally taken the form of neo-kantism. According to kant, *man should always act so that his norm of conduct might be translated into a universal law.* Kant asserted that the realm of 'ought' contained the absolute rule of morality which he called the categorical imperative. He held this imperative to be a principle whose absolute truth was known by intuition. Neo-Kantian philosophers such as Stammler (1856-1938) argued, however, that in the realization of justice the specific content of a rule of positive law will vary from place to place and from age to age. It is this relativity which has earned neo-kantism the name 'natural law with a variable content'.

The sociological theory of natural law, on the other hand, adopts a more factual approach. It attempts to *apply scientific methods derived from social sciences in order to elect the primary date of man's fundamental drives, urges or needs.* TAuhis approach has been greatly canvassed in the United States of America where there is a strong emphasis on the social sciences.

ii) Relevance of natural law today

The natural law idea received one of its most fruitful developments in the *incorporation of a Bill of Human Right in the written constitution of the U.S.A.* As a result such rights have been given not only a specific content but also legal recognition. The tendency today in most countries is to have a Bill of Human Rights incorporated in their written constitutions. Apart from constitutionally guaranteed rights there are many other claims that are made for natural law. It may be said that the *notions of reasonableness, fairness, good faith, equity, natural justice, etc. all rest on a foundation of natural law.*

In the international sphere one witnesses conflicting systems of law and nations competing to assert their individual needs and claims. The world is divided into so many conflicting regions, factions and ideologies. Added to these are the intrusions into space and the possibility of inter-planetary travels in the future. These stress the need for some rational way of developing an international society and establishing standards of conduct for the same, to meet the requirements of peace, justice and human welfare.

Although international law is as yet not as developed as municipal law, it does aim in a gradual and piecemeal way, at achieving solutions to the problems which beset the international community by a variety of methods. These include developing existing rules, creating new rules by means of international treaties to which most, if not all, nations adhere, and the creation of new international institutions such as the U.N and the International Court of Justice. This system of rules may be ill-developed. But it owes a good deal historically to a general belief in a rational and universal law of nature.

g) Law and Science: Legal Positivism

The birth of the positivist approach may be traced to the Epicurean School of Ancient Greece as well and the renaissance period with its emphasis on the secular study of science and humanism. As a movement, however, positivism was inspire by Rene

Descartes (1596-1650), given powerful impetus by John Locke, and it gained momentum in the nineteenth century following the writing of David Hume.

Positivist doctrine makes a demarcation between the laws of the physical universe, which govern the behaviour of all physical entities in accordance with the inexorable principle of physical causation, and normative laws, which lay down norms of human conduct. Positivists argue that philosophical speculations should be based on empirical (scientific) tests, associated with observation. David Hume, who rejected natural law, distinguished two areas of human inquiries: the field of facts and the field of 'ought'. The field of fact is concerned with what 'is' actually the case, and whose proposition can be treated as either true or false. The field of 'ought' is concerned with what ought to be the case. Those *subjects which deal with ought-propositions are known as normative and the actual propositions of such subjects are called norms. Norms refer to standards of conduct.* Thus *positive and moral laws are both normative or 'ought' propositions, since they lay down rules of conduct rather than stating facts.*

Jeremy Bentham (1748-1832) adopted this line of approach. He *developed and popularized the principle of utility* which became so influential in the nineteenth century that legal positivist drew a great deal from it. Man's behaviour, the utilitarian's maintained, was conditioned by pain and pleasure. If pleasure is increased and pain diminished, then human happiness was utility. The test for utility was what served the happiness of the largest possible number. Bentham's utilitarianism was geared towards maximizing human happiness according to his slogan 'the greatest happiness of the greatest number'. The *contribution of utilitarianism to legal philosophy is that it provided a fertile climate for the move towards legal positivism.*

Legal positivism has two aspects. First, the firm distinction between law as it 'is', (i.e., the lex lata) and as it 'ought' to be (i.e. the lex ferenda). Secondly, the tendency to treat law as a science deserving to be ranked with the other sciences both in its aim and its methods is the other aspect.

- **Law as it is and as it ought to be**

Bentham rejected natural law doctrine. He took the view that law would be better understood if it were treated as an autonomous field of study free from all issue of morals and religion. He maintained that 'law as it is' differed from 'law as it ought to be'. Each constituted a distinct field of study. Bentham gave the name 'expository jurisprudence' to that field of study which dealt with 'what law is'. As for that field of study which dealt with 'what law ought to be', he called it 'censorial jurisprudence' or the science of legislation.

Bentham who was scornful of natural law went on to point out that whether a rule can be qualified as 'law' within a given state is a purely juristic question to be decided by those criteria which the particular legal systems accept. Accordingly, *in deciding whether a legal rule is valid or not, the point whether it is a good or bad rule is irrelevant because that is a moral question which does not deprive the legal rule of its validity.*

Of course Bentham was not asserting that law and morals are unrelated. Nor was he saying that a bad law was just and must be obeyed. For Bentham, the goodness or

badness of any given law was to be determined by the principle of utility. If the law maximized the greatest happiness of the greatest number, then it is a good law. If the law is a bad one it does not cease to be legal because of its moral iniquity. However, whether such a law should be obeyed is a question of each citizen's conscience.

B - LAW AS A SYSTEM OF RULES

In his book "The Concept of Law", Hart states that *law is a system of rules made up of "primary" and "secondary" rules*. According to him, *primary rules are those which impose duties while secondary rules are those which confer power*. He points out that a community without a legislature, courts or officials of any kind is one in which only primary rules exist. The group is in fact living in a 'pre-legal' state. When the primary rules are supplemented with the secondary rules, a transition from the pre-legal to the legal state occurs. The rules thus combined take on a legal quality and become part of the legal system. To Hart there must be an established law-making authority, and what this authority determines to be law is law.

Dworkin however *denies that law is a system of rules*. According to him, when lawyers reason or dispute about legal rights and obligations they make use of standards that do not function as rules, but operate differently as principles, policies and other sorts of standards. Rules, he maintains, are all-embracing and are either valid or invalid. Principles, policies and other sorts of standards have a dimension of weight or importance, a quality which rules do not possess. Sometimes, however, a legal provision may function logically as a rule and substantially as a principle.

a) Rules and Habits

A *rule is any norm of behaviour*. A *habit, on the other hand, is a pattern of behaviour or conduct*. Not all rules or norms are legal. Some are social. And there exist a point of similarity between social rules and habits. In both cases, the behaviour must be general, for example, knocking at a door before getting in or taking off ones hat in church. These are all habits and they happen 'as a rule'. The two however differ in at least two respects. Where social rules exist requiring certain behaviour, any deviation set will be a reason for criticism. With regard to habit, a habit can be attributed to a social group on the basis of the observable behaviour of the majority of that group. Legal rules, on the other hand, are norms which contain an imperative or a command.

b) Legal Rules

A legal rule may be defined as *any rule of human conduct which is recognized by members of any given society as being obligatory and which therefore the society in question can force its members or whosoever finds himself or herself there to obey by external compulsion*. One of the main functions of law is to regulate human behaviour. It is in this respect that legal propositions or rules differ from those describing the behaviour pattern of nature. For example, the Cameroon Penal Code contains a list of prohibited conduct. These prohibitions are legal rules couched in passive form. So when section 276 for instance prohibits capital murder under pain of death, it is in fact saying

that no one should deliberately kill another and that anyone who does so will be visited with the death penalty.

Legal rules or norms do not exist in isolation. Legal rules dealing with a series of relations on the same subject constitute what is known as a 'legal institution'. For example, all the series of legal rules concerning the union of man and woman constitute the legal institution of marriage. Taken together, legal rules and legal institutions, form what is known as the 'legal order' of a state.

c) The Characteristics of Law

A legal rule is a particular normative provision of a legal institution. It is law. It is a rule of human conduct imposed by the state upon its members under pain of sanction.
An essential quality of a legal rule or law is its *generality*, *abstractness* and *impersonal nature*. A legal rule is general in the sense that it is addressed not to specific individuals but to the community and it enjoins not single actions but types and species of actions. It therefore follows that legal rules exist in a time-continuum.

Since the law is abstract, it is impersonal. This quality of the law is a guarantee against arbitrariness. It removes the otherwise possible fear that the law has been against or in favour of a particular individual. The law applies to everyone, rich or poor, big or small, powerful or weak. This is one reason why people willingly submit to the law.

Another characteristic of law is its *appeal to force*. Force, it has been said, is of the essence of any law. Any law passed is meant to be enforced and must be enforced. All laws implicitly appeal to the use of force. For example, all laws passed in Cameroon end with the following provision: "The present law shall be registered, published in the Official Gazette in French and in English and enforced as a law of the Republic of Cameroon".

There are various ways in which obedience to the law can be exacted; by the threat of a prescribed penalty against anyone who violates it; by the nullification of any legal act performed in breach of the law; by seizing and selling the property of the judgment debtor and handing the money over to the judgment creditor. Law, it has been said, typically has two modes of operation, directives and coercive.

d) Why Law is Obeyed

Law compels obedience because of the *threat of sanctions*. But this is not the sole reason why people obey laws. Other reasons include *indolence*, *deference*, *sympathy*, *fear* and *reason*.

Most people willingly and loyally accept laws made for them because they are themselves too lazy or indulgent to question either the rulers or the rules. Other people obey laws because of deference (respect) either to the personal authority of the law giver, or to the impersonal authority of tradition. Yet another reason for compliance with law is that people feel sympathy for one another, the ruler for the ruled and vice versa, in the delicate task of social adjustments rendered necessary by the fact of a common political life. But fear is also an important element of the habit of obedience to law. Some people obey law for the fear of punishment whether by human authority or by divine

intervention. Finally there are people who obey laws because the raison d'être of the particular rules appears to make sense to them.

e) Legal Customs

Customs are *patterns of behaviour which all societies tend to evolve without express formulation or conscious act of creation*. They are ancient usages and observances so generally accepted and practised by the people that they have formed a body of standardized patterns of behaviour and acquired the force of law. Such customs are legal customs and constitute customary law which is observed in its own right as legal rules.

It is sometimes said that customs are unwritten rules of law. This is not necessarily the case. Customs may be reduced into writing and they do not cease to be customs simply because they have been reduced into writing.

f) Distinction between legal rules and social habits

There are countless rules, institutional habits, and various kinds of social compulsion in every society. But not all of these are legal rules. *Rules of decorum or etiquette, rules of morality and religious precepts are not legal rules*.

Rules of decorum or etiquette include rules of courtesy, honour, practice, a game and so on. These are non-legal. However, like legal rules, they also impose a certain line of outward conduct on individuals in the interest of order necessary for good and proper human relations. Nevertheless, they are not justiciable. The only sanction against the violation of a rule of decorum is reprobation or at worst exclusion from the circle where the rule is observed.

Rules of morality are also not enforceable in the courts. They depend for their effect solely on the force of the public opinion or one's own conscience. There are other distinctions between law and moral precepts. The *purpose of the law is to maintain peace and social order; that of morality is to perfect man's inner self*. The *law imposes far shorter lists of duties towards one's neighbour than morality does. Law-imposed duties are narrowly defined. Moral obligations are wide and appeal to justice generally and even to charity*. The biblical counsel not to return good for evil is a moral precept. Again, whereas the *law is concerned with external human conduct, morality is concerned with the heart and soul*. Morality therefore frowns on attitudes such as greed, jealousy, hatred and so on.

g) LEGAL REASONING

From the definitions contained in modern dictionaries, to reason means to talk, argue persuasively or think in a connected, sensible and logical manner. Legal reasoning involves all three in the context of making law, administering laws, arguing cases in court, deciding cases and negotiating legal transactions.

i) The nature of legal reasoning

Broadly speaking, legal reasoning follows a pattern similar to that of everyday life. The human mind feels a natural disposition towards *treating like cases alike*. That is why practical reasoning makes frequent *use of analogy* and is primarily concerned with weighing various considerations and supporting conclusions with reasons. Since law is a practical science dealing with everyday problems, legal reasoning leans heavily on *argument by analogy* and, to a lesser degree, on other types of logic such as the *logic of induction*, *deduction* (syllogism) and *justification*.

