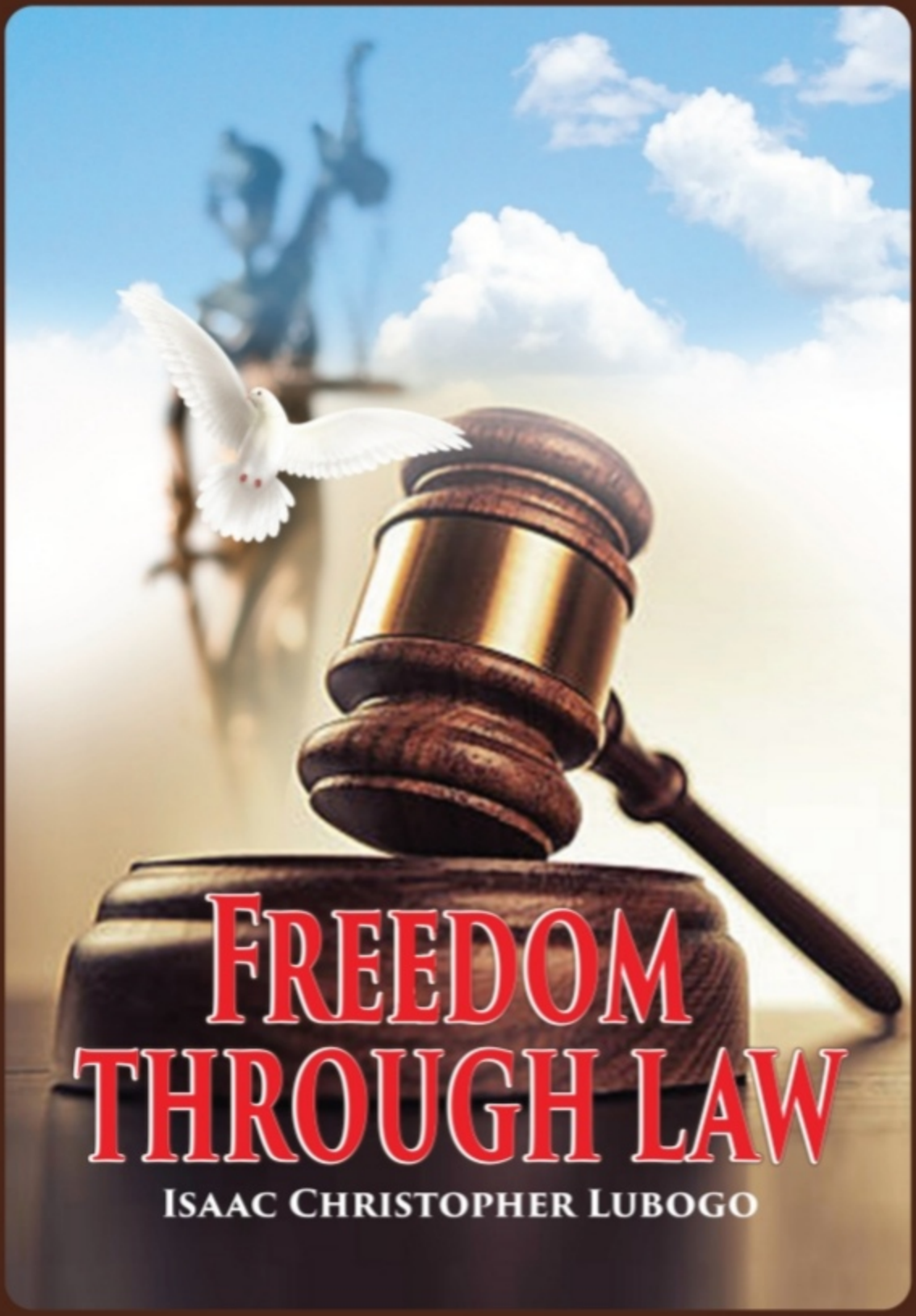
FREEDOM
THROUGH LAW
ISAAC CHRISTOPHER LUBOGO

Freedom through **LAW**

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Dedication

To my "soul and spirit" you sought HIM and the law, HE found you I hope and pray you find the law

About the Book

If the legal system or a particular law is wrong or not good enough, and should be changed: if that is against the law, then the law is an ass – an idiot….said of a law that one thinks is unnecessary or ridiculous. The phrase comes from Charles dickens Novel Oliver twist this opinion was expressed by Mr. Bumble, when he learned from Mr. Brownlow that, under Victorian law, he was responsible for actions carried out by his wife.

His words and action vividly convey the extent of his indignation when he apprised of this legal fact, if that's the eye of the law, the law is a bachelor: and the worst I wish the law is that his eye may be opened by experience. (**Resonate with changing society**)

This is the **very purpose of this book the law should be seen to resonate with changing society not a dogma** for if we fail to do so then to use Shakespeare's exact line by the famous plotter of treachery " the first thing we do, let's kill all the lawyers" this was stated by dick the butcher in Henry VI part II, Act IV, Scene II, LINE 73 Dick the Butcher was a follower of the rebel Jack Cade, who thought that if he disturbed law order, he could become king. Shakespeare meant it as a compliment to attorneys and judges who instill justice in society. It is among Shakespeare's most famous lines, as well as one of his most controversial. Shakespeare may be making a joke when character "Dick the Butcher" suggests one of the ways the band of pretenders to the throne can improve the country is to kill all the lawyers. Dick is a rough character, a killer as evil as his name implies like the other henchmen, and this is his rough solution to his perceived societal problem. The line has been interpreted in different ways: criticism of how lawyers maintain the privilege of the wealthy and powerful; implicit praise of how lawyers(law) emphasis added stand in the way of violent mobs; and criticism of bureaucracy and perversions of the rule of law under THE NAME OF DOGMA

SCHOLARY REMARKS

"In future decades and centuries, the law, rather than religion, will ensure humanity survives"
– Mitchell Landrigan, Faculty of Law, University of Technology Sydney, Alternative Law Journal

Contents

Acronyms

AD	After The Death Of Christ
AG	Attorney General
BC	Before The Death Of Christ
CARICOM	Caribbean Community
CEHURD	Centre of Health Human Rights & Development
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CLEP	Commission on the Legal Empowerment of the Poor
OECS	Organization Of Eastern Caribbean States.
ECHR	European Court of Human Rights
HRNU	Human Rights Network Uganda
ICCPR	International Covenant on Civil and Political rights
IACHR	Inter-American Convention on Human Rights
ECHR	European Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
JSIP	Judiciary Strategic Investment Plan
JLOS	Justice Law and Order Sector
LASPNET	Legal Aid Service Providers Network
NGO	Non-Governmental Organization
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
WLCT	Women's Legal Center Trust
IPPR	The Institute of Public Policy Research
UDHR	Universal Declaration of Human Right

CHAPTER ONE

The Theory Of Law

Law might be understood as *a* set of rules which are generally obeyed and enforced within a politically organized society[1].

In other words, law is a *body of rules for the guidance of human conduct which are imposed upon and enforced among the members of a given state*.

Philosophers sometimes find the justification for these rules and authority in the idea of a social contract into which people have entered with their respective governments. Law is a set of rules and regulations of the social contract, and those rules are enforced by political institutions, which we refer to as the state or government.

In this theory, the idea of law also includes the notion of **enforcement** of the rules with **punishments** (sanctions) which follow from the disobedience of rules.

Why social contract? Philosophers regard the human in his original state as someone living without rules. *This means:*

- Each individual is only a slave to desire and self-interest.
- Everyone does as he pleases.
- Life is savage and short.
- This means that, without laws people keep on destroying each other. But reason leads humankind to realise that it is in its self-interest not to sustain such a lifestyle.
- Therefore people decide to enter into a social contract (or agreement) with each other and to put in place an institution (government) to oversee the enforcement.
- According to this agreement each person gives up his or her unlimited freedom in order to make peaceful co-existence possible.
- Fear of own destruction makes it possible for each individual to accept the authority of the ruler (or state).
- The ruler (government or state) lays down legal rules which the citizens must follow, because they have agreed to that authority and have given over their freedom to the government.

1 Introducing the Law- Glanville Williams 3rd Edition

ORIGIN OF LAW

The definition and meaning of law is one topic that has attracted significant jurisprudential and scholarly ink with an understanding that the law has been from the beginning of time, it is only conventional that the different taints and ideas of persons through ages would be affected by the time they were born and lived in as well as the different societies within which they grew and came into consciousness.[2] As Thurman Arnold writes, law can never be defined with equal obviousness, however, it should be said that adherence of the legal institutions must never give up the struggle to define law.[3]

Even though the definition of law has been a long term debate with many scholars and jurisprudential authors asserting that there is no clear definition due to many criticisms faced by their definitions at times due to rigidity and shallow nature, E.J Fitzgerald argues that defining law could not have been necessary if not for the need to clarify some legal concepts. According to him, if law is not defined, how would we determine whether international law is law or not. His idea is not and can never be opposed to some extent; but that being the case; one could ask the requirements of a legally acceptable definition of law given the increasing neglect of the existing definitions. Was this truly answered by Freeman when he said that; it includes what is generally accepted as proper with in this sphere; excludes what is universally regarded as not being law.[4] But based on the hitches faced by these definitions, is there need to define law? Is there any importance attached to the definition of law? Because a layman also understands law and can explain it in his or her own language. Is this the reason why law has become a dogma due to unclear definition and understanding of the law?

In an attempt to demystify the meaning of law, many philosophers and jurisprudential authors came up with their distinguished definitions of law. Plato and Aristotle described law as "An Embodiment of Reason whether in the individual or the community." These philosophers were behind the natural law theory where they put forward a view that law was about what the conscience tells you to do.[5] To Thomas Aquinas another philosopher of the same school of thought "Is an ordinance of reason for the common good, made by him who has care of the community."[6] The definitions of these philosophers lies on the notion of human conscience and reasoning to result in valid judgment and is premised on a normative nature. But their definition creates uncertainty that people have different morals based on societal influence and characters.

2 Okezi, Uwede- Meshack: A Critical enumeration of the definitions of law by various writers and Evaluation of the place of law in Society. School of Law and Security Studies. Babcock University.
3 T. Arnold, The Symbols of Government (1935) p.35.
4 M.D.A Freeman, Lloyds Introduction to jurisprudence 8th Edition 2008 London, Sweet & Maxwell.
5 Plato. Greek Philosopher born 427 BC and Aristotle Greek Philosopher born 304 BC.
6 Summa Theologiae (Summery of Theology) Question 90, Art 4.

The Oxford professor of Jurisprudence HLA Harts defined law as a system of rules, a union of primary and secondary rules. He had a positive analysis and understanding of the law. The problem with his definition was particularly on sanction for some laws are not obeyed because they have sanctions but rather the general perception that it is right and ought to be obeyed.[7] To John Austin; it is a rule laid down for the guidance of an intelligent being by an intelligent being with having power over him. In other words, law is a command given by a sovereign and carries a sanction to his subjects. His definition carries three elements; command of a sovereign and it has a sanction. His law definitions could best suit in the monarchical error where kings were the sovereign but can't fit in the geographical status of the modern spheres leaving question marks around his definition.

As time went on, a number of great thinkers attempted to provide a valid and solid definition of law. Among these was Justice Oliver. W. Holmes an American Judge. His ideas were a collection under legal realism. He opined that law is the prophecies of what the courts would do.[8] Justice Browne Wilkinson an English judge defined the law as the sum of the influences that determine decisions in courts of Justice. These realists maintained that the law can only be properly so called after that it has been interpreted and applied in the courts of justice obviously putting law at the mercy of judge's interpretation as to its real nature.

But there definition would bring about uncertainty as to law rather than a general standard. This means that one judge from a different background entirely would most likely not interpret a law in the same way another judge would and so the courts as a result of this inconsistency would not be able to give a precise meaning as to what law is in this context.

While attempting to define law, Kenneth Jiri puts forward for key arguments he bases on. One is that; law is a social science; it comes into force after being validated; it deals with the concerns that have arisen from society and lastly; it imposes sanctions whether express or implied. His analysis owns value. According to Macmillan English Dictionary, social means relating to society and to people's lives in general.[9] He asserts that law deals with issues in the society; It arises out of concerns from society; The people decide to come up with rules and regulations to govern their behavior in the course of their interactions. His other idea is that it comes into force after being validated and basically its validity is determined by the presence of higher norms say as the Constitution. He also unleashes, the idea that law concerns the concerns that have arisen out of society in other words what society demands or desires at the time and lastly it imposes sanctions whether express or implied. Ideally, I find value in his attempts to define law.