- **Analogical reasoning**

Reasoning by analogy is where the *reasoning proceeds case-by-case and by means of contrasting examples*, first one way and then another to see which way one's judgment is swayed. This type of reasoning is very popular in the common law system because of the desire for certainty in law. Moreover, when it comes to decisions on points of law, there exist a very large apparatus of previously decided and recorded cases with the reasons for those decisions systematically set out in the court's records. These cases may not always provide a ready-made answer to the problem that the court is now faced with. But they often provide clues as to what considerations need to be taken into account and the types of solution which are available.

In examining these earlier cases lawyers will pay close regard to the analogies that may not be present in the case with which the court is then concerned. And by inviting the court to weigh these analogies those arguing the case on behalf of the different parties will seek to work out the implications of treating like cases alike if these analogies are accepted or rejected. The object of such advocacy may be, for instance, to show that if a certain analogy is accepted it will lead to unfortunate consequences in other cases not easily or rationally distinguishable from the present case.

- **Inductive reasoning**

The logic of induction involves the *movement from the particular to the general* as opposed to deductive logic which is a movement from the general to the particular. The use of decided cases involves something like induction. The basic technique is argument by analogy, i.e., treating like cases alike. This often at some stage involves a consequential inductive movement from particular instances to a more generalised formulation. For example:

"Facts of case A are decided Y"
"Facts of case B are decided Y"
"Therefore, strictly speaking, only
Facts A and B should be decided Y"

- **Deductive or syllogistic reasoning**

Deductive logic is *often rejected as the prototype of legal reasoning*. But this does not mean that law does not use deduction reasoning. The syllogism goes, for example, like this:

"All the students in the Faculty are Cameroonians"
(Major premise)
"X is a student of the Faculty"
(Minor premise)
"Therefore, X is a Cameroonian"
(Conclusion)

Again:

"Whoever causes another's death shall be punished with imprisonment for life"
(Major premise)
"X has caused the death of Y"
(Minor premise)
"Therefore, X shall be punished with imprisonment for life"
(Conclusion)

In a legal judgment the syllogism assumes the following form:

"Facts of Type A are governed by Rule B"
"Facts of the present case are of Type A"
"Therefore, the facts of the present case are governed by Rule B"

A syllogism can only make explicit that which is implicit in the premise; it neither creates nor reveals anything new. With reference to a judicial decision, this gives rise to the idea that the result is deducible from a rule, which is already 'there'. In reality, however, law need not use deductive logic at all. Moreover, *there are at least three reasons why deductive logic often cannot be used. In the first place major premises are not given but have to be chosen. Where the chosen major premise is a clearly expressed statutory rule or a well-established case law rule and principle, then deductive reasoning becomes relevant. Otherwise it is irrelevant. This is so because where a statutory provision may be reasonably straight forward, the formulation of case law rule or principle may be doubtful. Secondly, the minor premises rest on perception, probability and description. This involves interpretation and evaluation. Thirdly, legal judgment involves an act of will.*

- **Logic of justification**

Here the *judge reaches a provisional conclusion and then finds authority or argument to support it*. The provisional conclusion may be the result of his trained instinct (what the

Americans call a 'hunch'), or his opinion as to the merits of the dispute; and he interprets or manipulates his authority so as to justify that conclusion. Another ploy in the logic of justification is for a judge to set out one line of argument leading to a certain conclusion, and then to set out an entirely different line of argument also leading to the same conclusion.

- **Arguments of inversion, a fortiori, and ad absurdum**

These are also methods of reasoning which are sometimes encountered in law. They are variants of the deductive and inductive methods.

The inversion method of argument goes like this:

"If A then B" – Premise

"Therefore, if not A then not B" – Conclusion

This kind of logical argument is dangerous and can be easily fallacious. The argument will be fallacious if a term in the premise is used in a particular sense and in the conclusion the same term is treated in a general sense. As inversion arguments are sometimes used in law, one must be on one's guard against fallacy.

The *a fortiori* method of argument is more common than the inversion. This kind of logic may be expressed thus: if something is prohibited (or allowed) then it is assumed that anything more obvious is prohibited (or allowed). For example, it is forbidden to walk across the lawn; then *a fortiori* it is forbidden to drive across it.

Arguments *ad absurdum* are often expressed in deductive form. The aim is to make the conclusion of another's argument demonstrate an absurdity. For example,
"If you say that, the logical conclusion of your argument is X and surely that is not so".

There is no such thing as a logical absurdity; only logical contradiction and invalidity. Legal arguments *ad absurdum* are, therefore, rhetorical rather than logical devices unless they expose a contradiction in another's argument. Logic is concerned with the formal validity of argumentation, not truth and justice. Law is interested in truth but primarily concerned with justice.

ii) Legal Rhetoric

Lawyers, like other professional groups, tend to create within ordinary language a certain esoteric jargon of their own. They do this so as to attain a greater degree of precision and definition than is needful in ordinary life. Moreover, lawyers are persons skilled in the art of assembling arguments and presenting them in their most persuasive form. Barristers represent the interest of their clients and their points of view. The judge, on the other hand, is seeking to arrive at and rationalise and justify his decision.

The principal rhetorical device used in law is *the appeal to authority – statute, case law, or some principle of law*. Both barrister and judge use this device. In English law the appeal to authority is an appeal to the previous decisions of the court and to legislation.

C - ORIGIN AND DEVELOPMENT OF THE ENGLISH LEGAL SYSTEM

Law and legal systems as they exist today are intrinsically connected to ancient Egyptian law, dating as far back as 3000 BC, which had a civil code that was written in twelve books. It was based on the concept of *Ma'at*, characterized by tradition, rhetorical speech, social equality and impartiality. By the 22nd century BC, *Ur-Nammu*, an ancient Sumerian ruler, formulated the first law code, consisting of short statements ("if... then..."). Around 1760 BC, King Hammurabi further developed Babylonian law, by codifying and inscribing it in stone. Hammurabi placed several copies of his law code throughout the kingdom of Babylon as *stelae*, for the entire public to see; this became known as the *Codex Hammurabi*. The most intact copy of these *stelae* was discovered in the 19th century by the British, and has since been translated into English, German and French. Ancient Athens, the small Greek city-state, was the first society based on broad inclusion of the citizenry, excluding women and the slave class.

a) Common Law and Common Law Family

It is normal to describe English Law as falling essentially within the common law legal system or family. The common law family embraces the law of England and legal systems based on the English legal system. Examples of the latter include the legal systems of the United States of America (USA), Nigeria, Ghana, Zimbabwe and the English-speaking Regions of Cameroon, to mention but a few. Of course, what they have in common is having as their original model the legal system of Great Britain. Simply put, therefore, the phrase common law represents the unwritten law of England that is applied by the courts. Such law is derived from ancient and universal usage.

The origin of the common law dates back to the year 1066 with the Norman Conquest in England. The period before the Norman Conquest was known as the Anglo-Saxon period. As early as 41A.D. during the reign of Emperor Claudius up to 54 A.D., the Romans had conquered and occupied Britain. But although the Roman occupation lasted four centuries, only minor traces of Roman law were left in England. After the end of the Roman occupation, that is to say at the beginning of the 5th Century, England was taken over by tribes of Germanic origins. These tribes were the Saxon, Jutes, Danes, and Angles. It was during this period in the year 597 that England was conquered to Christianity by the mission of St. Augustine of Canterbury.

Very little is known of the law of the Anglo-Saxon period. In the year 600, the King of Kent, Aethelbert, made laws which comprised only of 90 short sentences. Thereafter, there were the laws of the Danish king Canute (1016 – 1035) which were much more developed and suggested a transition from the tribal era to the feudal period. But these laws were still local laws.

During this period, England was loosely united under the crown. The central government was weak and inefficient. Hence, the local areas or tribes largely governed themselves and had their own systems of courts and local laws based on ancestral customs. In the year 1066, William I crossed the English Channel from Normandy, landed in the southern coast of England and conquered England after winning the decisive battle of Hastings. Thereafter, he crowned himself king of England and claimed to be the owner of all land in England. He thus established a feudal system of land tenure under which all persons possessing land did so merely as tenants or sub-tenants of the king. He also established a strong and centralised administration which was rich in experience for it had shown its worth in the Duchy of Normandy. William I also set up a uniform judicial system in England by unifying the various local customs into one system of law that was common and applicable to the whole of England. It was as a result of this development that the term common law emerged.

b) Medieval Courts in England

There were four main types of medieval courts in England in the middle Ages. These were Communal Courts, Seigniorial Courts, Ecclesiastical Courts, and Royal Courts to which we may add Commercial Courts.

i) Communal Courts

There were two types of Communal Courts, namely, the Shire Court (also known as County Court) and the Hundred Court (also known as Parish Court). These courts applied the various local customs that prevailed in England at that time.

ii) Seigniorial Courts

These courts were of three types – Baronial Courts, Leet Courts and Manorial Courts. These courts were owned by feudal landlords and mainly heard litigations from their tenants. Fines levied by these courts went into the pockets of the individual landlords.

iii) Ecclesiastical Court

These courts dealt with the discipline of the clergy, matrimonial and testamentary matters. They applied canon law common to all Christians.

iv) Royal Courts

The creation of the *comune lay* or common law was the exclusive work of the Royal Courts of Justice, usually called the Courts of Westminster after the name of the place where they sat from the 13th Century.

v) Commercial Courts

Much of the commerce of the middle Ages was conducted by travelling merchants who moved from fair to fair throughout the country. At each fair or market, they set up informal courts (contemptuously known by lawyers as '*pied poudrés*' courts) to settle trading disputes. The Crown later established formal commercial courts to settle trading disputes. In the 14th Century Edward III set up the High Court of Admiralty to punish pirates and to settle international disputes connected with shipping and sea trading. These courts applied international trade usages based on the Roman *jus gentium*, maritime law based on the ancient Rhodian Sea Laws of the Greeks, and Police regulations for the conduct of Fairs. The *pieds poudrés* courts and the admiralty courts however gradually declined in importance. With the passage of time they lost their autonomy and their jurisdiction was taken over by the common law courts.

c) Common Law Courts

The *Curia Regis* (King's council) originally had two duties which were judicial and governmental. During the middle ages the judicial functions of the *Curia Regis* were assigned to a number of subsidiary courts. These included the Courts of Assize, the Courts of King's Bench, the Court of Common Pleas and the Court of Exchequer.

i) Courts of Assize

These courts dealt with criminal matters. The itinerant judges derived their authority from the various commissions which the King issued to them, for example, a commission to hear and determine serious criminal matters (oyer and terminer), a commission to clear the prisons of persons awaiting trial (general gaol delivery) and a commission to deal with the abuses of justice (trialbaston).

ii) Court of King's Bench

This court separated from the *Curia Regis* in the 13th Century. It dealt with appeals in criminal matters. It also dealt with civil actions in which the Crown was involved. It issued the prerogative writ of mandamus, prohibition, certiorari and habeas corpus.

iii) Court of common pleas

It had jurisdiction over all civil matters between individuals, especially land cases.

iv) Court of Exchequer

This was a court which dealt with matters concerning royal revenue.

It would be noticed that these various courts dealt with three main types of cases – royal finances, matters concerning the ownership and possession of land and serious criminal cases affecting the peace of the Kingdom. As time went on these various royal courts gradually became autonomous and detached themselves from the *Curia Regis*.

Despite a poor communication system, attempts were made to establish a common legal system for the whole of England. Royal judges were sent regularly to all parts of the country to settle disputes (mainly relating to the possession of land) in the king's name. Gradually, these **itinerant judges** (who were also known as 'Justices in Eyre') extended their jurisdiction to criminal matters. In this way the foundation was laid for the common law of property and crime.