7 The Concept of Law, 1961.
8 The Path of the Law in Collected Papers, 1920.
9 Macmillan English Dictionary for advanced learners 2nd Edition p. 1417.

Blackstone said that law in its most general and comprehensive sense is that rule of action which is prescribed by some superior and which the inferior is bound to obey.[10] He defined civil law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[11] A clear analysis of his attempt to define law puts forward two concepts. One is of superiority and second is command. His definition is in no doubt an exclusion of international law and constitutional law and all laws adopted by people of a country. Why? His definition emphasizes that law is set and given by a superior to an inferior or by a sovereign to a person in a state of subjection. Yet in democratic countries the Constitutions unveil the citizens as the sovereign.[12]

Perhaps, Blackstone's definition was for this reason denied audience in the view of its inadequateness. When Austin said it's a command; is it really? Austin himself found it difficult to fit his definition to laws explaining the import of existing positive laws and the laws abrogating or repealing existing positive law.[13]

From the established attempts by the various authors, it seems expressly clear that there is no clear definition of law but rather ideas as to what it constitutes which has remained a nasty experience to society as the great shareholders of law.

In my understanding, I think it would be genuine to say that law denotes different kinds of rules and principles. It means Justice, morality, reason, order and righteous from the view point of society. Law means statutes, Acts, Rules, Regulations and Ordinances from point of view of legislature. It means Rules of Court, Decrees, Judgment, Orders of Courts and Injections from the point of view of Judges. Generally it connotes to justice, morality, regulations, orders, ordinances, and statutes, orders of courts, injunctions, torts, jurisprudence and legal theory.

In that context law differs from region to region, society to society and in that sense, having a complete definition of law is a challenge and can't make sense. There cannot be a conclusive definition of the law. My argument is embedded in the various ideologies and theories about law and these ideologies have been key in influencing the understanding of the Phenomenon and they end up giving various opinions.

The laws of many countries are heavily influenced by either the English Common law or the French Civil law.[14]In addition to German Civil law, Scandinavian law, and Socialist law prevail in

10 1 Blackstone, Commentaries, 38.
11 1 Blackstone, Commentaries, 44.
12 Clark, Practical Jurisprudence, 134, 1174, 186: International Law, 17: Pollock, Oxford, Lectures,19.
13 Hugh Evander Willis. A definition of law. Virginia Law Review Vol.12, No.3. Jan 1926. Pp. 203-214. Virginia Law Review.
14 In a study of civil procedures in 109 countries, Djankers et al, [2002a] identity 42 countries in the English Common Law tradition and 40 in the French Civil law tradition.

parts of the world. The common law has its origin from England from where it found its way through other colonies during the conquest and colonization period. It spread to countries like United States, Australia, Canada and many countries of Africa and Asia. Edward L. Glassor notes that the civil law tradition has its roots in the Roman law. Though it was lost during the Dark Ages, it was later rediscovered by the Catholic Church in the eleventh century and adopted by several continental states including France. Napoleon adopted the civil laws codified them in 1804 and later exported and adopted by other European countries like Spain through conquest. It was as well adopted in Latin America and parts of Africa and Asia.[15]

The origin of law is a long literature journey traced from the Old Testament. God gave the law to a particular community-Israel-for a particular place. Its regulations included not only criminal and civil law, but also requirements for their worship. [16]This law was given to Moses and came to be known as the Mosaic Law. This was found in the first five books of the Bible. The Old Testament dates back to 1280 BC and takes the form of moral imperatives as recommendations for good society. In Ancient Egypt, law dates from as far as 3000BC and was based on the concept of Ma'at. One of its characters was rhetorical speech, social equality, tradition and impartiality.[17]

By this time, there were no codifications for the law. In the 22nd Century BC, Ur-Nammu who was a Sumerian ruler formulated the first law code. This code had its own features. It was characterized by casuistic statements ("if…then…"). Around 1760 BC, King Hammurabi further developed what came to be known as the Babylonian law. After having it codified and inscribed in stone, King Hammurabi brought the law to the notice of the people. This was through placing copies of this law code throughout the kingdom of Babylon as Stelae. This came to be known as the Codex Hammurabi. [18]

For Ancient Greek no word for law as an abstract existed. Their small Greek city-state, ancient Athens, from about the 8th Century BC was the first society to be based on broad inclusion of its citizenry, excluding women and the slave class. Important to note is that this city-state had no legal science or single word for law. It basically relied on the three way distinction between divine law (Themis), human decree (nomos) and custom (dike). An outstanding example of early law making in Greece was by Solon. He was one of the seven wise men of Greece who lived between C.630-560BC and granted the authority to legislate in order to assist Athens in overcoming its social and economic crisis.

15 Edward L. Glasser and Andrei Shleifer. Legal Origin.
16 Skeel, David A, Jr and Longman, Tremper, "The Mosaic Law in Christian Perspective" (2011). Faculty Scholarship at Penn Law.367.
17 Theodorides. "Law" Encyclopedia of the Archaeology of Ancient Egypt.
18 Kelly, A short history of Western Legal Theory 5-6.

He dominated the Athenian politics and became the citys chief magistrate in the early years of the 6th Century. His reforms were designed to restore the bond between rulers and the ruled. His idea was that people needed to be consulted in a popular assembly and he ended up creating a council of four Hundred to represent the ordinary citizens and initiated reforms in many other areas of law such as debt relief and taxes. [19]These lasted for long after the end of the Solonian Constitution a Constitution created by him.

It's the Greek law that heavily influenced the Roman law but its detailed rules were developed by professional jurists and were highly sophisticated.[20] In the centuries that came after filled with the rise and decline of the Roman Empire, law was adopted to cope with the changing social situations and underwent major codification under Theodosius and Justinian 1.[21] The first law to be adopted was the law of **"The Twelve Tablets."** It was the earliest attempt to create a code of law by the Romans. In the midst of a perennial struggle for legal and social protection and civil rights between the privileged class (Patricians) and the common people (plebians), a commission of ten men known as Decemuiri was appointed between Ca.455 BC to draw up the Code of Law which would be binding on both parties and which the magistrates would have to enforce.

Long before the Roman Republic was established in 509 BCE, the Romans lived by laws developed through centuries of customs. This customary law (ius, in Latin) was handed down through generations and was considered by the Romans to be an inherited aspect of their society as it had evolved from its earliest days. The notion that it derived from their customs implied that it was only applicable to the Roman citizens and was thus ius civile or civil law.

During the periods of social unrests, some Romans felt that Legal decisions were being arbitrarily decided. A push was made to write down the law in order to better anticipate how decisions would be made. Thus a committee of ten men called the decemuirs was established in 451BCE to write down the law for the first time. This law was produced in 449 and came to be the Twelve Tablets (Lex Duodecim Tabulanum, C. 450BC) it documented the centuries old customary laws and became the foundation of Roman law and became the first codification of laws in the Roman Empire.

When law became more complex in the Roman Empire, the rulers found themselves in need of larger group of legal authorities to give order to the system of legal formulas and decisions. During the 3rd Century BCE, a new group of specialists trained in law known as Jurists (Gaius, Ulpian and others) emerged to meet this demand. These jurists did not participate

19 Effecting or designed to effect an improvement.
20 Stein, Roman Law in European History.1.
21 As a legal system, Roman law has affected the development of law worldwide. It also forms the basis for the law codes of most countires of continentalEurope and has played or important role in the creation of the idea of common European culture. (Stein, Roman Law in European History,2, 104-107)

in administration of law but rather focused on interpreting and governing formal opinions about the law. There work and ideas elevated the Roman law to its apex during the first two and a half centuries EC, which is referred to as the classical period of Roman law.

During the reign of the Byzantine Emperor Justinian 1 between 527-565 CE, the Roman Empire was divided into the Western and Eastern or Byzantine Empire. When it collapsed fifty years before he came to power, Justinian ordered a systematic and comprehensive codification of laws. The four resulting books known as Corpus Juris Civilis (Comprising of the Digest, Codex, Institutes and Novellae)

The emperor waged a successful campaign to conquer some of the parts of the Western territories. His war was partly successful and managed to acquire some territories which had been lost to the Germanic invaders, such as Italy, Spain and others. After this, the challenge he faced concerned ruling and controlling these created areas and creating a sense of unity within the Empire. The best way he thought was through law. In this way, Justinian formed a commission of Jurists to compile all existing Roman law into one body which would serve to cover the historical tradition, culture and language of Roman law throughout the empire. This compilation came to be known as the **Corpus Juris Civilis** and consisted of mainly three different original parts: the digest (Digesta), the Code (Codex) and the Institutes (Institutiones).[22] Code (534CE) outlined the actual law of the empire having constitutions, legislation and pronouncements. The Digest (533CE) collected and summarized all the classical jurists writing and opinions on law and justice and the Institutes (535CE) were a smaller work that summarized the Digest as a text book for students of law.

Six hundred years after the collapse of the Western Roman Empire, the scholarly study of Roman law revived, starting in Bologna, the first University in western empire (C.188 AD). The universities taught law students Justinian's civil law, which together with Canon law provided the basis for ius commune, the common law of continental Europe.

The Reception of Roman law in Europe

Between 1100 and 1500 Universities spread all over Europe. The law syllabus: Justinians civil law. At the same time lawyers begun to collect and study church law or canons. Canon law was studied in the Universities alongside civil law. Since the church had jurisdiction over marriage, wills, and lawsuits between clerics, canon law was a separate system.

Civil and Canon law were based on Roman law. So they had much in common and influenced

22 Roman Law. The George Washington University. Jacob Burns Law Library 716 20th Street, NW Washington. DC available at https://lam.gwu.libguides.com/romanlaw.

each other. The scholars known as the glossators followed by the commentators, looked for the correct way to study and interpret the Corpus Juris Civilis. Eventually, Roman law as interpreted by the glossators and commentators, became the basis of a common body of law which is referred ta as the "Common Law" of Europe or the jus commune. The process by which Roman law became the subsidiary law of most of Europe is called the reception of Roman law. England was an exception. There Roman law had some influence but was never accepted.

National Codifications

By the end of the 18th Century, the emergent nation states started creating their own national codes. Justinians Codification was replaced by several codes that sought brevity, accessibility and comprehensiveness while Justinians law books were addressed to an elite, modern codes with the spread of literacy, were partly meant to tell citizens what they must do to comply with the law.

The Napoleonic Code of 1804 came close to fulfilling these aspirations. It presented the law in clear concise and readily understandable language, addressed to the average citizens of France. It exerted an enormous influence in large parts of Western and Southern Europe as well as in Latin America. But unlike the French Code, the German Code, Burgerliches Gesetzbuch (BCG), enacted in 1900, was not written for the layperson it was addressed to the legal profession, giving precedence to precise solutions and predictability of outcomes. Its legal language is rather abstract and complex. BCG did not have any "foreign" non-German terms since it replaced Latin terms by German translations. The BCG model for civil codes spread in many countries, like Switzerland, the Baltic States, Turkey China, Japan, Taiwan and others.

The law as we find it in the different sources cannot be studied as an incoherent and disorderly mass of rules. The Romans started a tradition of classifying the law into different disciplines or branches, but there is no perfect and ideal classification of the law[23].

Obligatory sources of law

The obligatory sources of law are laws and customs. The following section analyses the two sources one by one.

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Laws

In the narrow sense, laws are statues enacted by the parliament and promulgated by the President of the Republic. In the current usage however, the word *law* is used in broader sense including the constitution and regulatory executive acts (acts of the executive power). The term *code* refers to a compilation which attempts to gather and systematically organise regulations on any special subject. Example: the criminal or penal code organises the subject of criminal matters.

Custom

It is also a subordinate source of law. Custom plays a preponderant role in a legal system, and in developing or applying the law, legislators, judges and authors are, as a matter of fact, more or less consciously guided by the opinion and custom of the community. Custom is not the fundamental and primal element of law; it is but one of the elements involved in establishing acceptable solutions. Its status as a source of law is not to be contested.