To begin an action in a royal court a plaintiff had to obtain a **writ**. A writ was a written command issued by the Lord Chancellor in the King's name, ordering the defendant to appear in court and show cause why the plaintiff should not be given the relief he claims. If there was no appropriate writ to cover the type of claim the plaintiff was making, there could be no remedy. The rule was "no writ, no remedy".

At first the royal chancery could issue many varieties of writs. There was no limit. The barons however did not want the royal courts to compete with their profitable Seigniorial Court. So they forced the king to forbid the issue of further new varieties of writs. The enactment by which the king forbade the issue of further new types of writs was called the **Provisions of Oxford 1258**. This enactment had the effect of restricting the growth of common law by tying it to the writs and remedies available before the year 1258.

To nullify the most harmful restrictions imposed by the Provisions of Oxford, 1258, the **Statute of Westminster II** was enacted in 1285. It provided that new writs could be issued to cover new types of claims if the new claims were analogous to those recognised before the passing of the Provisions of Oxford in 1258. In other words, new writs could be issued by the Chancery provided they were 'in like case' (*in consimili casu*) to those issued before the Provisions of Oxford. The Statute of Westminster II (also known as 'Statute *In Consimili Casu*) though extremely conservative nevertheless made possible the further development of common law. However, the evolution of English law did not in fact take place by means of the technique of actions *super casum* (on the case) through which the royal courts were seised of new matters by a consideration of the facts of the case provided in the detailed declaration of the plaintiff. With the increased importance and prestige of the royal courts business was gradually taken away from the Communal and Seignorial courts. By the year 1300 the common law had expanded from the criminal law and the law of property to include a law of contract and a law of torts (developed mainly from the old writ of trespass and its derivative *assumpsit*.

v) The Star Chamber

It was strictly speaking, not a common law court. It administered the royal prerogative rather than the common law. The Star Chamber originated from sittings of the *Curia Regis* in a chamber of Westminster known as the Star Chamber, possibly on account of its interior which was decorated with stars. A statute of 1487 (*pro camera stellata*) did not create the Star Chamber but conferred jurisdiction upon it to try certain offences such as riot.

The court had a miscellaneous civil jurisdiction over matters outside the common law such as mercantile and ecclesiastical disputes. It also assumed jurisdiction over matters within the scope of common law courts and for this reason it fell into disfavour with common law judges. It is however the criminal jurisdiction of the Star Chamber which is of far greater interest and importance. This is so because, although it did not try felonies, it tried many new offences which were, in modern terms, 'misdemeanours'. Many of these were offences of a public nature such as riot, unlawful assembly, conspiracy, criminal libel, perjury, forgery and criminal attempt. All these crimes were created to fill gaps in the criminal law which then, existed and as administered in the assizes and quarter sessions.

Procedure in the Star Chamber differed radically from procedure in the common law courts. Proceedings were commenced not by presentment by the grand jury, but by information filed by the Attorney-General. An inquisitorial procedure followed whereby the defendant was examined on oath, sometimes under torture. Witnesses' evidence was frequently given by affidavit thus denying the accused any opportunity of cross examination. Finally, there was no jury, guilt being determined by members of the court. So unpopular was the Star Chamber that it was abolished in 1641.

D - CRIMINAL AND CIVIL PROCEDURE IN COMMON LAW COURTS

a) Criminal procedure

There were three principal methods of trial in common law courts. These included trial on indictment, summary trial and appeal of felony. The first two methods still exist. The third existed until the 15th Century.

i) Appeal of felony

Prior to the Norman Conquest of 1066, the responsibility for bringing a person to justice was that of the individual against whom the crime had been committed. The procedure became obsolete under the Normans. However, the appeal of felony created by them perpetuated the ancient concept of private prosecution. Consequently, it was the victim of

the offence who could commence and conduct proceedings against anyone who aggrieved or infringed upon his rights. Under the appeal of felony procedure, the victim of an offence or his representative 'appealed' by bringing his complaint in the local courts or in the King's Bench. The defendant had a right to call for trial by battle known today as a duel. It was not until 1819 that this procedure was finally abolished.

ii) Summary trial

A summary trial is a trial without a jury. This method of trial was entirely created by statute and was only available where statute so provided. The trial was before justices of the peace holding 'petty sessions'. A statute of 1843 for the first time created a uniform procedure for summary trials.

iii) **Trial on indictment**

This was the most important method of trial conceived by the common law. This method of trial involved the use of the jury; at first it was a grand jury of 24 persons who were often witnesses or at least persons with local knowledge; later on the number was reduced to a petty (or trial) jury of 12 persons.

The earliest method of trial in the royal courts was **trial by ordeal**. **Trial by ordeal** was regarded as an appeal to God to decide the guilt or innocence of the accused and could take various forms. Ordeal by fire or boiling water was common. This involved burning or scalding the prisoner's hands and bandaging them. The bandages were removed after three days, when guilt would be established if the hands had not healed.

Another method of trial was '**wager of law**' which somehow appealed to the supernatural. This involved the prisoner finding a special number (generally twelve) of oath-swearers to his innocence. If he could not do so, or his oath-swearers faltered in their oath, he was immediately presumed guilty.

All these forms of ordeal were attended with elaborate religious ceremony which accounts for the credence placed in their efficiency. However, Pope Innocent III in the **Lateran Council in 1215** forbade members of the clergy from performing ceremonial at ordeals. This led to the effective abolishment of this means of trial before the Common Law courts.

This abolishment was not without consequences. It exposed the need for a new method of trial to be found and this led to the establishment of the system of trial by jury.

A jury trial was optional in cases of misdemeanours but compulsory in cases of felony. It should be stated that offences are generally classified into three categories according to the principal penalties provided for them – felonies, misdemeanours and simple offences. In the Cameroonian context, a felony is defined by reason of section 21

of the Penal Code as an offence punishable with death or with loss of liberty for a maximum of more than ten years. A misdemeanour is an offence punishable with loss of liberty of with fine, where the loss of liberty may be for more than ten days but not more than ten years, and the fine more than twenty-five thousand francs. Lastly, a simple offence is one punishable with imprisonment for up to ten days or with fine of up to twenty-five thousand francs. Only the first two offences were eligible for trial by jury.

In any case at the early stages, during proceedings an accused who remained silent when asked to enter a plea was treated as having pleaded guilty. It was not until 1827 that statute altered the position by providing that standing mute be treated as a plea of not guilty. This stance has been adumbrated today in the Cameroonian Criminal Procedure Code of 2005 with the introduction and acceptance of the presumption of innocence, a presumption very dear to the Anglo-Saxon tradition. This presumption of law is to the effect that the accused person will be considered innocent unless and until his guilt is established by the prosecution.

If found guilty of the commission of a felony, the prisoner was punishable by death, transportation for life to the American or Australian Colonies, or waiving and forfeiture of the felony's land and chattels to the Crown. Conviction for a misdemeanour was punishable by fine or imprisonment.

b) Civil procedure

One basic principle underlying the growth of common law is that a common law right only existed if there was a procedure for enforcing it (*ubi remedium ibi ius*). Consequently, substantive law is inextricably bound up with procedure. The course of a civil action in the common law courts may be divided into three stages – the issue of the appropriate writ, pleading and trial.

i) Issue of the appropriate writ

An action at common law was commenced by the plaintiff purchasing from the Chancery a writ. This writ constituted a royal command to the defendant to enter an appearance to it. Its near equivalent today is a summons which, however, is not issued by the chancellery. There was a different form of writ for each cause of action. Indeed, a cause of action existed only if the facts alleged disclose that the cause of action was within the scope of an existing writ.

The earliest civil matters over which the common law courts assumed jurisdiction were those concerning land. So the earliest forms of action were actions for the recovery of land. These were termed **real actions**.

Personal actions are actions for damages. The earliest personal actions at common law were **debt**, **detinue**, **covenant** and **account**. **Debt** was an action for a fixed sum of money (liquidated damages). The **writ of detinue** was an action for the return of a specific chattel which the defendant was wrongfully refusing to return. The **writ of account** was used to compel the defendant to account to the plaintiff for money received on the latter's behalf. The **writ of covenant** lay for breach of any obligation under the defendant's seal and for the recovery of unliquidated damages.

One of the most important forms of actions which developed was the **writ of trespass**. The nature of trespass was that it was the breach of the king's peace by a positive direct wrongful act. All writs of trespass contained the words '*vi et armis et contra pacem domini regis*' (by force and arms and against the king's peace).

ii) Pleadings at common law

Having obtained his writ, the plaintiff had to satisfy the stringent formality of pleading attendant upon each writ. At first pleadings were delivered orally in open court and entered on the court record by the clerk. This meant that the pleader had to be precise. By the 15th Century pleadings were being made in writing. The parties were therefore able to fix the issue between them and then argue in support of the issue at the trial. Each plea had to be set out according to a particular formula. Choice of the wrong plea or of the wrong writ would lose the action.

iii) Trial

The words of trial depended upon the form of action. Writs were rights triable by the archaic wager of war. All other actions were triable by judge and jury. Judges decided any issue of law raised while the jury decided any issue of fact raised.

Appeal by way of rehearing was introduced only in 1875. The first method of appeal from the decision of a common law court was by writ of error alleging an error on the record. This would not extend to any question of fact and could only extend to such points of law as would appear on the record.

E - CHARACTERISTICS (FEATURES) OF COMMON LAW

Common law can easily be recognized by the following features:

– It is basically judge-made law. This implies that common law was formed primarily by judges who had to resolve individual disputes in law courts.

- The legal rule in common law is one which seeks to provide the solution to the case in hand. It does not seek to formulate a general rule of conduct for the future. Common law is therefore not as abstract as the characteristic legal rule in civil law systems.

- The rules relating to the administration of justice, procedure, evidence and execution of judicial decisions have, for common law jurists, an interest equal, or even superior, to substantive rules of law. This is so because historically, the immediate preoccupation of those rules has been to re-establish peace rather than articulate a moral basis for social order.

- **Common Law and Equity**

Equity is a body of principles evolved mainly in the 15th century and applied by the Court of the Chancellor (Chancery Court) in order to complete and occasionally correct, regulate or moderate the common law which had become insufficient and defective because of its rigidity. When the common law functioned poorly, it was possible to render a decision that would make impossible the proper course of justice or provide a solution. The King as **Sovereign Justiciar**, had the moral duty of assuring that his subjects would receive justice. The Chancellor never intervened for the purpose of creating new legal rules which later judges would have to apply. He never purported to change the law as applied by the common law courts. On the contrary, the chancellor professed his respect for the law. Equity follows the law was the maxim proclaimed by chancery.

Until 1875, some basic features distinguished Equity from the common law:

- The historical origin of equity was different.
- It was applied in a court outside the regular system of common law courts.
- The remedies in equity were different from those available at common law.
- The granting of equitable remedies was discretionary, a concept unknown to common law.

i) Origin of Equity

The sclerosis of the common law and the alternative recourse to the king as the fountain of justice gave birth to equity. The writ system coupled with the **Provisions of Oxford, 1258**, by which the issuance of further new types of writs was forbidden, led to a sclerosis of the common law. In fact, this enactment had the effect of restricting the growth of common law by tying it to the writs and remedies available before the year 1258. Consequently, at a point in time the common law became incapable of providing a means of remedying its own inherent restrictions which were mainly created by the writ system. This was so despite the attempts to nullify the harmful restrictions imposed by the **Provisions of Oxford** by the **Statute of Westminster II, 1285** which provided that new writs could be issued to cover new types of claims if the new claims were analogous to those recognized before the passing of the **Provisions of Oxford**. Injustices started

occurring. For example, a litigant who suffered damage might not be able to find an existing form of action into which he could fit his case. A practice then grew in which dissatisfied litigants petitioned the king to exercise his royal prerogative in their favour.

From the 13th Century all appeals against decisions of royal judges were made directly to the king who was regarded as "the fountain of justice" and head of the judicial system. For a time, the King-in-Council determined these petitions himself. Later, pressure of business and the increased number of these petitions forced the king to delegate this task to his principal minister, the Lord Chancellor.

The Lord Chancellor was both the king's chief secretary (Keeper of the Great Seal and controlled the issuing of writs to litigants at common law) and was also the king's chaplain (or keeper of the king's conscience). He was also a priest and so, he tended to decide cases on the basis of morality, religious precepts or natural justice – that is on the basis of fairness and equity rather than in accordance with the narrow and technical rules of law. It is out of this practice that equity developed.

Equity had the following advantages:

- It was less formal and technical than common law.
- It could enforce entirely new claims which common law did not recognise.

Equity also had its disadvantage. The main disadvantage of equity was that it was too flexible. Since decisions were not based on rigid rules, they were varied from chancellor to chancellor, depending on the views of each. For this reason it was said that 'equity varies with the length of the chancellor's foot', that is, each chancellor had his own measurement of equity.

- **Development of Equity**

Equity is justice according to fairness and good conscience. It is natural justice. Because equity refused to be bound by technicalities and was not restricted by the writ system, the Chancellor's court became very popular. This popularity which was to the detriment of common law, resulted from the fact that equity could provide a solution to all wrongs. Hence the equitable maxim, equity cannot suffer a wrong to be without a remedy – *ubijus, ubi remedium* – where there is a right, there is a remedy. Eventually Vice Chancellors were appointed to deal with litigation, and a permanent Chancery court was established in London which dealt with:

- appeals from the common law courts and
- certain matters at first instance, for example, trusts.

- **Equity versus Common Law**

The great popularity of equity led to harmful competition with the common law courts. This competition became increasingly bitter during the latter part of the 16th Century and sometimes, chancery judges and common law judges would pronounce contradictory verdicts on the same case. A vivid example of the conflict between Equity and Common Law could be seen in the case of ***Courtney v. Glanvil*** **(1615)** in which **Coke LCJ**. held that where a common law court had decided a case, the court of chancery had no power to intervene between the parties and that any party who appealed from a common law decision to the Chancellor would be imprisoned under the **Statute of Praemunire**.

To terminate this dispute which reached its peak in **The Earl of Oxford Case (1615)**, **James I** (1603-1625) forced **Lord Chancellor Ellesmere** and the head of the common law system, **Lord Chief Justice Coke**, to present the matter to the Attorney-General, **Sir Francis Bacon**, for arbitration. On Bacon's recommendation, James I then ordered that in cases of conflict between Equity and the Common Law, Equity should prevail. But due to the reluctance of the common law courts to accept this order, Equity and the Common Law were finally fused by the **Judicature Acts 1873-75**.

This fusion was done in order to achieve some uniformity in the judicial system that is, removing the distinction between common law courts and chancery courts. All English courts became competent to apply the rules of common law as well as those of equity. The Judicature Acts also simplified procedure and also laid down that where there is any conflict between a rule of equity and a rule of common law, the rule of equity shall prevail. Before then, however, **Lord Nottingham** (Lord Chancellor 1673-82) sometimes called the father of modern equity, had attempted to reduce the vague rules of equity to a formal system. This work was carried on by his successors, notably **Lord Hardwicke, L.C**. (1736-56) and by the 19th Century Equity had become a system as rigid and formal as common law itself. As a result of this process of formalisation, the word equity by the 19th Century acquired two distinct meaning:

- Natural justice, or fair play (the original meaning), and
- The system of rules administered by the Chancery Court before 1873, when the Judicature Acts fused Equity and Common Law.

The importance of equity is that it introduced into English law (i) new rights such as Trust and Equity of Redemption, and (ii) new remedies such as injunctions, specific performance, rescission, discovery of documents, and appointment of receiver. Equitable remedies are, however, discretionary. They are not granted as of right.

- **The nature of Equity**

In **Dudley v. Dudley** (1705), **Lord Cowper** defined equity as follows:

"Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weaken the constitution (which is the life of the law) and defends the law from crafty evasions, delusions and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted rights are made remediless; and this is the Office of Equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assists it".

The basic nature of equity is expressed in these "maxims of equity":

- Equity will not suffer a wrong to be without a remedy.
- Equity follows the law.
- He who seeks equity must do equity.
- He who comes to equity must come with clean hands.
- Delay defeats equity.
- Equity aids only the vigilant.
- Equality is equity.
- Equity looks into the intent rather than the form.
- Equity acts in personam.
- Equity looks at that as done which ought to be done.
- Equity imputes an intention to fulfil an obligation.
- Where there is equal equity the law shall prevail.
- Where the equities are equal, the first in time prevails.

Thus equity provided new remedies where a remedy at common law was deficient on the basis that 'equity cannot suffer a wrong to be without a remedy'. 'Equity will not assist a volunteer' embodies the principle that a decree of specific performance will not be granted to a person who has given no consideration in return for the obligation which he seeks to have enforced. Similarly, equity does not provide a remedy to a person who has behaved unconscionably since 'he who comes to equity must come with clean hands'.

Equity will give effect to the parties' intention notwithstanding the absence of some formality required by the common law for, 'equity looks on that as done which ought to be done'. Thus an agreement to create a formal lease is equivalent to the lease itself, **Walsh v. Lonsdale** (1882), 21 Ch.D. 9. In this case the landlord (defendant) entered into an agreement in writing to grant to the tenant (plaintiff) a lease of a mill for seven years. The agreement provided that the rent was payable in advanced if demanded. No grants by deed of the lease as required for the grant of a lease exceeding 3 years at law was ever made. The tenant entered and paid rents quarterly not in advance. He

became in arrears and the landlord demanded a year`s rent in advance. It was not paid, and the landlord distrained. The tenant brought an action for illegal distress.

This action failed. The distress would have been illegal at law because no seven-year lease had been granted, and the yearly legal tenancy which arose because of the entry into possession and the payment of rent did not include the provision of payment of rents in advance because a yearly tenancy which arises in these circumstances includes only such terms of any agreement as are consistent with a yearly tenancy. An agreement to pay a year's rent in advance is not so consistent because a yearly tenancy can be terminated by 6 months' notice.

In equity however, the agreement for the lease was as good as a lease. The tenant was held liable to pay a year`s rent in advance and the distress was held to be lawful.

The doctrine of part performance enables a contract to be enforced even though, by reason of the Statute of Fraud, it could not be proved at common law, **Maddison v. Alderson (1883), 8 App. Cas. 467**.

Finally, an important principle of equity is that 'equity acts *in personam'* rather than *in rem*. Thus the right of a beneficiary is essentially a personal right against the trustee rather than a right in the trust property itself.

- **The content of Equity**

The rules of equity were created on the basis of conscience. They resulted sometimes in the recognition of new rights wholly unrecognized in the common law courts and sometimes in the granting of new remedies which the common law did not provide.

The two most important new rights recognized and enforced were the **rights of the beneficiary under a trust** and the **equity of redemption**. A trust is a relationship in which one person (the trustee) has property vested in him by another (the settler of the trust) subject to an obligation to permit another person (the beneficiary or *cestui que trust*) to have the beneficial enjoyment of the property. The trustee is the legal owner of the property while the beneficiary is the beneficial or equitable owner of the property.

In the 16th Century the classical form of common law mortgages was a conveyance of land to the mortgage subject to a covenant to re-convey to the mortgagor on payment of the loan and interest on or before a specified date. This was construed strictly by the common law judges so that the right to a re-conveyance was lost after the due date for redemption had passed at law. This strict view caused injustice. So the chancellor intervened and recognized a right to redeem after the due date for redemption had passed at law. This right was termed the 'equity of redemption' and was an equitable interest in land.

One of the ways equity supplemented the common law was by granting auxiliary or additional remedies where the common law remedies of damages proved inadequate.

Appointment of receiver, discovery of documents, specific performance of contracts, injunctions, rectifications and **rescission** are all new remedies which equity granted.

At common law a debtor's property could be seized to satisfy his debts, but this remedy might not be available in all cases, for example, where the debtor had only a beneficial interest under a trust. In such cases equity will appoint a receiver to collect all profits from the trust property and pay them to the plaintiff.

Where in an action one has possession of documents which might clarify the case and conceals them, equity may compel him to produce such documents for the better information of the court. This is known as discovery of documents.

A decree of specific performance is an order of the court compelling a person to perform an obligation existing either under a contract or a trust. Specific performance is always a discretionary remedy and may be awarded in addition to, or instead of, damages.

An injunction is an order of the court compelling (mandatory injunction) or restraining (prohibitory injunction) the performance of some act.

Rectification lies for a mutual mistake made by the parties in a contract.

In certain cases a court of equity will rescind a contract where it was possible to restore the status quo between the parties. The most important grounds for applying for rescission are fraud and innocent misrepresentation.

F - THE STRUCTURE OF ENGLISH LAW

English law may be said to have four characteristics. It is essentially judge-made law (i.e., the bulk of equity and the common law has not been enacted by parliament but has been developed through the centuries by the judges applying established rules to new situations and cases as they arise). That explains why the study of case law is vital in English law. Secondly, it has had a continuous historical development. Thirdly, at no time has there been a total codification of English law as French law is. Fourthly, English law consists of two main and complementary parts - the common law and equity.

However, what makes English law so very different from other laws is its structure, classification, the concepts it makes use of and the type of legal rule which it builds. There is, for example, no principal division of English law into "public" and "private", and no division such as 'civil law' and 'commercial law'. In their place there are other divisions such as the distinction between common law and equity, or that between real and personal property.

At a less abstract level, that of concepts, there is a similar disorientation for anyone schooled only in the civil law system. For example, he will discover no concepts of paternal authority (*puissance paternelle*), acknowledgement of natural children

(*reconnaissance des enfants naturels*), usufruct (*usufruit*), moral persons (*personnes morales*), '*dol*' or '*force majeurs*'. Instead, he will find new concepts such as trust, bailment, estoppel, consideration, trespass, etc., which mean nothing to him.

The evident structural difference between the civil law system and English law do not end with their respective categories and legal concepts. Even at the basic level of the definition of the legal rule the continental lawyer will not find the sort of rule with which he is familiar. Because English law has evolved through judicial decisions, the legal rule is something different from the doctrinally systematized or legislatively enunciated '*règle de droit*' familiar to the French jurist. In English law the legal rule is framed in less general terms than the continental legal rule. Because of this, elementary distinction found in the civil law system between imperative rules and suppletive rules (*règles imperatives et règles supplétives*) is not made in English law and codification of the continental type is more or less inconceivable in England.

a) The Machinery of Justice in England

i) The Judicial System

In England the theory is that the jurisdiction of the judges is merely an extension of the royal prerogative. The jurisdiction of all English courts is therefore derived directly or indirectly from the crown. At the apex of the English judicial system is the House of Lords, then comes the Supreme Court of Judicature which is made up of the Court of Appeal, the High Court and the Crown Court. At the bottom there are the County Courts and the Magistrate Courts. The present judicial organization is based on the Judicature Acts1873-75 as subsequently modified by later statutes, especially the Court Act, 1971.

- ***Courts with criminal jurisdiction***

The courts in which civil and criminal wrongs are tried are, to a large extent, different. Crimes are tried in the Magistrates' Courts and in the Crown Courts. Criminal appeals from these courts lie in the High Court (Queen's Bench Division) then to the Court of Appeal (Criminal Division), and finally to the House of Lords.

- ***Magistrate's Court***

A Magistrate's Court is any justice or justices of the peace acting under any enactment or by virtue of his or their commission or under common law. The jurisdiction of Magistrates' Courts is local, i.e., it is limited to the counties and boroughs. The criminal jurisdiction of Magistrates' Courts exists principally over summary offences. These are minor offences created by statute and tried without a jury. The maximum penalty which

may be imposed in respect of a summary offence is six months imprisonment and a fine of £400.