In general, the custom or customary law is said to be a branch of law which involves practices and usages of people of a given community and which have become socially acceptable norms with a force of law. Such custom must be generally accepted by all the members of the society concerned. Customary law in Africa is both a form and source of law. It can in other words be defined as the native law and custom prevailing in the area of jurisdiction of any African country so far as it is not repugnant or inconsistent with laws, natural justice and equity.
A distinction should be drawn between customary law and culture whereas the latter is narrow in scope and is not ascertained, the former is wider and its operation is well established. During the colonisation, African customs were not given their right place indeed, different court systems existed to cater for indigenous Africans vis-à-vis foreign presiding courts which tried those who were called the civilized people. It latter become necessary to integrate African customs in to the legal systems if justice was to be done to Africans. However, if a traditional custom was to be recognized by the court, then such a custom would first pass the repugnancy test (that of not being inconsistent to modern laws[24].

South African customs were in the eyes of colonial masters repugnant and therefore would

24 Principles Of Equity and Trusts 2nd edition- Samantha Hepburn

not be given cognisance. Most legislations therefore provide in as far as African customary law is concerned as follow: "courts in administration of justice shall have due regard to the African customs in so far as such customs are not repugnant to natural justice, morality and good conscience and not in conflict with written law". For this reason, most African customs were disqualified as being repugnant. It should be noted however that the test of repugnancy which was applied to traditional customs was the European test, and as such, it could not satisfactorily fit the requirements of the traditional society and values attached to these customs. In post-independence African societies customs remain a source of law. Where there is no applicable law, the judge is to rule on the basis of customary law.

Custom is said to be *secundum legem* when the written law expressly refers to it. It is *praeter legem* when it comes to fill in the vacuum in written law. It is finally *contra legem* when it is inconsistent with the law. However law and customs are the only sources of law (e.g. creating a legal rule) with binding force. The judge is bound by a legal or customary solution when he has to rule on a litigation brought before him. That is why laws and customs are said to be in Romano-Germanic legal systems primary sources of law or obligatory sources of law. Jurisprudence, doctrine, general principles of law and equity are auxiliary sources of law.

The distinction between the different branches of the law is sometimes quite artificial. Authors also differ considerably among themselves as to whether exactly some divisions of law fit into the whole classification. But any classification of law at least has the advantage that it provides an overview of the different divisions or areas of law. To a large extent it also shows how the law fits together and how it functions. The most important classification of law that we prefer is the division into public law and private law. This is to say that all legal rules are either of public law or of private law. Domestic law is the positive law applicable within the territory of a country. International law is basically the law regulating international relationships; those are relationships between a State and another State).

I would be doing an immeasurable disservice if I don't classify the different types of law around the world and their applicability not that it is any discredit to any of us to be one of the common people of a single government. It is indeed the greatest privilege that any man can have to be defined by their own.

All the countries of the world do not have the same laws. Each country has its own laws applicable all over its territory. However, domestic legal systems may be more interrelated. This is due to some factors such as history, politics, etc. Some criteria are utilized to divide legal systems of the world into "families", such as the similarities of legal techniques, the

hierarchy of sources of law. We have the Romano-Germanic legal system, the Common-legal system and other small systems.

Romano-Germanic legal system

This system comprises all countries of Continental Europe and their former colonies, such as France, Belgium, Italy, Spain, Portugal, German, etc. this legal system has been developed on the basis of the law of the former Roman Empire, it is also referred to as *Civil Law System*. Though each of these countries has its own laws, they all have in common same techniques, same vocabularies, and same hierarchy of sources of law the first being the law. Laws (statutes) are considered to be a main source of law.[25]

The Romano-Germanic legal group includes those countries in which legal science has developed on the basis of Roman *ius civile*. Here the rules of law are conceived as rules of conduct intimately linked to ideas of justice and morality. To ascertain and formulate those rules falls principally to legal scholars who, absorbed by this task of enunciating the doctrine on an aspect of the law, are some what less interested in its actual administration and practical application, these matters are the responsibility of the administration and legal practitioners.

Another feature of this family is that the law has evolved, primarily for historical reasons, as an essentially private law, as means of regulating the private relationships between individual citizens; other branches of law were developed later, but less perfectly, according to the principles of the civil law which today still remains the main branch of legal science. Since the nineteenth century, a distinctive feature of the family has been the fact that its various member countries have attached special importance to enacted legislation in the form of "codes".

The Romano-Germanic family of laws originated in Europe. It was formed by the scholarly efforts of the European universities which, from the 12th century and on the basis of the compilations of the Emperor Justinian (AD 483-565), evolved and developed a juridical science common to all and adapted to the conditions of the modern world. The term Romano-Germanic is selected to acknowledge the joint effort of the universities of both Latin and Germanic countries. Through colonization by European nations, the Romano Germanic family has conquered vast territories where the legal systems either belong or are related to this family. The phenomenon of voluntary reception has produced the same result in other

25 The History of Law, Compendium of traditional legal history- William McBorough Phd and Dr. Sonia Thatcher Msc University of Yale.

countries which were not colonized, but where the need for modernization, or the desire to westernise, has led to the penetration of European ideas, etc.

Common law.

A second family is that of the common law, including the law of England and those laws modeled on English law. The common law altogether different in its characteristics from the Romano Germanic family, was formed primarily by judges who had to resolve specific disputes. Today, it still bears striking traces of its origins. Common law originally meant the common law of England as opposed to local customary laws. England acquired a common law at an early date because it had a strong centralized monarchy before most other parts of Europe. In the 12th Century, under Henry II (1154-1189 AD) the royal courts extended their jurisdiction at the express of local and feudal courts. By the time that Roman law was received in other countries from about 1400 on words, the common law based on precedents and created by courts was well established to be displaced. The common law of English speaking countries developed for many centuries without codes and without university-trained lawyers. Even today common law systems rely much less on codes and on theory than do civil law systems. The common law of England was later spread to other countries through conquest. These were United States, Australia, New Zealand, Singapore, and Malaysia, large parts of Africa, India, Pakistan and South East Asia.

Important to note is that the countries experiencing the French Civil and English common law operate in a very different way. Civil laws rally behind legal codes, written records and professional judges. On the other side, common law rallies behind lay judges, broader legal principles and oral arguments.

The common law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future. It is then much less abstract than the characteristic legal rule of the Romano Germanic family. Matters relating to administration of justice, procedure, evidence and execution of judgements have, for common law lawyers, an importance equal, or even superior, to substantive legal rules because, historically, their immediate preoccupation has been to re-establish peace rather than articulate a moral basis for the social order.

The origins of the common law are linked to royal power. It was developed as a system in those cases where the peace of the English kingdom was threatened, or when some other important consideration required, or satisfied, the intervention of royal power. It seems,

essentially, to be a public law, for contestations between private individuals did not fall within the purview of the common law courts save to the extent that they involved the interest of the crown or kingdom. And as with the Romano Germanic family, so too the common law has experienced a considerable expansion throughout the world, and for the same reasons: colonization or reception[26].

NB: In espousing common law one should note that It doesn't stand alone, its moves hand in hand with equity and its principles as I will elucidate below.

The period from the Norman invasion of 1066 to the reign of Henry III in the thirteen's century witnessed the inception and growth of common law[iii] The backward judicial policy of the common law courts received statutory approval in the Provisions of Oxford 1258 which provided that power of the chancery to issue a new writ was subject to approval of the king and his council. This hindered litigants from filing their plaints. The Statute of Westminister II, 1258 tried to rectify the situation by giving power to the chancery to modify existing writs in order to cater for the new ones.[iv] Common law judges who assumed jurisdiction to decide on the validity of the writs frustrated the statute where they cancelled any writ which didn't fall into the existing writs creating more injustice to litigants. As a result many injuries could not be addressed and where common law remedies were awarded, they were inadequate. For those excluded from common law or simply disappointed or frustrated by it, the obvious avenue was to petition the King for justice. Petitions came to be addressed by the chancellor directly who was the keeper of the Great seal of England.[v]In the Medieval period, the power of the chancery court to grant reliefs was based on the King's prerogative. Jurisdiction was based on common law in a more liberal way to achieve justice which showed the equitable side of the chancellor. It is from the English side of chancery that modern equity emerged in the late Middle Ages.[vi]

Prior to the Seventeenth Century, chancery jurisdiction tended to be elastic, vague and unclear due to reasons that reports of decisions in relation to equity were very few and irregular thus affecting the development of decisions based on precedent. Secondly, majority of chancellors being non lawyers exercised equity jurisdiction based on principles of conscience and natural justice. In middle of the Seventeenth's century, chancery jurisdiction lost its flexibility and adopted the common law system of precedent owing to facts that principles on which equity was then based were very vague and that common law judges later presided over chancery and influenced the adoption of the precedent system.[vii]

26 The History of Law, Compendium of traditional legal history- William McBorough Phd and Dr. Sonia Thatcher Msc University of Yale.

In terms of the relationship between equity and common law, a few illustrations will demonstrate how courts resolved conflicts between common law and rules of equity in the adjudication of disputes.[viii]

The dispute between common law and the chancery 1613 to 1616 resulted from the intensified rivalry between the two. This was largely because of the chancery's power to issue the common injunction to restrain the enforcement of the of common law judgments. The decisive stage arose when Sir Edmund Coke became the Chief Justice of the King's Bench Division of the High court, he was totally opposed to chancery jurisdiction. He clashed with Lord Ellesmere in the ***Earl Oxford's case***[ix] the dispute was where he contended that on grounds of equity he had power to set aside common law decisions. Sir Edmund Coke however, argued that common law must take precedent over equity. The dispute settled in favor of equity by James I and it was established that the chancery could set aside common law where they were against conscience so that when equity in law came into conflict equity should prevail which rule remains a circuit breaker between the law and equity today.[x] In the mentioned case, Lord Ellesmere expressed his views on chancery, the chancellor and the role of equity,

*"**The cause why there is a chancery is, for that men's actions are so diverse and infinite, that it is impossible to make any general law which may aptly meet with every particular act and not fail in the circumstances, The office of the chancellor is to correct men's consciences for fraud, breach of trusts, wrongs and oppressions of what nature so ever they be, and to soften and mollify the extremity of the law." [xi]***

That seemingly unlimited power drew criticism for its uncertainty and apparently arbitrary nature of the chancellor's jurisdiction. The most famous being John Selden's aphorism where he stated that,

*"**Equity is a roguish thing, for law we have a measure, know what to trust to, equity is according to the conscience of him that is the chancellor and that it is large or narrower, so is equity . Tis all one as if they should make the standard for the measure we call a foot, a chancellors foot, what an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent, tis the same thing in the chancellor's conscience***."

The decision in ***Earl Oxford's case*** culminated into the chancery court jurisdiction which become more intensive and attracted a lot of litigants thus become overburdened. Lord Nottingham who is believed to be the father of equity, in 1673 firmly believed that equity should have clearly defined principles and needed to follow the doctrine of precedent. With time courts of equity were faced with a number of problems such as court officials become more corrupt, incompetent there by purporting to delays thus the call for reforms of the

chancery jurisdiction and procedure. Reforms included; common law courts applied equity rules to cases brought before them whenever those rules conflicted with common law rules. **Common Law Procedure Acts of 1852, 1854** and 1860 gave the common law courts power to exercise certain jurisdiction which was originally reserved for the chancery. The **Chancery Amendment Act 1852** gave the courts of chancery power to exercise certain common law powers. **Lord Cairn Act 1858** empowered the court in cases of contracts and torts to award damages in addition to injunctions, specific performance among others.[xii] These reforms however did not achieve much in dealing with the shortcomings of the dual system of administering justice. Thus the Royal Commission on administration of justice recommended the fusion of this administration by consolidating of all superior courts of law of and equity.

Judicature Acts 1873, 1875, provided that where there was conflict between the rules of equity and those of common law, equity should prevail. Under the judicature system the administration of these bodies of law was brought under control of one court. It is crucial to remember that it is only administration of these principles which is fused not the principles themselves. The main features of the judicature system were that all branches of court have power to administer equitable remedies, equitable defenses can be pleaded in all branches of the court and appropriate reliefs given, all branches of the court must recognize equitable rights, titles and interests, and the common injunction was also abolished.

Equity arose and developed in its early days as a reaction to the rigors and inadequacies of common law[xiii] and to provide remedies where common law was unable to avail to the litigants. Equity is said to have been divided into three categories namely;

Exclusive jurisdiction, this covered situations in which rights could be recognized and enforced at common law by common law courts but due to the inflexibility of those courts, such rights were neither recognized nor protected thus the chancery court stepped in to protect and recognize these rights. These rights included aspects which depended on the subject matter for example trusts and also depended on the type of remedy.

Concurrent jurisdiction, this involved the creation of new remedies. The exercise of this jurisdiction depended on rights which common law recognized and enforced, which were inadequately enforced thus equity intervened to make them adequate. Auxiliary jurisdiction, on the other hand involved creation of new procedures. This was exercised in order to assist the defective procedure at common law. This led to new procedures including the administration of interrogatories, discovery of documents and perpetuation of testimony.

The relationship between Common law and Equity, in relation to the introduction of the Judicature Act style legislation.

Even though the Judicature Acts have now unified the administration of law and equity the two bodies of the law and equity the bodies of law remain separate. There are, however statements by great judges to the effect of the law and equity are fused for example in ***Walsh vs. Lonsdale*** [xiv] where Sir George Jessel said, as early as 1881; "**there are not two estates as there were formerly, one estate in common law by reason of payment of rent year to year, and an estate in equity under the agreement. There is only one court, and equity rules prevail in it."** [xv] Even with the above assertion, it is important to be clear as to what is meant by the claim that law and equity are fused. If it means that there is now no difference between legal rights and remedies and equitable rights and remedies, it cannot be supported [xvi]and to properly understand the nature of modern equity it is essential to comprehend the relationship between equity and the law before their administration under one court. There were a number of major features of that relationship;

Common law courts would not recognize equitable rights, titles and interests. Thus, at common law the trustee and not the beneficiary were regarded as the owner of the trust property. This meant, for instance, that no action could be brought at common law for breach of purely equitable obligation. In ***Castlereagh vs. Davies[xvii]*** , a company brought an action against one of its directors seeking damages for breach of his duty to act in the interests of the company. Asprey and Jacobs JJ rejected the company's claim saying, "We do not think that . . . all those principles which must govern the conduct of directors as fiduciaries which have been developed in equity have become in some manner transposed into the common law so that there is at common law an action for their breach .... The courts of equity having developed the principles of duty enforce those principles by their own remedies." But there were exemptions to this rule; common law recognized the validity of devises of equitable interests for example in the case of in ***Pawlett vs. Attorney General***[xviii], a devise of an equity of redemption was upheld. The common law also recognized equitable claims in interpleader cases, for example in the case of ***Gourlay vs. Lindsay[xix]*** and in contracts of sale of land always held the purchaser to be entitled to insist on a conveyance of the equitable as well as the legal title. In some circumstances courts of common law have recognized trusts in particular where leases have been held on trust. Common law courts also recognized equitable, rights and interests where the subject matter of a claim was in tort or contract such as breach of contract.

Equity had no power to award damage. The court of chancery had power to award monetary remedies by way of resitutionary relief but not damages as they were known at law. In

England a power to award damages in addition to the remedies of injunction and specific performance was conferred on chancery by Lord Cairn's Act in 1858[xx] this right to award damages was not unlimited. Some entitlement to one of the two equitable remedies had to be shown before damages could be awarded. However it was ultimately held that a claim for injunction or specific performance which could be justified on the original pleadings was sufficient, even though the claim might be defeated by some subsequent intervening factor: In ***King vs. Poggioli[xxi],*** a purchaser of rural land sought specific performance against the vendor and damages for the vendor's failure to complete on a specified day as stipulated. However, the purchaser had refused to tender the full purchase price and retained a sum sufficient to cover the cost of stock lost through lack of grazing. The High Court held that specific performance was not available as the purchaser could not show that he was at all times ready and willing to fulfill his part of the contract and, as he was not entitled to specific performance, he could not get damages under s 9 of the *Equity Act* 1901.

Common law courts lacked the power to give interlocutory relief. Chancery had inherent power to order remedies of discovery and interrogatories, to award interim injunctions and to appoint receivers. The common law courts lacked these powers although a power to order discovery and interrogatories was conferred on the common law courts in England by Section 50 and 51 of the Common Law Procedure Act 1854.

Courts of common law had no power to award specific performance, injunctions. The only exceptions to this were, first a power to award injunctions in addition to damages given to common law courts by section 48 to 51 of the Common Law Procedure Act 1854. No power existed to transfer cases from one jurisdiction to another. There was real risk, particularly in cases concerning mistake or breach of contract, of commercial proceedings in the wrong court. It was not until 1854 in England and 1857 in New South Wales that power to recognize equitable defenses was conferred on the courts of common law. However the courts of common law had no power to impose conditional relief. They could only find for or against a party. As a result the right to raise equitable defenses at law was restricted to cases in which a court of equity would have granted an absolute perpetual and unconditional injunction on the pleading raised.

The modern development of the law of estoppel, especially promissory estoppel and proprietary estoppel has been achieved without enquiring whether the doctrines are doctrines of equity, or of law or of both.[xxii] The doctrine of promissory estoppel works negatively that is giving protection to the party who relied on the promise but not to give rise to a new cause of action, but proprietary estoppel operates positively and is capable of creating new rights.

Such rights though are recognized in equity only. Proprietary estoppel must therefore be regarded as a development of equity and other estoppels as being based on common law or equity thus a relationship is created between the two.

In its beginnings equity grew from common law, it has never existed independently of it. Equity is further a modification of and hence a supplement to common law. Equity came to fulfill the law.[xxiii] In some historical circumstances it has appeared to rival common law as seen above. Today, however as a result of given developments, Judicature acts 1873 to 1875 in particular; Law and Equity stand not in rivalry but as an integral part of one system.

Relations between Romano Germanic family and Common law family[27]

Over the centuries, there have been numerous contracts between countries of the Romano Germanic family and those of the Common law; and the two families have tended, particularly in recent years, to draw closer together. In both, the law has undergone the influence of Christian morality and, since the Renaissance, philosophical teachings have given prominence to individualism, liberalism, and personal rights. Henceforth, at least certain purposes, the reconciliation enables to speak of one great family of Western law.

The Common law retains, to be sure, its own particular structure, very different from that of the Romano Germanic system, but the methods employed in each are not wholly dissimilar; above all, the formulation of the legal rule tends more and more to be conceived in Common law countries as it is in the countries of the Romano Germanic family. As to the substance of the law, a shared vision of Justine has often produced very similar answers to common problems in both sets of countries.

The inclination to speak of a family of Western law is all the stronger when one considers that the laws of some states cannot be annexed to either family, because they embody both Romano Germanic and Common law elements. The laws of Scotland, Israel, Southern Africa, the Province of Quebec and the Philippines would fall into this group. And lastly, but from another point of view, the Romano Germanic and Common law families are included in the same deliberately ignominious term of "capitalist" or "bourgeois laws" by jurists of the socialist camp, made up of the Soviet Union and those countries that have used its law as a model.

The difference between the Common law and Romano Germanic (civil law) systems[28]

The common law and civil law systems have developed similarities but their fundamental approaches to the law are substantially different. The civil law system begins with an accepted set of principles. These principles are set out in the civil code. Individual cases are then

27 The History of Law, Compendium of traditional legal history- William McBorough Phd and Dr. Sonia Thatcher Msc University of Yale.

28 Dickson, B, Introduction to French Law, London, Pitman Publishing, 1994.

decided in accordance with theses basic tenets. In contrast, the common law approach is to scrutinize the judgements of previous cases and extract general principles to be applied to particular problems at hand.

This difference in approach helps to explain the different manner in which the two systems regard the doctrine of *stare decisis*. Owing to the doctrine of *stare decisis*, judges in a common law system are bound to follow precedent cases, decided by judges of higher courts, given a similar fact situation in the precedent case and the case at hand. In contrast, however, in the civil law system, the codified principles, and not the cases, are supreme.

As a result, theoretically at least, judges are not bound by previous decisions and may differ in their interpretation of the civil code. In deciding cases, a civil law judge is essentially applying the various codified principles to the cases at hand. In doing so, he must, of course, interpret those principles. But he need not rely on prior interpretation in a precedent case. Instead, he can choose to conduct his interpretation in accordance with the dictates of justice. He may even consider that an instant case is an exception to a particular codified principle.

Practically speaking, however, civil law judges do not ignore previous cases. There are several reasons for this. First, once given principle, as set out in the civil code, has been given the same interpretation a number of times, a civil law judge would be risking reversal on appeal if he entertained a new analysis in interpreting the same principle. Secondly, judges do, in fact, follow previously decided cases because of the necessity of providing an element of predictability in the law.

It has been said that a major distinction between the two systems is that the civil law system is codified while the common law is not. Fundamentally, the difference between the civil law system and the common law system relates not only to the importance of precedent in the common law system and the relative lack of importance of precedent in the civil law system, but also to the general approach taken by the courts in the two systems.

In a common law system, the courts extract existing principles of law from decisions of previous cases, while in civil law system, the courts look to the civil code to determine a given principle and they then apply the facts of an instant case to that principle. If the code is silent in respect of a given matter, a judge will then attempt to apply general principles contained in the code to the specific fact situation before him.

NB: The common law system however also gave birth to civil law which is rarely mentioned in the types of laws yetb it's a very strong backbone in the legal systems.

What is Civil Law?

The term Civil Law refers to a legal family that organically emerged from the European Continent, starting during the Roman Empire. It was not until the 19th Century, however, that this body of law was assembled, organized, and distributed across the continent. France and Germany are considered to be prime examples of this codification effort. In the 20th century a number of elaborations were made to these laws, producing the Civil Law most know today.

This term for a particular legal family is not to be confused with the use of the term "civil law" to describe the laws and procedures governing a case in controversy between private litigants.

Roman and Other Roots of Civil Law

Corpus Juris Civilis: In the 6th Century, the Roman Emperor Justinian decided to organize and assemble the scattered legislation and legal commentary of the Empire. The Corpus Juris Civilis was the result—a comprehensive reduction of Roman Law to a single, written text. It was divided into basic sections familiar to those with knowledge of today's civil codes: Of Persons (Family Law), Of Things (Property Law), and Of Obligations (Contracts and Torts). In the years following, this comprehensive text spread throughout Europe. During the period between the 11th and 15th Centuries, Roman Law was revived and studied by scholars in Italy, and some customary law was incorporated.

Canon Law of Roman Catholic Church: Beginning in the 12th Century and continuing through the 16th Century, ecclesiastical courts evolved within the Roman Catholic Church. The codes that arose under this legal family dealt with clerical issues, sources of law, marriage, and penal law. The ecclesiastical courts are known for the introduction of methods for documenting proceedings, legal argumentation by the parties, and legal reasoning as the basis for all decisions.

Lex Mercatoria or Law Merchant: The other key development of the medieval period was the various laws arising from commerce between the Italian peninsula and other ports of the Mediterranean Sea. While each city's code varied, Barcelona's Consolata Del Mare was translated into Latin, French, and Italian and spread throughout Europe, and this law became influential in the region.

Scandinavia, British Isles, etc. as distinct: While today's Scandinavia was heavily influenced by the Civil Law of the continent, some scholars would not classify Scandinavian countries as pure Civil Law jurisdictions. For example, their system of legislation does not mirror the codes of the Continental systems.3 The British Isles also developed differently, forming the common ancestor of the American system, or the Common Law. Finally, it should be noted that the Socialist Law of the Cold War Period, while it drew heavily from the Civil Law tradition, was a wholly separate branch as well.

Modern Codification of Civil Law in the 19th Century In the Enlightenment Period,

The belief in the power of reason led scholars to turn to the issue of codification on the

continent. While many countries contributed to the codification process, the leaders were France and Germany, which undertook to synthesize the various bodies of European law described in sub-section A above into a coherent whole.

France: Napoleon Bonaparte spearheaded the development of the modern civil code, and its dissemination in the countries he conquered. In 1800, he appointed four distinguished lawyers. They met approximately 100 times in four years, producing the Code Civil des Francais (a.k.a. the Code Napoléon) in 1804 that consisted of three books and 2000+ articles. The basic structure of the Code Napoléon is as follows: General Principles: Publication, application, and effect; Book I (Arts. 7-515): Status of persons, marriage, divorce, and paternity; Book II (Arts. 516-710): Real and personal property; and Book III (Arts. 711-2281): Contracts, torts, and security Interests.

Germany: In 1873, a German commission was established to bring a uniform civil code to the newly-unified German state. The comprehensive Bugerliches Gesetzgebuch (BGB) was approved in 1896, and it went into effect on January 1, 1900. The basic structure of the BGB is as follows: Book I: General Principles, definitions, prescriptive periods, and classification of legal acts; Book II: Contracts and torts; Book III: Real and Personal Property; Book IV: Family law including marriage; and Book V: Law of succession, wills, etc.6 These codifications of the substantive aspects of Civil Law were later matched with similar efforts in procedural matters, as well substantive and procedural areas of criminal law.