- ***Crown Court***

Created by the Courts Act, 1971, this court replaces the old Quarter Sessional and Assize Courts which formerly dealt with indictable offences. The Crown Court consists of a jury and a judge appointed from among High Court judges, Circuit judges and Recorders. A Recorder is a barrister or solicitor of at least ten years standing acting as part-time judge.

The Crown Court has exclusive jurisdiction over all trials on indictment for offences wherever committed, including proceedings on indictment for offences within the jurisdiction of the Admiralty in England. It has jurisdiction to try such serious offences as treason which used to carry the death penalty.

- ***The Queen's Bench Division of the Court***

The criminal jurisdiction of the High Court is exercised exclusively by the Queen's Bench Division. This jurisdiction is entirely appellate and is exercised by the Divisional Court consisting of at least two but usually three judges of the division. The jurisdiction is exercised over appeals by way of case stated from Magistrates' Courts and the Crown Court.

- ***The Criminal Division of the Court of Appeal***

This court hears appeals by persons convicted on indictment or coroner's inquisition at the Crown Court. It also hears appeals against sentence from the Crown Court. In addition, the Home Secretary may refer a case to this court under Section 17 of the Criminal Appeals Act, 1907, for assistance on any point or for determination as an appeal. The jurisdiction of the Criminal Division is solely appellate.

The Criminal Division of the Court of Appeal is composed of the Lord Chief Justice and Lords Justice of Appeal. But the Lord Chief Justice in consultation with the Master of the Rolls may from time to time require judges of the Queen's Bench Division of the High Court to join the court. Decision is by majority vote. Appeal to the Criminal Division of the Court of Appeal lies on any ground involving a point of law, by leave of the court of Appeal or (rarely) of the trial judge on any ground, or against sentence with leave of the court of Appeal only.

- ***The House of Lords***

The Criminal Appeal Act, 1970, made the House of Lords the Supreme criminal appeal court. The House of Lords hears appeals from the Criminal Division of the Court of

Appeal submitted to the House of Lords with leave of the Court of Appeal or the House of Lords itself at the instance of the defendant or prosecutor on a point of law of general public importance.

When the House of Lords sits as a court, only the Lords are entitled to participate in the Appeal Committee, together with the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls and any other peer who holds or has held high judicial office. A quorum is any three of these. Law Lords are appointed from among barristers of at least fifteen years standing, and judges of the Supreme Court of at least two years standing.

- ***The Judicial Committee of the Privy Council (J.C.P.C.)***

It consists of the Lord President of the Council, the Lord Chancellor and a number of Privy Councillors (three form a forum). The J.C.P.C. is the supreme court of appeal for (i) colonies, protectorates, trust territories and certain commonwealth nations which have chosen to preserve this link with London; (ii) the English Ecclesiastical Courts of the Church of England; (iii) appeals from medical tribunals; and (iv), appeals from the Admiralty Court of the Queen's Bench Division on certain technical matters.

A decision of the J.C.P.C is binding on all courts in the territory from which the particular appeal was remitted. Its decisions are not binding upon other territories than the one from which the appeal came or upon British Courts. But its decisions always have great persuasive influence in every Commonwealth country, especially in Britain.

- ***Courts with civil jurisdiction***

These are the County Court, the High Courts, the Civil Division of the Court of Appeal and the House of Lords hearing civil appeals. Although Magistrates' Courts deal mainly with petty criminal matters, they do have some civil jurisdiction chiefly in matrimonial matters, guardianship, adoption and affiliation (maintenance of illegitimate children).

- ***County Courts***

The County Courts Act, 1846, modernised and simplified the procedure in these courts. A County Court is presided over by a judge who is a barrister of at least seven years standing. Since the Courts Act, 1971, County Court judges have been replaced by circuit judges. Each judge is assisted by a Registrar who is a solicitor of at least seven years standing.

County Courts are courts of exclusive civil jurisdiction. They deal with minor civil claims such as minor debts. Their jurisdiction is local. Appeal from a County Court lies to the Court of Appeal on points of law or the admission or rejection of evidence. In bankruptcy matters appeal lies to a divisional court of the Chancery Division.

- ***The High Court***

The High Court consists of three divisions: the Queen's Bench Division (Q.B.D.), the Chancery Division and the Family Division. While the less important civil matters are tried in the County Courts, the more important ones are tried at first instance in the High Court sitting in London or on circuit. Appeal from the High Court lies to the Court of Appeal (Civil Division) and thence to the House of Lords.

The Queen's Bench Division of the High Court administers primarily the common law (tort, contract, prerogative orders of mandamus, prohibition, certiorari). The Chancery Division deals mainly with Equity (trust, partnership, mortgages, equitable remedies, bankruptcy, most company matters, revenue matters and wardship of infants). The Family Division is concerned with matters relating to family law (divorce, nullity, separation, adoption, legitimacy and guardianship of minors).

- ***The Civil Division of the Court of Appeal***

It is staffed by the Master of the Rolls and fourteen Lord Justices of Appeal. Three judges constitute a forum. Appeals in civil matters from the High Court and County Courts come to the Civil Division of the Court of Appeal on matters of law and fact. Appeal is by way of a rehearing. Evidence on appeal may be admitted where deemed appropriate. The court may allow or disallow an appeal in whole or in part.

- ***The House of Lords***

Appeal lies from the Court of Appeal to the House of Lords. But a civil case may go on appeal directly from the High Court to the House of Lords under the 'leapfrogging' procedure introduced by the Administration of Justice Act 1969. This can happen with the consent of the parties and on certification from the judge, if the case turns on the construction of legislation or is governed by a previous decision of the Court of Appeal or House of Lords which one of the parties wishes to overturn.

- **Courts with particular (special) jurisdiction**

These courts are outside the normal hierarchy of courts. The jurisdiction of these specialized courts is usually applicable only to certain members of the society who have impliedly agreed to submit to their jurisdiction, though in some instances it extends to all members of the community.

- ***The Coroner's Court***

This court is presided over by a specially qualified coroner, usually a barrister or a solicitor and/or doctor, assisted by a jury. The coroner's jurisdiction is principally concerned with inquests into the death of persons dying within his district where there is reasonable cause of suspecting that the person has died a violent or unnatural death, or a sudden death the cause of which is unknown, or has died in prison.

- ***Courts – Martial***

These courts exercise jurisdiction over members of the armed forces. Their constitution, jurisdiction and procedure are governed by the Army and Air Forces Acts, 1955, and the Naval Discipline Act, 1957. The accused may be arrested for any offence against military law by a superior officer. Courts-martial are presided over by military officers.

- ***Administrative Tribunals***

These assist in the administration of Acts of Parliament and delegated legislation, and determining disputes arising out of the operation of such legislation.

ii) The legal profession (The judiciary)

- ***Heads of the appellate courts***

The head of the judicial system in England is the Lord Chancellor (L.C.). The Lord Chancellor is at the same time (i) a Government Minister, (ii) Speaker of the House of Lords, (iii) President of the Court of Appeal, (iv) President of the Chancery Division of the High Court, and (v) Chairman of the House of Lords appeal court.

The head of the Court of Appeal is called the Master of the Rolls (M.R.). He is the Lord Chancellor's deputy. He controls admission of solicitors to the Rolls of the Supreme Court. The Criminal Division of the Court of Appeal and the Queen's Bench Division of the High Court are headed by the Lord Chief Justice (L.C.J.). The head of the Family Division is the president of that Division.

- ***Appointment and tenure of office***

The Lord Chancellor, the Master of the Rolls, the Lord Chief Justice, the President of the Family Division of the High Court, the Lords of Appeal in Ordinary and the Lords Justices of Appeal are all appointed by the queen on the advice of the Prime Minister.

All judges are appointed for as long as they are of good behaviour. They can be removed from office only for misconduct by the crown, upon the advice of both Houses of Parliament in a joint address.

Since the passing of the Court's Act, 1971, the retiring age for judges of the High Court and County Courts is 70. County Court judges may be removed from office by the Lord Chancellor for misconduct or incompetence.

English judges are 'servants' of the crown and are paid out of the Consolidated Fund voted by Parliament. But in the exercise of their office they cannot be controlled by the Queen or her Ministers. Judicial independence is fundamental of English Constitutional Law

G – SOURCES OF ENGLISH LAW

i) Principal Sources of English Law (Case law)

Case law and legislation are the two principal sources of English law.

The most outstanding characteristic of English law is that it is 'judge-made'. Indeed, the bulk of common law and equity has not been enacted by Parliament but has been developed through the centuries by the judges applying established or customary rules of law to new situations and cases as they arise. In each case the judges apply existing principles of law, that is, they follow the example of precedent of earlier decisions. This is known as the doctrine of precedent.

i) The doctrine of binding precedent

This doctrine originated in the desire of the mediaeval judges to create a system of law common to England, and the consequent need to secure uniformity in their decisions. Hence, the function of the English judge is not to make law but to decide cases in accordance with existing legal rules. The judge does not merely refer to earlier decisions for guidance. He is bound to apply the rules of law contained in those decisions.

When a judge applies to a case an existing rule of law without extending it, his decision is a **declaratory precedent**. But where the case to be decided is one without precedent, i.e., a case of first impression, the judge must decide it according to general principles of law. By so doing, he lays down an **original precedent** (in fact this is law-making by the judge) which later judges will follow if they encounter a similar case. By means of original precedents, common law and equity are being constantly developed and expanded by the judge.

The advantages of the doctrine of binding precedent are certainly precision and flexibility. The obvious disadvantages of the system are its inherent rigidity, which may occasionally cause hardship, and the vast and ever increasing bulk of reported cases to which the court must advert to determine what is the law, since an excess of case law tends to obscure basic principles.

The operation of the doctrine of precedent depends upon the hierarchy of courts. All courts stand in a definite relationship to one another. A court is bound by decisions of a court above itself in the hierarchy.

ii) *The hierarchy of courts (stare decisis)*

Some courts have greater authority than others. This affects the importance of the precedents laid down by each. The most powerful court in Britain is the House of Lords. Next are the Court of Appeal and then the High Courts. The general rule governing the standing of decisions (i.e., *stare decisis*) is that every higher court binds lower courts.

The House of Lords binds all lower courts but not itself following a practice Directive issued in 1966. Decisions of the Court of Appeal bind all lower courts. The Court of Appeal is itself bound by the decisions of the House of Lords and its own decisions. Divisional Courts of the High Courts are bound by their own decisions and the decisions of the House of Lords and the Court of Appeal. The High Court is bound by its own decisions (including the decisions of its own Divisional Court) and by the decisions of the Court of Appeal. County Courts, the Crown Court and Magistrates Courts are bound by the decisions of all superior courts. These inferior courts do not themselves lay down binding precedents.

iii) The binding element of precedents

When a judge delivers a judgment there is a certain element of the decisions which is binding (the *ratio decidendi*) and another element which is not binding (the *obiter dictum*).

- ***The ratio decidendi* of a case**

Every decision contains the following basic ingredients: (i) findings of material facts, direct and inferential, (ii) statements of the principle of law applicable to the legal problems disclosed by the facts, and (iii) judgment based on the combined effects of (i) and (ii). It is (ii) that is known as the *ratio decidendi.* Hence *ratio decidendi* may be defined as that part of a case which possesses authority, that is, the rule of law upon which the decision is founded. The *ratio decidendi* of a case can also be defined as the material facts of the case plus the decision thereon.

- **The *obiter dictum* of a case**

In contrast with the *ratio decidendi* is the obiter dictum. An *obiter dictum* is a 'by the way' comment made by the judge in the course of a judgment. An *obiter dictum* is not binding on courts. It may, however, be respected according to the reputation of the judge,

the eminence of the court, and the circumstances in which it came to be pronounced. Thus although *obiter dicta* are not binding they may be of persuasive authority. The reason for not regarding an *obiter dictum* as binding is that it was probably made without a full consideration of the cases on the point and the consequences that may follow from an *obiter dictum* that is very broad in its terms and also that the judge may not have expressed a concluded opinion.

There are two types of *obiter dicta*. First, a statement of law is regarded as *obiter dicta* if it is based upon facts which either were not found to exist or, if found, were not found to be material. A second type of *obiter dictum* is a statement of law which, although based on the facts as found, does not form the basis of the decision.

iv) Over-ruling and distinguishing precedents

A precedent can either be over-ruled or distinguished.

- ***Over-ruling***

If an earlier precedent would lead to injustice in the particular case before him, a judge may refuse to apply it. If the precedent is one laid down by an inferior court, he may over –rule it.

A precedent does not lose its authority with the passage of time. Indeed, the strength of a precedent increases with age in that courts tend to be reluctant to over-rule long standing authorities, unless they are clearly wrong.

A decision altered on appeal is said to be reversed. Reversal takes place when the same case is decided the other way on appeal. Over-ruling takes place when a case in a lower court is considered in a different case taken on appeal and held to be wrongly decided. Reversing differs from over-ruling in that the former affects the decision in the case whereas the latter only affects the rule of law upon which the decision is based.

- ***Distinguishing***

If the application of an earlier precedent to a particular case would lead to injustice, a judge may refuse to follow that precedent. If the precedent was one laid down by an inferior court, he would simply over-rule it. But if it was laid down by a superior court (so that in theory he is bound to follow it), he would have to evade the precedent by distinguishing differences between the case he is deciding and the one in which the precedent is laid down. Cases are distinguished on the facts.

v) The interpretation and construction of statutes

- **The need for interpretation and construction**

If the words of a statute are clear and unambiguous, no problem of judicial interpretation arises. However, if the meaning of a statute is unclear, litigation is inevitable and the statute would have to be interpreted. Technically, interpretation is a process whereby a meaning is assigned to the words of a statute. Construction, on the other hand, is a process whereby uncertainties and ambiguities in a statute are resolved. Hence, every statute which comes before a court is interpreted whereas only uncertain or ambiguous provisions require construction.

Ambiguity arises through an error in drafting whereby words used in a statute are found to be capable of bearing two or more literal meanings. The three principal types of ambiguity are: homonym where the same word has two distinct meanings, polysemy where a word has many senses attached to it, and amphiboly which arises out of uncertain grammatical construction. Uncertainty is far more common that ambiguity. Uncertainty occurs where the words of a statute are intended to apply to various factual situations and the courts are called upon to decide whether or not the set of facts before them amounts to a factual situation envisaged by the Act.

- ***Judicial approaches to interpretation***

- ***The literal rule***

The literal rule of interpretation is that the intention of the legislator must be found in the ordinary and natural literal meaning of the words used. The rule, however, cannot be applied in the case of ambiguity. For example, if the words, interpreted literally, are capable of alternative meanings, the literal rule clearly cannot be applied.

- ***The golden rule***

The golden rule is that words in a statute must be interpreted in such a way as to avoid a manifestly absurd result. Where the statute permits two or more literal interpretations the court must adopt the interpretation which produces the least absurd or repugnant result.

- ***The mischief rule***

The rule is also known as the Rule in Heydon's Case. The rule is that where a statute was passed to remedy a mischief, the court must adopt the interpretation of the statute which will have the effect of correcting the mischief in question.

- **Rules followed in interpreting and construing statutes**

- ***The statute must be read as a whole***

This means that every section must be read in the light of every other section, especially in the light of an interpretation of sections and schedules.

- ***The ejusdem generis rule***

This rule means that when a series of particular words in a statute is followed by general words, the general words are confined by being read as of the same scope or genus as (i.e. ejusdem generis with) the particular words.

- ***Penal provisions are construed narrowly***

Where a statute imposes criminal liability or tax obligations (which are treated as penal) and the statute is ambiguous or uncertain, it should be construed in favour of the individual.

- ***Presumptions in construction***

Presumptions apply only where there are no express and clear provisions to the contrary. Some presumptions that apply in the construction of statutes include the following - presumption against alteration of the law; presumption against the imposition of liability without fault; presumption against depriving a person of a vested right; and presumption against ousting the jurisdiction of the courts.

- ***Material aids to construction***

There are two classes of aids to construction, internal aids and external aids. These aids are resorted to only where the process of interpretation has disclosed an uncertainty or an ambiguity.

An ***internal (or intrinsic) aid*** is an aid which is to be found within the Queen's Printer's copy of the statute itself. Those parts of the statute which form part of the enactment must be consulted as part of the general process of interpretation in applying the general rule that the statute must be read as a whole.

An ***external or extrinsic aid*** to construction is an aid which is not to be found in the Queen's Printer's copy of the Act. It might be thought that the courts would readily refer to statements made in Parliament as to the intention of the member or party introducing the Bill. In fact, the reverse is the case. The reports of debates on the Bill (*les travaux préparatoires*) in its passage through Parliament are rigidly excluded as aids to interpretation.

Where a superior court has interpreted the words of an Act, an inferior court in the hierarchy is bound to adopt that interpretation if faced with the same words in the same Act.

vi) Law Reports

The operation of the doctrine of precedent is inextricably bound up with law reporting. The efficient working of the doctrine depends largely on the existence of accurate reports of cases and decisions. The history of law reporting can be roughly divided into three periods: the period of the Year Books extending from about 1272 to 1535, the period of the private named reporters extending from 1535 to 1865, and the modern semi-official system of law reporting which began in 1865.

- ***The Year Books***

First compiled during the reign of Edward I, these are simply notes compiled by students and junior advocates for use by advocates as guides to pleading and procedure. They are not intended to be used by judges as precedents. Most litigations in the 13th and 14th Centuries took the form of disputes over title to land. Hence most cases reported in the Year Books are land cases decided by the Court of Common Pleas.

When printing was invented in the 15th Century, Year Book manuscripts were printed in the so-called 'Black Letter' editions (the Roll series, R.S., and the Selden Society Series, S.S.). The language used in the Year Books was 'law French'.

- ***The Private Reports***

Compilation of the Year Books ceased in about 1535. Almost immediately, private sets of reports began to be produced, printed and published under the name of the law reporter. The citation of precedents became progressively more common as the private reports became more comprehensive. "L.C.J." was probably the greatest of all law reports. Coke's Reports (Co. Rep.) contain comprehensive expositions of virtually every aspect of the common law supported by a wealth of authority assiduously gleaned from the Year Books. Other great reporters were Dyner, Saunders, Plowen and Barrow. If the reference of a case is, for example, 1 B. & Ad. 289, it means the case can be found in volume one of the Barnewall and Adolphus's Reports at page 289. Similarly, a reference to 3 Burr. 1663 is a reference to volume three of Burrow's Reports at page 1663. Most of these private reports have been reprinted in a series known as English Reports (E.R.).

- **The present system of law reporting**

In 1865 the system of private reporting gave way to the system which still exists at the present day. In 1886, the Incorporated Council of Law Reporting was established. The Council published detailed reports of cases heard in the Supreme Court. The reports are made by specially trained barristers and sometimes revised by the judges. In addition,

several private firms published similar series of reports, for example, the All England Reports, The Times Law Reports, Lloyds Law Reports, etc.

Before 1891 the citation of cases or of the law reports was somehow complex. Before 1875 a case was cited by reference to the court in which it was decided, for example, Irvin v. Askew (1870), L.R. 5 Q.B. 208. The dates of cases were surrounded either by square or round brackets. The square bracket is used where the date is an indispensable part of the reference to the case and the round brackets are used where it is not.

b) Principal Sources of English Law (Legislation)

Legislation means enacted law. Enacted laws of this kind are called statutes. Legislation may be direct or indirect.

i) Direct legislation

Direct legislation means laws enacted by the legislature itself. Before the 15th Century legislation was not an important source of law. Statutes were enacted by the king and Grand Council, for example, when King John was forced to pass the **Magna Carta in 1215** which stated the constitutional rights of the English people, the **Provisions of Oxford, 1258**, and the **Statute of Westminster II, 1285**.

Today, Parliament is the supreme legislative body in Britain. Parliament consists of three essential components: the Sovereign, the House of Lords and the House of Commons. Proposals for legislation must be put before both Houses in the form of Bills. If approved by both Houses, the Bill is then placed before the Sovereign and does not become an Act of Parliament until it receives the royal assent (which by convention, cannot be refused).

There is a presumption that an Act of Parliament is operative throughout the United Kingdom unless its geographical operation is limited by the Act itself. A statute comes into force on the day on which it receives the royal assent, unless some other date is specified in the Act itself. No statute becomes obsolete by the passing of time.

Because Parliament is the Supreme legislative body in Britain, its enactments absolutely bind all courts and citizens.

ii) Indirect (delegated or subordinate legislation)

Indirect or subordinate legislation means rules of law laid down by a body or person to whom the legislature has delegated some power to make such rules. Orders-in-Council made by the Queen and Privy Council, statutory instruments and bye-laws of local authorities are all subordinate legislation.

Parliament delegates its legislative powers to subordinates because it is supreme. However, if the subordinate to whom legislative powers have been delegated exceeds the scope of its powers (i.e., acts *ultra vires*), laws laid down in excess of that power are void. The *ultra vires* doctrine enables the courts to assert some control over delegated legislation.

In Britain there is no clear separate administrative law yet, although many jurists believe that it is necessary and is beginning to develop spontaneously. Generally, control of the executive branch of Government in Britain is left entirely in the ancient common law and to the doctrine of *ultra vires*. Administrative tribunals exist to enforce delegated legislation and to examine its application and misuse.

c) Secondary Sources of English Law

Customs, Canon Law, Roman Law and Legal textbooks are also sources of English law. But these sources are not as important as case law and legislation. They therefore constitute only secondary sources of English law.

i) Custom

Custom, the oldest source of English law, had by the 14th Century ceased to be the mainspring of the development of the common law. There are two types of customs - general and local. A general custom is one recognized and obeyed throughout the country even before it was enforced by the courts. General custom is the foundation of common law.

A local custom is a rule or tradition regularly obeyed by the inhabitants of a particular locality. In order to gain recognition and enforcement by the courts, a local or a particular custom must be (i) reasonable, (ii) not contrary to any statute or any fundamental principle of law, (iii) observed as of right, i.e., *nec vi, nec clam, nec precario* – not by force, not secretly, not under dispute., (iv) exercised from time immemorial, i.e., since 1186, but in practice it is generally sufficient to show that the custom has existed as long as any living person can remember ('beyond living memory'), (v) must be definite in nature and scope, (vi) must have been exercised continuously and without interruption, and (vii) must be recognized as binding by those who are affected by it.

In strict legal terms, however, custom no longer enjoys any great importance. But it does in fact play a determinant role in English life. Constitutionally, for example, England is still in many respects an absolute monarchy. Ministers are the servants of the queen and dismissed by her at pleasure. Warships, land and public buildings are the queen's property. Even the salaries and pensions of civil servants are granted *ex gratia* through her Majesty's favour.

ii) Roman Law

Roman law, although the basis of most European legal systems, is of very minor assistance as a source of English law. Roman law has, however, influenced canon law, maritime and mercantile law.

iii) Canon Law

Canon law has influenced the growth of English law in two ways. First, it was the basis of many concepts which were formulated in the lay courts. Secondly, canon law was applied exclusively in the ecclesiastical courts. Being outside the control of the king, canon law was a system of law wholly independent of the common law.

iv) Legal textbooks or books of authority

On the continent of Europe the writings of legal authors form an important source of law. In England, in accordance with English ancient tradition that the law is to be sought in judicial decisions, these writings have in the past been treated with comparatively little interest. They have been cited in court, if cited at all, rather by way of evidence of what the correct interpretation of the law is, than as independent sources from which it may be derived.

d) Legal Concepts and Legal Reasoning in English Law

A concept is a class of things into which the facts of cases can be fitted. Concepts exist as ideas in the human mind rather than as concrete entities. But there is a strong tendency to try to 'objectify' everything which is capable of being the subject of human thought and language. In other words, there is always a temptation to treat abstractions as real entities. This temptation is particularly strong in the field of legal and political concepts where such concepts are highly charged with various emotional overtones.