Major Influences, Modifications, and Enhancements in the 20th Century

Austrian Constitutional Court: In 1920, the Austrians introduced onto the Continent a permanent, "centralized" system of judicial review utilizing a specialized Constitutional Court. This centralized system of constitutional review should be contrasted with the American "diffuse" system whereby all courts are empowered to address constitutional issues. This specialized Constitutional Court is commonly considered to be formally outside of the judicial system for reasons that will be explained below.

De-codification: The complexities of 20th life, commerce in particular, have led to what is sometimes referred to as the "decodification" of Civil Law, which has several meanings: 1) proliferation of additional specialized legislation, such as labor codes; 2) delegation of authority to the executive branch; and 3) judge-made law, such as the torts/consumer protection jurisprudence in France and Germany. Summarized another way: The legal science

or positivism that spurred the creation of these codes, which were to cover all conceivable circumstances, gave way to the practicalities of modern life, allowing specialty areas of law to develop outside the traditional mechanism of comprehensive codification.

Council of Europe: The establishment of the Council of Europe (CoE) in 1949 and its accompanying international jurisprudence under the European Convention on Human Rights have had a dramatic influence on the development of human rights law within Member States. The CoE membership spans Europe and the former Soviet Union, and it should not be confused with membership in the European Union despite the considerable geographic overlap between the two distinct multilateral organizations.

European Union: Since 1957, the development of the European Union (EU) and its accompanying supranational legislation and jurisprudence have had an intense effect on the formulation of domestic law within the Member States, which now include all major Western European states based on the Continental legal tradition. Of particular note is the fact that the EU encompasses countries that do not follow the Continental tradition, so the process of developing supranational legislation that they can all agree on has served to further harmonize the various legal traditions in a number of different areas.

Defining Elements of the Civil Law System

To quickly grasp the outlines of the Civil Law system, a common law lawyer should be familiar with some basic concepts, as well as differences in approach to certain issues. These can be broadly defined as follows:

1) Public v. Private Law: A conceptual distinction that shapes the legal architecture of the Civil Law system;

2) Codes and Case-Law: Civil Lawyers look to the code and commentaries more than cases, and the doctrine of stare decisis (case-law precedent) does not per se apply;

3) Legal Education System: Civil Law is an undergraduate discipline that has a very different format from U.S. post-graduate legal education or U.K.-style undergraduate programs; and

4) Legal Profession: Civil law lawyers often choose particular professional focal areas during or at the end of their law school, and they rarely switch professional paths later in their careers.

Other systems[29]

This part covers in summary various sorts of laws such as Muslim law, Hindu law, and Jewish law, Far East laws as well as black African laws.

Muslim, Hindu and Jewish laws

These categories of law are included within the major contemporary legal systems. The attitude of the Muslim, Hindu and Jewish communities about the law is easily understood by a western jurist, even though the definition of law itself in western jurisprudence has always given rise to difficulties and no single definition has so far elicited any general acceptance. One of the fundamental reasons for this lack of agreement is the debate between the proponents, and adversaries of the notion of "natural law". But it is because the idea of natural law exists that we are able to understand the starting premise of these other systems.

In this debate, law is held by some to be no more the body of the rules that are really observed, the application of which is entrusted to the courts. In Muslim countries, in the same way, more attention is given to the model of law linked to the Islamic religion than to local custom (treated as merely administrative measures) and neither of these is thought to possess the full dignity of law.

The same can be said of Jewish law and, in a very different context, Hindu law, then, whether linked to a religion or corresponding to a particular way of thinking about the social order, is not in either case always necessarily observed by private persons or applied by courts. It may nonetheless exert considerable influence on both "righteous" men may endeavour to rule their own lives according to what they consider to be truly the law.

Far East

The situation in the Far East, especially China, is completely different. Here there is no question of studying an ideal law distinct from rules laid down by legislators or simply followed in practice; here the very value of law itself has traditionally been put into question. In the West, and in Islamic and Hindu communities, law is held to be a necessary part of, indeed a basis for, society.

Good social order implies the primacy of law: men must live according to law, and where necessary, be prepared to fight for the supremacy of law; administrative authorities, no less than any other part of society, must act legally; courts must ensure that law is respected. Law, a mirror of justice, is in this conception superior even to equity itself; outside the law, there can only be anarchy, or arbitrariness, chaos or, the rule of force. Law is therefore venerated, the courts ate temples of justice, the judges its oracles.

29 The History of Law, Compendium of traditional legal history- William McBorough Phd and Dr. Sonia Thatcher Msc University of Yale.

Far Eastern countries reject this view. For the Chinese, law is an instrument of arbitrary action rather than the symbol of justice; it is a factor contributing to social disorder rather than to social order. The good citizen must not concern himself with law: he should live in a way which excludes any claim of his rights or any recourse to the justice of courts. The conduct of individuals must, unfailingly, be animated by the search for harmony and peace through methods other than the law; man's first concern should not be to respect the law. Reconciliation is a greater value than justice; mediation must be used to remove conflicts rather than invoking law to resolve them. Laws may exist to serve as a method of intimidation or as a model; but law is not made with a view to being really applied, as in the west. Scorn is reserved for those who aspire to regulate matters according to law or whose preoccupation is its study or application, and who thereby defy convention and accepted proprieties.

Countries of the Far East have, traditionally, held the view that law is only for barbarians. The Chinese communist regime and the Westernization of Japan have not fundamentally changed this conception rooted as it is in their ancient civilizations. In China the communist regime rejected the legal codes drawn up after the fall of imperial rule along Western lines and, after some brief hesitation, then repudiated the Soviet method of building communism. The techniques finally adopted for doing so have given up to the present time a very narrow place to law. Codes on the European model have been instituted in Japan but, generally speaking, the population makes little use of them; people abstain from using the courts and the courts themselves encourage litigants to resort to reconciliation; and new techniques have been developed for applying or removing the need to apply the law.

Black Africa and Malagasy Republic

The preceding observations regarding the Far East apply as well to the Black African countries and the Malagasy Republic (Madagascar). There too, in milieu in which the communitys cohesion prevails over any developed sense of individualism, the principal objective is the maintenance or restoration of harmony rather than respect for law. The Western laws adopted in Africa are often hardly more than a vaneer, the vast majority of the population still lives according to traditional ways which do not comprise what is in the west called law and without heed to what is very often nothing more than an artificially implanted body of rules.

Civil law in other sense refers to the entire system of law that currently applies the most Western European countries, Latin America, countries of the Near East, large parts of Africa, Indonesia and Japan. It is derived from Roman law, and originated in Europe on the basis of the roman *jus civile*, the private law which was applicable to the citizen, and between citizens, within the boundaries of a state in a domestic context. It was also called the *jus quiritum*, as opposed to the *jus gentium*, the law applied internationally, that is, between states.[30]

30 Introducing the Law- Glanville Williams 3rd Edition

I will now come back to the legal system that is most notorious, where most countries find their legal heritage, common law. And perhaps this shall guide on a better understanding of the law in itself and its heritage.

The Norman kings ruled with the help of the most important and powerful men in the land who formed a body known as the Curia Regis (King's Council)[31]. This assembly carried out a number of functions: it acted as a primitive legislature, performed administrative tasks and exercised certain judicial powers. The meetings of the Curia Regis came to be of two types: occasional assemblies attended by the barons and more frequent but smaller meetings of royal officials. These officials began to specialise in certain types of work and departments were formed. This trend eventually led to the development of courts to hear cases of a particular kind. The courts which had emerged by the end of the 13th century became known as the Courts of Common Law and they sat at Westminster. The first to appear was the Court of Exchequer. It dealt with taxation disputes but later extended its jurisdiction to other civil cases.

The Court of Common Pleas was the next court to be established. It heard disputes of a civil nature between one citizen and another. The Court of Kings Bench, the last court to appear, became the most important of the three courts because of its close association with the king. Its jurisdiction included civil and criminal cases and it developed a supervisory function over the activities of inferior courts. The Normans exercised central control by sending representatives of the king from Westminster to all parts of the country to check up on the local administration. At first these royal commissioners performed a number of tasks: they made records of land and wealth, collected taxes and adjudicated in disputes brought before them. Their judicial powers gradually became more important than their other functions. To begin with, these com- missioners (or justices) applied local customary law at the hearings, but in time local customs were replaced by a body of rules applying to the whole country[32].

When they had completed their travels round the country, the justices returned to Westminster where they discussed the customs they had encountered. By a gradual process of sifting these customs, rejecting those which were unreasonable and accepting those which were not, they formed a uniform pattern of law throughout England. Thus, by selecting certain customs and applying them in all future similar cases, the common law of England was created. A civil action at common law was begun with the issue of a writ which was purchased from the offices of the Chancery, a department of the Curia Regis under the control of the Chancellor.

31 The History of Law, Compendium of traditional legal history- William McBorough Phd and Dr. Sonia Thatcher Msc University of Yale.

32 http://www.kent.ac.uk/lawlinks

Different kinds of action were covered by different writs. The procedural rules and type of trial varied with the nature of the writ. It was essential that the correct writ was chosen, otherwise the claimant would not be allowed to proceed with his action.

However, Over a period of time the common law became a very rigid system of law and in many cases it was impossible to obtain justice from the courts. The main defects of the common law were as follows:

The nature of law[33]

The common law failed to keep pace with the needs of an increasingly complex society. The writ system was slow to respond to new types of action. If a suitable writ was not available, an injured party could not obtain a remedy, no matter how just his claim. The writ system was very complicated, but trivial mistakes could defeat a claim. The only remedy available in the common law courts was an award of damages. This was not always a suit- able or adequate remedy. Men of wealth and power could overawe a court, and there were complaints of bribery and intimidation of jurors.

It became the practice of aggrieved citizens to petition the king for assistance. As the volume of petitions increased, the king passed them to the Curia Regis and a committee was set up to hear the petitions. The hearings were presided over by the Chancellor and in time petitions were addressed to him alone. By the 15th century the Chancellor had started to hear petitions on his own and the Court of Chancery was established. The body of rules applied by the court was called equity. The early Chancellors were drawn from the ranks of the clergy and their decisions reflected their ecclesiastical background. They examined the consciences of the parties and then ordered what was fair and just. At first, each Chancellor acted as he thought best. Decisions varied from Chancellor to Chancellor and this resulted in a great deal of uncertainty for petitioners.

Eventually, Chancellors began to follow previous decisions and a large body of fixed rules grew up. The decisions of the Court of Chancery were often at odds with those made in the common law courts. This proved a source of conflict until the start of the 17th century when James I ruled that, in cases of conflict, equity was to prevail. For several centuries the English legal system continued to develop with two distinct sets of rules administered in separate courts. Equity is not a complete system of law. Equitable principles were formulated to remedy specific defects in the common law. They were designed to comple- ment the common law rules and not to replace them. Equity has made an important contribution to the development of English law, particularly in the following areas:

Recognition of new rights*;*

The common law did not recognise the concept of the trust. A trust arises where a settler (S) conveys property to a trustee (T) to hold on trust for a beneficiary (B). The common law treated T as if he were the owner of the property and B's claims were ignored. The Court of Chancery, however, would require

33 http://www.kent.ac.uk/lawlinks

T to act according to his conscience and administer the trust on B's behalf. Thus, equity recognised and enforced the rights of a beneficiary under a trust. The Court of Chancery also came to the aid of borrowers who had mortgaged their property as security for a loan. If the loan was not repaid by the agreed date, the common law position was that the lender (mortgagee) became the owner of the property and the borrower (mortgagor) was still required to pay the outstanding balance. Equity gave the mortgagor the right to pay off the loan and recover his property even though the repayment date had passed. This equitable principle is known as the equity of redemption.

Introduction of new remedies

The new equitable rights were enforced by means of new equitable remedies. In the field of contract law, the Court of Chancery developed such remedies as the injunction, specific performance, rescission and rectification. These remedies were not available as of right like common law remedies: they were discretionary. The Court of Chancery could refuse to grant an equitable remedy if, for example, the claimant had himself acted unfairly.