Sometimes in legal usage the word category is used instead of concept. Some concepts are ingredients of rules and principles such as the concepts of intention and good faith. Others such as ownership are of wider scope and are used in a broad generic way to embrace a number of rules, principles and standards. Often, conceptual questions are questions about meaning and classification.

The law classifies and regulates types of transactions which occur in real life. It translates everyday occurrences into legal terms - contract, tort, crime, etc. Many fundamental legal concepts are, to a large extent, legal creations in their own right with vitality of their own. Examples of leading legal concepts are concepts such as rights and duties, property and ownership, human personality and group personality, trust, patent rights, copyright and trademarks. The concept of trust is discussed hereunder.

i) TRUST

The concept of trust is fundamental to English law and is the most important creation of equity. The trust in a general way embodies the following idea: the person who constitutes the trust, the settler of the trust, provides that property will be administered by one or more trustees for the benefit of one or more other persons, the *cestui que trust*. This type of arrangement is very frequent in English law because it fulfils such useful purposes as providing for incapable persons and married women. The settling of estates, endowments, and charitable institutions also very often make use of this technique.

The trustee is not the representative of the incapable or moral persons and the latter are not the owners of the trust property managed for their benefit.

The trust is therefore not an application of the principle of 'representation', a kind of mandate or agency conferred by the settler of the trustee or in some cases, by the law, upon the trustee. At common law the trustee is not simply an administrator or a representative of the *cestui que trust* or trust beneficiaries. He is the legal owner of the trust property. He therefore administers the property as he wishes. He can dispose of it at will. He does not have to account to any person for his use or management. That is the position of the trust 'at law'.

The restriction placed on his right or ownership is of a moral not a legal nature. It is not according to law but according to conscience that he has to administer the property as a reasonable prudent man and pay the revenues, and at a later time the capital, to certain persons, the beneficiaries designated by the settler of the trust. At common law the *cestui que trust* had no right at all. In the face of this gap and the fact that the trustee abused the confidence placed on him, the Chancellor was requested to intervene. The Chancellor ordered the trustee to perform his undertaking under the trust and to remit the benefits arising from the trust to the *cestui que trust*. If the trustee disobeyed he would be imprisoned or his property seized. The trustee, however, still remains the owner of the trust property. His powers over the trust property are dispositive and not simply administrative. He may dispose of the property by way of sale or even by gift. In law such acts of disposition are completely valid.

In these cases of alienation of property of trust property, however, Equity intervenes in two ways. First, it gives effect to a principle of subrogation: if the trustee has alienated the trust property for value received, the property is subrogated to the original trust property. The trustee will be henceforth considered the trustee of the amounts arising from the sale of the property or such property as may have been acquired through the reinvestment of these funds. The beneficiary's interest attaches to this new property. In the second place if the third party has acquired such property gratuitously, i.e., without paying valuable consideration, or is in bad faith, the factor does not prevent the ownership of the trust property from passing into his hands; but the acquirer of such

property, considered to have become the legal owner, becomes at the same time a trustee and he must, in turn, manage it in the interests of the trust beneficiaries.

The beneficiary under a trust has no right. He only has an **interest**, a 'beneficiary interest', in the trust property guaranteed by Equity. The trust appears to be a fragmentation of the attributes of ownership – the legal ownership belongs to the trustee but the equitable belongs to the *cestui que trust*.

ii) THE LEGAL RULE

English law is essentially case law, i.e., judge-made. The rules of English law are, fundamentally, the rules to be found in the *ratio decidendi* of the decisions rendered by the English superior courts. When an English judge makes a statement not strictly necessary for the solution of the case before him, he is said to be speaking *obiter*. *Obiter dicta* do not constitute rules of law.

The English legal rule is situated at the level of the case for which, and only for which, it has been found and enunciated. If it were placed at a higher level, it would make English law 'doctrinal' and greatly distort it.

The continental legal rule is enunciated by 'doctrine' or the legislator and is designed to direct the conduct of citizens in a large number of cases without any reference necessarily to a particular dispute.

The technique of English is not one of interpreting legal rules. It consists in discovering the legal rule that must be applied to the instant case. This step is taken by paying great attention to the facts of each case and by carefully studying the reasons for distinguishing the factual situation in the case at hand from that in a previous case. To a new factual situation there corresponds a new legal rule. The function of the judge is to render justice not to formulate in general terms a series of rules the scope of which may well exceed the terms of the dispute before him.

H - THE COMMON LAW IN AFRICA

The common law system has had an enormous influence in Africa and Asia even though the peoples of these places have always had their own laws, civilization and religious beliefs.

The common law got to Africa through British colonization. The British imported English law into their colonial territory. They established a legal system which (i) provided the essential framework of law and order; (ii) regulated the personal and proprietary relationships of non-Africans with each other and with Africans; (iii) establish legal structures for the development of the territory; and (iv) allow those

Africans who wished, by reason of their education or functions, to move out of customary law and into western law system.

The general law created for each British dependency in Africa was based either on the legal system of England or the legal system of British India (itself an adapted version of the legal system of England). In Ghana, Nigeria, Sierra Leone, Somalia, The Gambia, Malawi, Zambia and Anglophone Cameroon, the extraneous law so was the common law and statute law of England. Kenya, Uganda and Tanzania adopted the codified law of British India, supplemented by the common law and statute law of England.

The received English law consisted of (i) the common law, (ii) the doctrines of equity, and (iii) the statutes of general application in force in England as of a specific date.

The date of reception of English statutes of general application varied from country to country: 1874 for Ghana, 1900 for Somalia, Nigeria and Anglophone Cameroon; 1920 for Malawi and 1911 for Zambia.

The date of reception of the law of British India was also not uniform: 1897 for Kenya, 1902 for Uganda and 1920 for Tanzania. The reception dates signifies that statutes in existence in the donor country as of that date applied in the receiving countries, while those coming into existence in the donor country after that date were not received.

The reception of extraneous law as the basis of the general law of a territory was by no means the end of the matter. Power was given to the local legislative authority to amend or appeal the law as originally adopted. Provision was also made for the continued enforcement of rules of customary law provided that such rules were not "repugnant to natural justice, equity and good conscience".

The current general law of each African country formerly under Britain consists of: (i) the received extraneous basic law, (ii) enactments by the colonial legislature or legislative authority, and (iii) enactments by the national legislature or legislative authority since independence.

Today, modern African law is a modified version of the imported law, peculiarly adapted to its African environment. Moreover, it is also a novel blend of local and imported laws, harmonized and integrated together. In other words, we have witnessed the emergence of a new species of common law, a specifically common law defined, fortified and elaborated by local legislation and decisions of African courts.

J - RELIGIOUS LAW

Religious law is explicitly based on religious precepts. Examples include the Jewish Halakha and Islamic Sharia—both of which translate as the "path to follow"—while

Christian canon law also survives in some church communities. Often the implication of religion for law is unalterability, because the word of God cannot be amended or legislated against by judges or governments. However a thorough and detailed legal system generally requires human elaboration. For instance, the Quran has some law, and it acts as a source of further law through interpretation, *Qiyas* (reasoning by analogy), *Ijma* (consensus) and precedent. This is mainly contained in a body of law and jurisprudence known as Sharia and Fiqh respectively. Another example is the Torah or Old Testament, in the Pentateuch or Five Books of Moses. This contains the basic code of Jewish law, which some Israeli communities choose to use. The Halakha is a code of Jewish law which summarizes some of the Talmud's interpretations. Nevertheless, Israeli law allows litigants to use religious laws only if they choose. Canon law is only in use by members of the Catholic Church, the Eastern Orthodox Church and the Anglican Communion.

Until the 18th century, Sharia law was practiced throughout the Muslim world in a non-codified form, with the Ottoman Empire's Mecelle code in the 19th century being first attempt at codifying elements of Sharia law. Since the mid-1940s, efforts have been made, in country after country, to bring Sharia law more into line with modern conditions and conceptions. In modern times, the legal systems of many Muslim countries draw upon both civil and common law traditions as well as Islamic law and custom. The constitutions of certain Muslim states, such as Egypt and Afghanistan, recognize Islam as the religion of the state, obliging legislature to adhere to Sharia. Saudi Arabia recognizes Quran as its constitution, and is governed on the basis of Islamic law. Iran has also witnessed a reiteration of Islamic law into its legal system after 1979. During the last few decades, one of the fundamental features of the movement of Islamic resurgence has been the call to restore the Sharia, which has generated a vast amount of literature and affected world politics.

I - LEGAL SUBJECTS

It should be noted that different legal systems deal with the same basic issues, but jurisdictions categorize and identify its legal subjects in different ways. A common distinction is that between "public law" (a term related closely to the state, and including constitutional, administrative and criminal law), and "private law" (which covers contract, tort and property). In civil law systems, contract and tort fall under a general law of obligations, while trusts law is dealt with under statutory regimes or international conventions. International, constitutional and administrative law, criminal law, contract, tort, property law and trusts are regarded as the "traditional core subjects", although there are many further disciplines .

i) International law

International law can refer to three things: public international law, private international law or conflict of laws and the law of supranational organizations.

Public International Law concerns relationships between sovereign nations. The sources for public international law development are custom, practice and treaties between sovereign nations, such as the Geneva Conventions. Public international law can be formed by international organizations, such as the United Nations (which was established after the failure of the League of Nations to prevent the Second World War), the International Labour Organization, the World Trade Organization, or the International Monetary Fund. Public international law has a special status as law because there is no international police force, and courts (e.g. the International Court of Justice as the primary UN judicial organ) lack the capacity to penalize disobedience. However, a few bodies, such as the WTO, have effective systems of binding arbitration and dispute resolution backed up by trade sanctions.

Conflict of laws (or "private international law" in civil law countries) concerns which jurisdiction a legal dispute between private parties should be heard in and which jurisdiction's law should be applied. Today, businesses are increasingly capable of shifting capital and labour supply chains across borders, as well as trading with overseas businesses, making the question of which country has jurisdiction even more pressing. Increasing numbers of businesses opt for commercial arbitration under the New York Convention 1958.

European Union law is the first and, so far, only example of a internationally accepted legal system other than the UN and the World Trade Organization. Given the trend of increasing global economic integration, many regional agreements—especially the Union of South American Nations—are on track to follow the same model. In the EU, sovereign nations have gathered their authority in a system of courts and political institutions. These institutions are allowed the ability to enforce legal norms against or for member states and citizens in a manner which is not possible through public international law. As the European Court of Justice said in the 1960s, European Union law constitutes "a new legal order of international law" for the mutual social and economic benefit of the member states.

e) **Constitutional and administrative law**

Constitutional and administrative laws govern the affairs of the state. Constitutional law concerns both the relationships between the executive, legislature and judiciary and the human rights or civil liberties of individuals against the state. Most jurisdictions, like the United States and France, have a single codified constitution with a bill of rights. A few,

like the United Kingdom, have no such document. A "constitution" is simply those laws which constitute the body politic, from statute, case law and convention. A case named *Entick v Carrington*[14] illustrates a constitutional principle deriving from the common law. Mr Entick's house was searched and ransacked by Sheriff Carrington. When Mr Entick complained in court, Sheriff Carrington argued that a warrant from a Government minister, the Earl of Halifax, was valid authority. However, there was no written statutory provision or court authority. The leading judge, Lord Camden, stated that,

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole ... If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.[15]

The fundamental constitutional principle, inspired by John Locke, holds that the individual can do anything but that which is forbidden by law, and the state may do nothing but that which is authorized by law. Administrative law is the chief method for people to hold state bodies to account. People can apply for judicial review of actions or decisions by local councils, public services or government ministries, to ensure that they comply with the law. The first specialist administrative court was the *Conseil d'État* set up in 1799, as Napoleon assumed power in France.

f) Criminal law

Criminal law, also known as penal law, deals with crimes and punishment. It defines offences and attaches to them penalties but makes no moral judgment on an offender nor imposes restrictions on society that physically prevents people from committing a crime in the first place. Investigating, apprehending, charging, and trying suspected offenders are regulated by the law of criminal procedure. The paradigm case of a crime lies in the proof, beyond reasonable doubt, that a person is guilty of two things. First, the accused must have committed an act which is deemed by society to be criminal - the *actus reus* (guilty act). Second, the accused must have had the requisite malicious intent to do a criminal act - the *mens rea* (guilty mind). However, for "strict liability" crimes, an *actus reus* is enough. Criminal systems of the civil law tradition distinguish between intention in the broad sense (*dolus directus* and *dolus eventualis*), and negligence. Negligence does not carry criminal responsibility unless a particular crime provides for its punishment.