By the 19th century the administration of justice had reached an unhappy state of affairs and was heavily criticised. The existence of separate courts for the administration of common law and equity meant that someone who wanted help from both the common law and equity had to bring two separate cases in two separate courts. If a person started an action in the wrong court, he could not get a remedy until he brought his case to the right court. The proceedings in the Court of Chancery had become notorious for their length and expense.[34] (Charles Dickens satirised the delays of Chancery in his novel Bleak House.) Comprehensive reform of the many deficiencies of the English legal sys- tem was effected by several statutes in the 19th century culminating in the Judicature Acts 1873–75.

The separate common law courts and Court of Chancery were replaced by a Supreme Court of Judicature which comprised the Court of Appeal and High Court. Every judge was empowered thenceforth to administer both common law and equity in his court. Thus, a claimant seeking a common law and an equitable remedy need only pursue one action in one court. The Acts also confirmed that, where common law and equity conflict, equity should prevail. These reforms did not have the effect of removing the distinction between the two sets of rules: common law and equity are still two separate but complementary systems of law. A judge may draw upon both sets of rules to decide a case. See, for example, the decision of Denning J in the High Trees Case.

34 "Delays of Chancery" Bleak House by Charles Dickens

Legal doctrine as an Origin Of Law

By doctrine we mean legal scholars' opinions on critical questions of law. In the wider sense, doctrine refers to publications of persons deeply involved in the study of law. These are law professors, lawyers, etc. For its part, plays an important role in the creation and the development of law. But, it is only an indirect source of law, as new interpretations and theories proposed by doctrinal legal writers have to be accepted by courts, before they are considered to be really law.
Doctrine serves to better understand the positive law (*de lege lata*), which means those rules applicable in a given society at a precise time. Doctrine serves also to inspire possible law reforms by proposing rules that should be enacted by the legislator (*de lege ferenda*). Moreover, doctrine exercises an important influence even though not a binding source of law. It guides the judge by proposing to him/her reasons of deciding in this or that way. This is called *ratio legis*. On the other hand, doctrine guides the legislator when enacting laws. He can either consult him/her self legal works (publications) of scholars or ask them to participate in the law making process as experts. The doctrine is important not because of its legal authority but because of the authority of its reasoning. The factual authority attached to doctrine relates somehow to the reputation of the scholar him/herself. The more he/she is highly estimated, the more his/her opinion will be of much influence.

The law affects every aspect of our lives; it governs our conduct from the cradle to the grave and its influence even extends from before our birth to after our death. We live in a society which has developed a complex body of rules to control the activities of its members. For a better understanding of the course, some key words need to be defined, the first being law itself. The word "law" is susceptible of several meanings depending on the point of view on which we envisage it. However, some of them are to be examined in this course due to their importance in any study of law. Before we start our study of law as such we will first consider some questions about the nature of law. Law is made for and by people. It is not cast in stone. Neither is it elevated above criticism. The law is constantly being recreated. It is thus not a completed monument from which the student must only lift a veil, but rather an unfinished statue which he must help complete.

Thus, for the proponents of social contract theory such as Thomas Hobbes, law is a set of rules and regulations of the social contract, and those rules are enforced by political institutions, which we refer to as the state or government. In this theory, the idea of law also includes the notion of enforcement of the rules with punishments (sanctions) which follow from the disobedience of rules. Thomas Hobbes, an English writer of the 17th century, regarded the human in his original state as someone living without rules. Each individual is only a slave to

desire and self-interest. Everyone does as he pleases. Life is savage and short. Without laws people keep on destroying each other. But reason leads humankind to realise that it is in its self-interest not to sustain such a lifestyle. Therefore people decide to enter into a social contract (or agreement) with each other. According to this agreement each person gives up his or her unlimited freedom in order to make peaceful co-existence possible. Fear of own destruction makes it possible for each individual to accept the authority of the ruler (or state). The ruler (government or state) lays down legal rules which the citizens must follow, because they have agreed to that authority and have given over their freedom to the government.

According to Shisholm R and Nettheim G (1994: 2-3), law is a body of rules by which both the affairs of a community are organized and the general order and well-being of the community are maintained. Law is a rule of human conduct. What, then, is meant by the term rule? A rule is essentially a directive, something like an order. As such it can be either positive or negative. A positive rule allows certain conduct to be engaged in whilst a negative rule prohibits a certain type of conduct. In summary, the necessity of law in some order of importance can be explained in this way; that life without basic laws prohibiting theft, violence and destruction would be solitary, nasty, brutish and short. This however would be the bare minimum for human existence even if, these basic laws exist. If life is to be orderly, convenient, healthy and wholesome, certain other types of laws are needed. Beyond this, law also facilitates peaceful and efficient change in community.[35]

John Locke, another English writer of the 17th century, takes a more optimistic view of human kind in its original condition as his starting point. In his view humans are governed from the beginning by reason and live good and stable lives. But life still remains uncertain, full of threats and conflicts. Without fixed and generally ascertainable rules which can be applied impartially, conflict cannot be resolved. Therefore, people enter a social contract whereby they submit themselves to the authority of the state. In terms of the contract the state is allowed to make laws and to enforce them.
From these observations the following ideal characteristics of the law may be listed:

- *It consists of a body of rules or regulations facilitating and regulating human interaction;*
- *It orders society and gives certainty;*
- *The rules are applied or interpreted by institutions of state.*

But law should be more than just a series of decrees and rules enforced by a brutal display of state power. It should reflect the shared values of the majority of the population (society). Underlying any legal system is an ideology (value system) which is important to society and

35 Shisholm R and Nettheim G- Province Of The Law 3rd Edition

acts as a unifying force. The following may be part of this ideology: economic values, political values, social values, moral values, etc. When legal rules do not reflect the current values in any of these spheres, a legitimacy crisis may result. This means that the members of society lose their belief and confidence in their legal system.

The establishment of laws therefore in society is necessary to protect the rights of individuals and to ensure the good order, functioning and survival of the society. In effect, what the law is trying to do is to provide answers to the myriad of everyday problems that can arise in society. The solutions to such problems must accord with objectives that are judged by the community to be socially desirable. The problems arise in the first place because of the conflicting interests of individuals and groups within the society and the necessity to ensure the functioning and survival of the society itself. The more civilized a community becomes, and the greater the industrial and scientific progress it makes, the more laws it must have to regulate the new possibilities it is acquiring.

What the law does in attempting to prevent and resolve conflict in society is to:

- control social relations and behaviour;
- provide the machinery and procedures for the settlement of disputes;
- preserve the existing legal system;
- protect individuals by maintaining order;
- protect basic freedoms;
- provide for the surveillance and control of official action;
- recognize and protect ownership and enjoyment of the use of property;
- provide for the redress (compensation) of harm;
- reinforce and protect the family;
- Facilitate social change.

[36]Secular legal systems around the world provide an immeasurably bigger and more comprehensive moral regime to govern our lives than the religious codes. Backed by potent and haunting images the book states that the law, for all its faults, is the one universal ethical framework that everyone believes in and that the law is now by far the most important ideology we have for our survival. The reach of the law extends not just to crime and the family, but also to vast realms relating, for example, to money, banks, tax and corporations and even securitizations and derivatives. The immense influence that the law has raises fundamental moral challenges.

36 Harold J G Introduction to law and the legal system, (London: Houghton Mifflin company, 1975)

The study of law and legal systems is a diverse and intriguing subject which cannot be divorced from its proper social context. In the Commonwealth Caribbean, the law and legal systems were born out of the colonial experience. Indeed, the very nomenclature by which the region is known is evidence of this. The notion of a 'Commonwealth' betrays the historical fact of imperialism and gave the region a certain identity, which even today, still survives. For a description with less emotive connotations, the Commonwealth Caribbean is that part of the globe known as the West Indies. It comprises both dependent and independent democratic States, but the former are now few in number. The independent countries of the region belong to a socio-economic grouping – a loose political community labeled the Caribbean Community (CARICOM). There is a further sub- grouping of the countries of the Eastern Caribbean, known as the Organization of the Eastern Caribbean States (OECS).

The historical reality of colonialism is perhaps more evident in the study of 'Law and Legal Systems' than in any other legal subject. While the ex-colonies have attempted to fashion new identities since gaining independence, their legal expressions remains largely British, or, at least, neo-colonial. As Sharma JA from the Trinidad and Tobago Court of Appeal explained in Boodram v AG and Another:

. . . even after independence, our courts have continued to develop our law very much in accordance with English jurisprudence. The inherent danger and pitfall in this approach is that, since independence our society has developed differently from the English and now requires a robust examination in order to render our Constitution and common law more meaningful...

The statement above alludes to natural justice, which is a great contribution to the origin of law and its stature in society, therefore in enunciating the origin of law one ought to mention natural justice. It is said that principles of natural justice and law are of very ancient origin and was known to Greek and Romans. The notion of a natural justice system emerges from religious and philosophical beliefs about how we see ourselves with respect to nature. Kluckhohn's (1953)[37] analysis provides one of the most noted descriptions of the philosophical principles that govern our relationship with nature. He claimed that humans think of themselves as being

1) Subjugated to nature

2) An inherent part of nature, or

3) Separate from nature.

Each of these views shapes a particular natural justice belief and thus a distinct moral stance toward nature. Some cultures emphasize their submissiveness to nature and would tend to adopt a morality of divinity. Others emphasize their harmonious relationship with nature and

37 H L Packer Kluckhohn's The Limits of the Law, Stanford University Press, Stanford California 1968

would tend to adopt a morality of caring. Still others emphasize their control over nature and would tend to adopt a morality of justice.

The Principles were accepted as early as in the days of Adam and of Kautilya's Arthashastra. According to the Bible, when Adam & Eve ate the fruit of knowledge, which was forbidden by God, the latter did not pass sentence on Adam before he was called upon to defend himself. same thing was repeated in case of Eve. Later on, the principle of natural justice was adopted by English Jurist to be so fundamental as to over-ride all laws.

The principles of natural justice were associated with a few 'accepted rules' which have been built up and pronounced over a long period of time. In the West, in the olden days of laissez-fair practice, when industrial relations were governed and administered by the unscrupulous and harsh weighted law of hire and fire, the management was in supreme command and at its best with the passage of time, notions of social justice developed and the expanding horizons of socio- economic justice necessitated statutory protection to the workmen. The freedom to hire men/women is embedded in the management philosophy and thinking and the liberty is restrained to firing them arbitrarily or at its own will. The passage demonstrates that the rule against bias, like the hearing rule, was treated as an expression of the natural law regarded by Roman legal scholars as 'that ideal body of right and reasonable principles which was common to all human beings'. Those principles are said to have emerged from Cicero's Latin renderings of Greek Stoic philosophy, written in the first century BC. They became the underpinnings of Thomas Aquinas's philosophy and were regarded as divine law informing creation and binding human beings.

The word 'Natural Justice' manifests justice according to one's own conscience. It is derived from the Roman Concept 'jus - naturale' and 'Lex naturale' which meant principle of natural law, natural justice, eternal law, natural equity or good conscience. Lord Evershed, in Vionet v. Barrett remarked, "Natural Justice is the natural sense of what is right and wrong." But Natural justice has meant different things to different peoples at different times. In its widest sense, it was formerly used as a synonym for natural law. It has been used to mean that reasons must be given for decisions; that a body deciding an issue must only act on evidence of probative value.

De Smith submitted as follows:

No proposition can be more clearly established than that a man cannot incur the loss of liberty or property until he has had a fair opportunity of answering the case against him. For this he gives following assertion,

Even God did not pass sentence upon Adam before he was called upon to make his defense.

Adam, says God, „Where art thou? has thou not eaten out of the tree whereof I commanded thee that thou should not eat?

Accordingly even though person has committed a wrongful act he must be heard before sentenced, specially where decision affecting liberty or property is to be made fair opportunity of hearing must be provided, for this reason whatever the meaning of natural justice may have been, and still is to other people, the common law lawyers have used the term in a technical manner to mean that in certain circumstances decisions affecting the rights of citizens must only be reached after a fair hearing has been given to the individual concerned. And in this context fair hearing requires two things, namely, ***AUDI ALTERAM PARTEM*** and ***NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA.***

In the first place the law says that no man is to be imprisoned except by judgment of the King's Courts or whilst awaiting trial by them. This freedom is safeguarded by the most famous writ in England, the writ of Habeas Corpus. Whenever any man in England is detained against his will, not by sentence of the King's Courts, but by anyone else, then he or anyone on his behalf is entitled to apply to any of the judges of the High Court to determine whether his detention is lawful or not. The court will then, by this writ, command the galore or whoever is detaining him, to bring him before the court; and, unless the detention is shown to be lawful, the court will at once set him free. This was not always so. In 1627, when the executive Government cast Sir Thomas Darnel and four other knights into prison because they would not subscribe money for the King, the Court of King's Bench, to its disgrace, held that if a man were committed by command of the King he was not to be delivered by habeas corpus.[38]Those were the evil days when the judges took their orders from the executive. But the people of England overthrew the Government which so assailed their liberties, and passed statutes which gave the writ its present power. Never thereafter have the judges taken their orders from anyone.

So in 1771, when the colored slave James Sommersett was held in irons on board a ship lying in the Thames and bound for Jamaica, Lord Mansfield declared his detention to be unlawful. 'The air of England is too pure for any slave to breathe,' he said, ' Let the black go free,' and the slave went free.* And take a modern instance, in 1949 when the communist Gerhardt Eisler was taken forcibly from a Polish ship in Cowes Roads, Sir Laurence Dunne held that there was no lawful ground on which he could be handed over to the United States.[39] It was a case of ' let the " red " go free.' The law of England knows no colour bar, whether it be the colour of a man's skin or of his politics. Nor are the King's Courts to be overawed by high officers of the State. So in 1947 when the Army authorities took a bank clerk from his home in Lancashire, in the middle of the night, carried him off to Germany and court-martialled him

38 Darnel's Case, 3 St.Tr. 1. Freedom Under The Law- Alfred Denning

39 This was a case of refusal to extradite. If Eisler had still been detained, a writ of habeas corpus would no doubt have issued.

there, the Lord Chief Justice of England called on the Secretary of State for War to justify his conduct by law ; and when he failed to do so, directed that a writ of habeas corpus should issue. The bank clerk left the court a free man.[40] It was thus shown again in our time, as it has often been shown before in our long history, that the executive Government has no right to deprive any man of his freedom except by due course of law. The Attorney-General of the day seems to have thought that the decision was wrong but there was nothing he could do to alter it. Once a man is set free under a writ of habeas corpus, there is no appeal open to those who would imprison him.[41]

Moreover if the first court to which he applies refuses to grant the writ of habeas corpus, he can apply to any other High Court judge and ask him to hear the case a fresh : and if he can persuade but one judge that he is unlawfully detained, he will be set free. This is an accident of procedure,* as are many other incidents of the writ, but these accidents are all on the side of freedom. This writ of habeas corpus is available, not only where the original detention is unlawful, but also when a man, who has been lawfully arrested on a criminal charge, is kept in prison without trial. The police have no right to hold him on their own authority for more than a day. He must be brought before a magistrate within 24 hours and it is then for the magistrate to decide whether he shall be further detained pending trial or let out on bail. So also whenever a man is found not guilty of an offence with which he is charged, there is no appeal open to the prosecution who think him guilty the magistrate to decide whether he shall be further detained pending trial or let out on bail. If the magistrate refuses to let him out on bail, the man can apply to a High Court judge for bail. No person in this country who is committed to prison on a charge of crime can be kept long in confinement because he can insist upon either being let out on bail or else of being brought to speedy trial.

All this is of course familiar law but I make no apology for saying it again now, because I wish to point the contrast between this effective procedure and the procedure of other countries.

The freedom- loving countries of Western Europe have the same principles in common law there, as here, no one must be imprisoned except by due course of law but they have not the same procedure for enforcing these principles. They have no procedure corresponding to our writ of habeas corpus. They have no means whereby a man who is unlawfully detained can be at once set free. All that a man can do there is to lodge a complaint with a police officer, who ought then to transmit it to a magistrate: but if the police officer does not do his duty, as for instance if he refuses or neglects to put it before a magistrate, the man has

40 Ft. v. Governor of Wandsworth Prison, ex p. Bo/dell [1948] 2 K.B. 19

41 A note on Habeas Corpus, by Lord Goddard, 6; L.Q.R. 30. So also whenever a man is found not guilty of an offence with which he is charged, there is no appeal open to the prosecution who think him guilty.

no remedy except to charge the police officer with an offence.[42] There is no machinery by means of which he can, so to speak, pass by the officials and go straight to the judge: nor is there any means of obtaining a speedy trial. This was pointedly shown in 1946 when a British soldier was arrested in Belgium and charged with having committed a murder there. The preliminary investigations took so long that more than a year passed before he was brought to trial: and he was kept in custody all the time. The delay seemed by our standards to be a denial of justice. Questions were asked in Parliament and representations were made by our Government to the Belgian Government. He was eventually tried and acquitted. In this country he would not have been detained for so long without trial. If he had not been brought before the next Assizes he would have had a right to be let out on bail—a right which he could enforce by writ of habeas corpus.

Now let me leave the first principle by which our personal freedom is protected, and the exception to it; and come to the second principle, which is that no man shall be arrested except for reasonable cause allowed by law. This principle is of course the same as the first but it deals with a specific aspect of it, namely, the power of arrest for a criminal offence. It is safeguarded by requiring every person who makes an arrest, whether he be a policeman or private individual, to justify the arrest, if called upon, in a court of law. A policeman in this country is not allowed to arrest a man simply because he in good faith suspects him of a criminal offence, but only if he on reasonable grounds suspects him: and his grounds can be examined in the courts. This state of the law has only been reached by degrees : and the story of it is the story of the police in England— a story of which we have every reason to be proud. We had no professional police in England until comparatively recent times. By the common law it was the duty of every man, not only to keep the peace himself, but also to arrest, or help to arrest, anyone who had committed a felony. On a cry of ' Stop Thief' all had to cease work and join in the pursuit of the offender. There were, of course, parish constables and night watchmen who had to levy the hue and cry and follow ' with all the town ', but these were a standing joke for years.

You will remember how Shakespeare poked fun at them: Constable Dogberry's instruction to watchmen is

'You shall make no noise in the streets: for, for the watch to babble and talk is most tolerable and not to be endured'.

To which the watchmen reply

42 Faustin Hclie, Practiquc Crimincllc, ijth ed., p. 49, commenting on Art. 117 of the Code. Freedom under the Law- Sir Alfred Denning

'We will rather sleep than talk: we know what belongs to a watch '.

In the eighteenth century the watchmen still kept up their reputation for somnolence. Lee, in his History of Police in England, describes how ' it was a popular amusement amongst young men of the town to imprison watchmen by upsetting their watch boxes on top of them as they dozed within; and the young blood who could exhibit to his friends a collection of trophies such as lanterns, staves or rattles was much accounted of in smart society[43]. The newspapers were never tired of skits at the parochial watch '. It was in 17 53 that the first step was taken towards professional police. There was at that time an acute ' crime wave '[44]. So Henry Fielding presented a plan to the Duke of Newcastle as a result of which they organized the Bow Street Runners. These were men especially quick in catching thieves. They were paid from private funds. In 1805 John Fielding organized the horse patrol to guard the roads. These proved very effective and there was a sharp fall in the number of crimes of violence. But it was still a lay organization. In 1829, however, Sir Robert Peel brought into being the modern disciplined efficient force. It was regarded by many as a threat to free- dom. Anonymous placards were broadcast reading ' Liberty or death I Englishmen ! Britons! ! and Honest Men 1 ! ! The time has at length arrived. All London meets on Tuesday. Come armed. We assure you from ocular demonstration that 6,000 cutlasses have been removed from the Tower for the use of Peel's bloody gang. These damned police are now to be armed. Englishmen will you put up with this ? ' .10 There was clearly a need to balance conflicting interests. It has been done. But how ?

The conflict has been solved by the judges, who have granted to the police very few privileges—

Indeed, only such privileges as are absolutely essential for them to do their work, and have in all other respects treated them as subject to the same rules as any private citizen. Take the power of arrest. Until the eighteenth century a constable there were, of course, only the parish constables in those days— had no greater power of arrest than any private individual. He had not only to have reasonable suspicion of the man, but he had to prove that the crime the felony had actually been committed.[45] This gave a constable a grand excuse for doing nothing: because when a householder came up to him and complained that his goods had been stolen and pointed out the thief, the constable could say ' How do I know your goods have been stolen ? ' The constable could justly say that he was in a difficulty : for if a private citizen made a reasonable charge of felony against another, the constable was bound by his oath of office to arrest the accused man, but nevertheless the constable was not protected by the law if it should turn out that the informant was mistaken. No wonder that Dogberry advised his watchmen not to meddle with a thief. When they asked ' If we know him to be a

43 'Legal and Social Aspects of Arrest' by Jerome Hall, 49 H.L.R. $66.
44 Lee, History of Police in England, 184-j. 10 Lee, p. 2ji. Freedom Under the Law- Sir Alfred Denning
45 i Hale, P.C. 91-2. 11 See per Lord du Parcq in Christie v. Leachimij [1947] A.C. at PP- J96-7.

thief, shall we not lay hands on him ? ' Dogberry replied ' Truly by your office you may : but the most peaceable way for you, if you do take a thief, is to let him show himself what he is and steal out of your company '.

The unsatisfactory state of the law was modified by the judges. The pressure of events indeed made it imperative. The industrial revolution had, indeed, increased the need for security, protection and order. And the turbulent state of the country is shown by the Gordon Riots, in which the rioters not only stormed Newgate Prison and released the inmates but they also burnt the houses of the judges, including the house of Lord Mansfield. It was clearly necessary to strengthen the powers of the constables. Accordingly, in that very year, 1780, Lord Mansfield laid it down that if a private citizen made a charge of felony, that was sufficient justification for a constable, and his assistants, to arrest the person accused, although no felony had, in fact, been committed.[46] It was held that they could act on bare information without doing anything to verify it. For a time it was even thought unnecessary for the constable to inquire into the reasonableness of the charge but it became obvious that, if a constable were allowed to arrest individuals on unreasonable charges, freedom would be greatly imperilled. The balance had swung too far against individual freedom. The judges therefore restored the balance. In 1827 it was laid down that even a constable is not allowed to make an arrest unless he has reasonable ground for believing that the accused has committed a felony.[47] The necessary adjustments in the law were thus achieved just in time for the coming of professional police two years later.

The increased need for social security was met by giving the police Just so much extra power of arrest as was necessary and no more. Since that time Parliament has extended the power of arrest so as to include many misdemeanors as well as felonies but the underlying principle has remained untouched. No greater power must be given than is absolutely necessary for the protection of life and property. In all cases Parliament has insisted that an officer shall only arrest a man if he has reasonable ground for believing that he has committed the offence in question: and if the reasonableness of his action is afterwards called into question, it is for

46 Freedom Under The Law- Sir Alfred Denning

47 Samuel v. Payne, i Doug. 3$9. "See the law stated by Buller J. quoted in [1947] A.C. at p. 197. 11 Beckwith v. fhilby (18J7) 6 B. 8c C. 63 j.

the judges to determine it.[48] The working of the law was well shown a few years ago when some customs officers boarded a steamship which had arrived at Liverpool and found a box of cigars concealed under the mattress of a bunk in an unoccupied state room. It turned out that the cigars belonged to a ship's steward who had not declared them. So the officers arrested him. The steward was acquitted by the magistrate because there was a real doubt in the case : but the arrest was held by the House of Lords to be justifiable. Lord Simon pointed out that ' if officers of customs cannot detain a man who is coming off a ship whom they suspect on reasonable grounds of endeavouring to defraud the customs . . . the working of our customs laws is likely to be seriously impeded.