Examples of crimes include murder, assault, fraud and theft. In exceptional circumstances defences can apply to specific acts, such as killing in self defence, or pleading insanity. Another example is in the 19th century English case of *R v Dudley and*

Stephens, which tested a defence of "necessity". The *Mignonette*, sailing from Southampton to Sydney, sank. Three crew members and Richard Parker, a 17 year old cabin boy, were stranded on a raft. They were starving and the cabin boy was close to death. Driven to extreme hunger, the crew killed and ate the cabin boy. The crew survived and were rescued, but put on trial for murder. They argued it was necessary to kill the cabin boy to preserve their own lives. Lord Coleridge, expressing immense disapproval, ruled, "to preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it." The men were sentenced to hang, but public opinion was overwhelmingly supportive of the crew's right to preserve their own lives. In the end, the Crown commuted their sentences to six months in jail.

Criminal law offences are viewed as offences against not just individual victims, but the community as well. The state, usually with the help of police, takes the lead in prosecution, which is why in common law countries cases are cited as "*The People* v ..." or "*R* (for Rex or Regina) v ..." Also, lay juries are often used to determine the guilt of defendants on points of fact: juries cannot change legal rules. Some developed countries still condone capital punishment for criminal activity, but the normal punishment for a crime will be imprisonment, fines, state supervision (such as probation), or community service. Modern criminal law has been affected considerably by the social sciences, especially with respect to sentencing, legal research, legislation, and rehabilitation. On the international field, 111 countries are members of the International Criminal Court, which was established to try people for crimes against humanity.

g) Contract law

Contract law concerns enforceable promises, and can be summed up in the Latin phrase *pacta sunt servanda* (agreements must be kept). In common law jurisdictions, three key elements to the creation of a contract are necessary: offer and acceptance, consideration and the intention to create legal relations. In *Carlill v Carbolic Smoke Ball Company* a medical firm advertised that its new wonder drug, the smokeball, would cure people's flu, and if it did not, the buyers would get £100. Many people sued for their £100 when the drug did not work. Fearing bankruptcy, Carbolic argued the advert was not to be taken as a serious, legally binding offer. It was an invitation to treat, mere puff, a gimmick. But the court of appeal held that to a reasonable man Carbolic had made a serious offer. People had given good consideration for it by going to the "distinct inconvenience" of using a faulty product. "Read the advertisement how you will, and twist it about as you will", said Lord Justice Lindley, "here is a distinct promise expressed in language which is perfectly unmistakable".

"Consideration" indicates the fact that all parties to a contract have exchanged something of value. Some common law systems, including Australia, are moving away from the idea of consideration as a requirement. The idea of estoppel or *culpa in contrahendo*, can be used to create obligations during pre-contractual negotiations. In civil law jurisdictions, consideration is not required for a contract to be binding. In France, an ordinary contract is said to form simply on the basis of a "meeting of the minds" or a "concurrence of wills". Germany has a special approach to contracts, which ties into property law. Their 'abstraction principle' (*Abstraktionsprinzip*) means that the personal obligation of contract forms separately from the title of property being conferred. When contracts are invalidated for some reason (e.g. a car buyer is so drunk that he lacks legal capacity to contract), the contractual obligation to pay can be invalidated separately from the proprietary title of the car. Unjust enrichment law, rather than contract law, is then used to restore title to the rightful owner.

h) Tort law

Torts, sometimes called delicts, are civil wrongs. To have acted tortiously, one must have breached a duty to another person, or infringed some pre-existing legal right. A simple example might be accidentally hitting someone with a cricket ball. Under the law of negligence, the most common form of tort, the injured party could potentially claim compensation for his injuries from the party responsible. The principles of negligence are illustrated by *Donoghue v Stevenson*.[36] A friend of Mrs Donoghue ordered an opaque bottle of ginger beer (intended for the consumption of Mrs Donoghue) in a café in Paisley. Having consumed half of it, Mrs Donoghue poured the remainder into a tumbler. The decomposing remains of a snail floated out. She claimed to have suffered from shock, fell ill with gastroenteritis and sued the manufacturer for carelessly allowing the drink to be contaminated. The House of Lords decided that the manufacturer was liable for Mrs Donoghue's illness. Lord Atkin took a distinctly moral approach, and said,

> The liability for negligence ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay ... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

This became the basis for the four principles of negligence; (1) Mr Stevenson owed Mrs Donoghue a duty of care to provide safe drinks (2) he breached his duty of care (3) the harm would not have occurred but for his breach and (4) his act was the proximate cause, or not too remote a consequence, of her harm.

Another example of tort might be a neighbour making excessively loud noises with machinery on his property. Under a nuisance claim the noise could be stopped. Torts can also involve intentional acts, such as assault, battery or trespass. A better known tort is defamation, which occurs, for example, when a newspaper makes unsupportable allegations that damage a politician's reputation. More infamous are economic torts, which form the basis of labour law in some countries by making trade unions liable for strikes, when statute does not provide immunity.

i) Property law

Property law governs things that people own or can possess. It may be subsumed under two heads – real property and personal property. Real property, equally called 'realty or real estate' refers to ownership of land and things attached to it. Personal property refers to everything else after real property has been deducted. It is therefore residual in character. Examples include movable objects such as computers, cars, jewelry or intangible rights, such as stocks and shares.

A right *in rem* is a right to a specific piece of property, contrasting to a right *in personam* which allows compensation for a loss, but not a particular thing back.

Land law forms the basis for most kinds of property law, and is the most complex. It concerns mortgages, rental agreements, licences, covenants, easements and the statutory systems for land registration. Regulations on the use of personal property fall under intellectual property, company law, trusts and commercial law. An example of a basic case of most property law is *Armory v Delamirie* [1722]. A chimney sweep boy found a jewel encrusted with precious stones. He took it to a goldsmith to have it valued. The goldsmith's apprentice looked at it, sneakily removed the stones, told the boy it was worth three halfpence and that he would buy it. The boy said he would prefer the jewel back, so the apprentice gave it to him, but without the stones. The boy sued the goldsmith for his apprentice's attempt to cheat him. Lord Chief Justice Pratt ruled that even though the boy could not be said to own the jewel, he should be considered the rightful keeper ("finders keeper") until the original owner is found. In fact the apprentice and the boy both had a right of *possession* in the jewel (a technical concept, meaning evidence that something *could* belong to someone), but the boy's possessory interest was considered better, because it could be shown to be first in time. Possession may be nine tenths of the law, but not all.

This case is used to support the view of property in common law jurisdictions, that the person who can show the best claim to a piece of property, against any contesting party, is the owner. By contrast, the classic civil law approach to property, propounded by Friedrich Carl von Savigny, is that it is a right good against the world. Obligations, like

contracts and torts are conceptualised as rights good between individuals. The idea of property raises many further philosophical and political issues. Locke argued that our "lives, liberties and estates" are our property because we own our bodies and mix our labour with our surroundings.

j) Equity and trusts

Equity is a body of rules that developed in England separately from the "common law". The common law was administered by judges. The Lord Chancellor on the other hand, as the King's keeper of conscience, could overrule the judge made law if he thought it equitable to do so. This meant equity came to operate more through principles than rigid rules. For instance, whereas neither the common law nor civil law systems allow people to split the ownership from the control of one piece of property, equity allows this through an arrangement known as a 'trust'. 'Trustees' control property, whereas the 'beneficial' (or 'equitable') ownership of trust property is held by people known as 'beneficiaries'. Trustees owe duties to their beneficiaries to take good care of the entrusted property. In the early case of *Keech v Sandford* [1722] a child had inherited the lease on a market in Romford, London. Mr Sandford was entrusted to look after this property until the child matured. But before then, the lease expired. The landlord had (apparently) told Mr Sandford that he did not want the child to have the renewed lease. Yet the landlord was happy (apparently) to give Mr Sandford the opportunity of the lease instead. Mr Sandford took it. When the child (now Mr Keech) grew up, he sued Mr Sandford for the profit that he had been making by getting the market's lease. Mr Sandford was meant to be trusted, but he put himself in a position of conflict of interest. The Lord Chancellor, Lord King, agreed and ordered Mr Sandford should disgorge his profits. He wrote,

I very well see, if a trustee, on the refusal to renew, might have a lease to himself few trust-estates would be renewed ... This may seem very hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued and not at all relaxed.

Of course, Lord King LC was worried that trustees might exploit opportunities to use trust property for themselves instead of looking after it. Business speculators using trusts had just recently caused a stock market crash. Strict duties for trustees made their way into company law and were applied to directors and chief executive officers. Another example of a trustee's duty might be to invest property wisely or sell it. This is especially the case for pension funds, the most important form of trust, where investors are trustees for people's savings until retirement. But trusts can also be set up for charitable purposes, famous examples being the British Museum or the Rockefeller Foundation.

SELECTED TERMINOLOGY: OLD AND NEW

1- **Action** – Claim
2- **Amicus curiae** – Advocate of the court (lawyer, barrister)
3- **Anton Piller Order** – Search Order
4- **Certiorari, Order of** – Quashing Order
5- **Discovery** – Disclosure
6- **Ex-parte** – Without notice (to the other parties)
7- **Garnishee Order** – Third party debt Order
8- **Guardian ad litem** – Litigation friend
9- **In camera** – In private
10- **In open court** – In public
11- **Inter partes hearing** – hearing with notice or hearing on notice (to other parties)
12- **Interlocutory** – Interim
13- **Interlocutory judgment for damages to be assessed** – Judgment for an amount to be decided by the court
14- **Leave** – Permission
15- **Mandamus, Order of** – Mandatory Order
16- **Mareva injunction (Order of)** – Freezing injunction
17- **Next friend** – Litigation friend
18- **Plaintiff** – Claimant
19- **Pleading** – Statement of case
20- **Statement of claim** – Particulars of claim
21- **Subpoena** – Witness summons
22- **Substituted service** – Alternative service

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REVISION QUESTIONS

1- What are the characteristics of law?
2- Why is law obeyed?
3- Explain the origin/genesis of the Common Law.
4- Name the features/characteristics of the Common Law.
5- Distinguish the Common Law from the Romano-Germanic system of law.
6- How was an action commenced before the Common Law courts?
7- What accounted for the rise of Equity as a branch of law in England?

8- Explain the techniques employed by lawyers and judges to persuade the court to arrive at a given decision in a particular case in England and Anglophone Cameroon.
9- Distinguish between construction and interpretation of statutes in English law.
10- Using any three maxims of Equity explain their relevance today.
11- Distinguish the Common Law from Equity.
12- State two advantages of Equity over the Common Law.
13- Explain the doctrine of Trust and Equity of Redemption.
14- Name two rights and three remedies developed by the courts of Equity which were not available at Common Law and explain them.
15- Distinguish between *ratio decidendi* and *obiter dictum*.
16- Distinguish between original and declaratory precedents.
17- Distinguish between over-ruling, reversal and distinguishing.