A man's freedom to go where he liked on his lawful occasions, his freedom from arbitrary arrest, and from oppression during arrest. Now I come to the freedom of his mind and of his conscience. This is just as important, if not more important, than his personal freedom. To our way of thinking it is elementary that each man should be able to inquire and seek after the truth until he has found it. We hold that no man has any right to dictate to another what religion he shall believe, what philosophy he shall hold, what shall be his politics or what view of history he shall accept. Every one in the land should be free to think his own thoughts to have his own opinions, and to give voice to them, in public or in private, so long as he does not speak ill of his neighbor : and free also to criticise the Government or any party or group of people, so long as he does not incite anyone to violence. Although this principle seems obvious to us it is on occasions prone to bring the individual into conflict with the State, or rather with the people who are in power in the State. This country, just as every country, preserves to itself the right to prevent the expression of views which are subversive of the existing Constitution or a danger to the fabric of society. But the line where criticism ends and sedition begins is capable of infinite variations. This is when the practical genius of the common law shows itself.[49]

The line between criticism and sedition is drawn by a jury who are independent of the party in power in the State : whereas in the countries of Eastern Europe the line is drawn by people's courts who are only the instruments of the party in power. Just as in the first lecture we saw that personal freedom depended on the remedies for its enforcement, so also freedom of mind and conscience depend on the tribunals which decide upon it. Let me give you proof of this from our history. Some 300 years ago we had a Star Chamber, which was as much the instrument of the party as the people's courts are in Russia now. The way they approached

48 See the instances given by Lord Atkin in Lirasldge v. Anderson [1942] A.C. at p. 229. " Barnard v. Gorman [1941] A.C. 378. Freedom under the Law

49 Freedom under the Law- Sir Alfred Denning

freedom of speech is well shown by the case of Richard Chambers.[50] He was a silk merchant of London who was, with other merchants, called to the Council Board at Hampton Court because of complaints about the conduct of customs officers. He then said, in the presence of all those at the Council table : ' The merchants are in no part of the world so screwed and wrung as in England '. For those words the Star Chamber fined him £2,000 and ordered him to make submission, that is, to acknowledge and confess his fault. He refused. He said that never till death would he acknowledge any part of it. He was therefore, by their decree, thrown into the Fleet prison. He sought redress by means of habeas corpus in the King's Bench on the ground that the Star Chamber had no authority to punish him for words only. But the Court of King's Bench refused to release him, saying that the Star Chamber was one of the most high and honorable Courts of Justice. So he suffered in prison six whole years on account of those few words. If you wish for proof that this was solely to get him out of the way, it is provided by what Archbishop Laud said to King Charles about this man Richard Chambers.

' *If your Majesty had many such Chambers you would soon have no chamber left to rest in* '

All that tyranny was done away with by the abolition of the Star Chamber in 1641 : and Richard Chambers lived to become, during the Commonwealth, an alderman and sheriff of the City of London.[51]

50 State Trials (j Charles I, 1629) p. 374
51 Freedom of Mind and Conscience- Freedom Under The Law: Sir Alfred Denning

CHAPTER TWO

Inflexibility of Law as Dogma

The strictness of the law, as a dogma is a clog on society rather than a relief, law is a failure in society in many different ways because it erodes some values of humanity that would have otherwise developed society e.g religion, unity, culture and custom.

Laws help in bringing a system, country or society under one rule which everyone must obey and accept. Laws are therefore enforced upon people without making any distinction between them so that there is discipline and peace in society. My concern under this chapter is the inflexibility part of the law especially in failing to satisfy the demands of the society as it evolves. Society does not remain static so the legal system and the laws it produces need to be relevant in order to be effective. The laws need to respond to social, economic, technological, moral and political change by evolving as those changes emerge.

For instance society involves innovations that come about when people think of a way to make life better. These inventions then evolve as technology advances or as needs of society change. People needed faster ways to travel, so they rode horses which then pulled wagons which transitioned into trains and automobiles. As roadways became smoother and more direct, cars that drove faster and more power became the norm. Eventually commercial airplanes were created. [52] With all such evolvements, how would laws be able to maintain a smooth environment if they were fixed and not dynamic. Do we actually need the written laws?

The welfare of any society depends in good part on its ability to adjust its legal system to change, technological and economic climate. Unless its legal institutions respond to current needs, the system faces many dangers. Institutional rigidities can create such conflicts within a societal frame work that they may spark the decline of the society a phenomenon which has occurred several times in the course of man's history.[53] Such needs for adjustment attain increased importance during periods of substantial social and economic change.

So while formulating the laws, the leaders must look in the needs of the society since the needs of a society as a whole are not fixed and are subject to time, place and circumstances. The needs of people change with changing times. What was required in the past is not the need in the present. Why should laws be rigid? Whenever these laws remain rigid, they become a clog to society. How then is justice achieved when reliance to older models still

52 David Ober. Laws evolve to keep up with changes in Society. (2013) available on https://www.kpcnews.com

53 Mark.S. Massel. Legal Institutions in a Changing Society: The need for Appraisal. Journal of Legal Education Vol 21, No 2 (1968) pp.125-144.

takes influence? As Von Jhering noted, "the origin and ultimate purpose of law is social control and therefore law is an instrument for serving society. His argument is that law which may be suitable at one time may not be so at another time. Society is always in flux and to suit the conditions of changing society law must adopt itself to the changing conditions."[54]

His ideas do not differ from those of Roscal Pounds who noted that the function of law is to adopt to the needs of a particular generation or period since law is not based on absolute ideals but on the views and attitudes of a particular society and economic condition of a particular period and time.[55] Is law cast in stone that can't be altered? The laws should conform to the demands of the society. It should not be fixed but flexible. Whenever laws remain rigid and fixed unfairness is raised. Take for instance if in the past generation, divorce, annulment and judicial separation were available to married people and that in the present majority are together passing off as husband and wife. Have been together for long made property and had children, why don't they share the available marriage remedies? Why don't they be available to cohabitants? For that is what society has turned into. The standards and costs of living have turned high and few people can afford marriage. In case of separation why don't they share property as married people? In other words cohabitation should be taken as marriage for that is what society demands other than relying of fixed rules.

Should society ideally continue with the notions of an eye for an eye or a pound of flesh for a pound of flesh? Does it yield fairness in society? Courts of law should not rely on fixed rules and previous decisions in determining the matters in the prevailing conditions. Here I mean the doctrine of precedents. Society is like a moving wheel, it never drives backwards. My argument is that legal tribunals should be dynamic in their decisions that should uphold the prevailing and fit in the expectations and demand of the society as it stands other than the old fixed precedents and rules of law.

I will try to tackle one of these areas above in light of the law as a clog. What does religion have to contribute to our thinking about legal ethics, implementation and legal practice? The standard answer would probably be "Not much." With the splendid exception of Thomas Shaffer,' and a few other unconventional scholars,2 the study of legal ethics and the legal profession has developed in isolation from the thinking of the great religious traditions about questions of law, justice, and the moral life. In this Article, I intend to show that the traditional answer is wrong. Religion has much to contribute to legal ethics and to our thinking about the practice of law.

My argument will be two-fold. In Part One, I will point out some of the ways in which our

54 Von Jhering. "Law as a means to an end" (1924). One of the great proponents of the Sociological School of Jurisprudence.

55 Roscal Pounds. "Social Contract Through Law".

conception of legal ethics and legal practice is impoverished when we exclude religion from our consideration. In Parts Two and Three, I will provide an example of how religion can illuminate the study of legal practice and ethics by developing the connection between my religious faith and my thinking about legal practice, by presenting and defending what I call a covenantal model of lawyer-client relationships.

Religion And Legal Ethics[56]

One way to shed light on the relationship between religion and legal ethics is by comparing the evolution of legal ethics and its sister discipline, bioethics. This comparison clearly reveals the shortcomings that result from an exclusively secular approach to professional ethics.

A useful overview of the development of bioethics has been pro- vided by Daniel Callahan, the long-time president of the Hastings Center, and one of the most prominent and influential thinkers in the field. Callahan traces several stages in the history of this discipline. In the first stage, throughout the 1960s, theology and theologians dominated the scholarly thinking. Callahan remembers, "When I first became interested in bioethics in the mid-1960s, the only re- sources were theological or those drawn from within the traditions of medicine, themselves heavily shaped by religion." In the 1970s, however, bioethics entered a second stage, in which the influence of theology declined dramatically. One reason was that the churches and seminaries shifted their focus to more global concerns such as poverty, racism, and nuclear arms. Equally significant was the pressure "to frame the issues, and to speak, in a common secular mode." In order to influence public policy, and avoid the fractious disputes that often characterize religious disagreements, scholars thought it necessary to adopt a language and an ethics that was not rooted in religion. The philosophers and the lawyers stepped to center stage, which led to the enshrinement of "[a]n ethic of universal principles-especially autonomy, beneficence, and justice ...."" Currently, bioethics remains entrenched in this second stage although Callahan holds out the possibility of a third stage in which religion and religious scholarship would reassume their place as a partner in the great debates about the meaning of life and death.[57] If we shift our attention from bioethics to legal ethics, we notice some interesting similarities and differences.

Legal ethics as a field of scholarship dates only from the 1960s and 1970s. The Watergate

56 Lawyers, clients and covenant A Religious Perspective on Legal Practice and Ethics 1998 by Joseph Allegretti

57 There are a number of signs of a resurgence of interest in bioethics on the part of religious thinkers. See eg., Hessel Bouma, III et al., Christian Faith, Health, and Medical Practice (1989); On Moral Medicine: Theological Perspectives in Medical Ethics (Stephen E. Lammers & Allen Verhey eds., 1987); Allen Verhey & Stephen E. Lammers, Theological Voices in Medical Ethics (1993).

crisis of the mid-1970s is customarily acknowledged as the stimulus for the development of legal ethics as a distinct field of study and teaching.[58] Legal ethics arose, then, at the same moment when bioethics was breaking free from its religious roots and becoming a secular discipline dominated by philosophy and law. Indeed, many of the earliest important articles in the field of legal ethics-among them Richard Wasserstrom's Lawyers as Professionals: Some Moral Issues, published in 1975, and Charles Fried's The Lawyer as Friend[59], published in 1976-are steeped in the Enlightenment tradition that characterizes most scholarly writing about bioethics. Wasserstrom, for example, criticizes lawyer paternalism as violative of client autonomy,'[60] while Fried argues that the freedom of human beings to enter into personal relationships implies the right of lawyers to represent whomever they wish striking difference is the absence of a formative stage in legal ethics shaped by religion and religious thinkers. From the outset, legal ethics has been dominated by the lawyers and the philosophers.,' Religion has never played the kind of critical role in legal ethics that it played in the earliest days of bioethics.[61]

The Costs of a Secularized Legal Ethics

The divorce of legal ethics from religion has had substantial costs. Let me mention just four; here, too, I am indebted to Callahan and his critique of the secularization of bioethics.[62]

The Loss of Religious Wisdom

An exaggerated secularization deprives us of the accumulated wisdom of the religious traditions, which have wrestled for thousands of years with the perennial questions of the moral life. For example, Christianity is concerned with the meaning of human life, its purpose and its destiny. While Christianity insists upon the goodness of human beings, it also speaks honestly about their brokenness and estrangement. It places a high value on self-sacrifice and reconciliation, exhorting believers to "turn the other cheek"[63] and even to lay down

58 Mary C. Daly et al., Contextualizing Professional Responsibility: A New Curriculum for a New Century, 58 Law & Contempt. Probs. 193, 194 (1995) (indicating that the American Bar Association mandated the teaching of professional responsibility at ABA-accredited law schools as a direct response to the Watergate scandal). A useful survey of the history of professional responsibility teaching is found in Deborah L. Rhode, Ethics by the Pervasive Method, 42 J. Legal Educ. 31, 33-42 (1992).

59 Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer- Client Relation, 85 Yale LJ. 1060 (1976).

60 Wasserstrom, supra note 14.

61 Interestingly, however, the earliest important writer on legal ethics in America, David Hoffman, was also a Biblical scholar, and the Bible played a part in his analysis of the nature and purpose of law. Shaffer, Faith & Professions,

62 Callahan

63 Matthew 5:38-40 (New Revised Standard 1989). All Biblical citations and quo- tations in this article are

their lives for each other.[64] Christianity has something to say about the purposes of law and its limits, the duties owed to the secular state, and the relationship between justice and love.[65] Most importantly, in the life, death, and resurrection of Jesus Christ, Christianity finds the central revelation about God's purposes for human beings. It entreats those who are followers of Jesus to model their lives in discipleship upon his. Christians are to love one another as Jesus has loved us. Can anyone deny that this tradition, this way of thinking about life, has something to contribute to our debates about law, ethics, justice, and the role of lawyers? Can anyone deny that Judaism, Islam, and the other religious traditions have something to contribute as well? Legal ethics benefits when it opens itself to wisdom from every source, when it grants religion a place at the table-not uniquely privileged, of course, but not uniquely disadvantaged either. As Callahan says, whatever we may think about the truth claims of religions, we cannot deny that "they have provided a way of looking at the world and understanding one's own life that has a fecundity and uniqueness not matched by philosophy, law, or political theory." We are all impoverished when our moral discourse is limited to the language of rights and autonomy; when Aquinas, Calvin, and Barth are ignored; when Amos, Isaiah, and Jeremiah are deemed irrelevant.

Law Fills the Void

When religion and the deep wellsprings of the human spirit are excluded from legal ethics, law fills the void. As Callahan notes, the removal of religion..

"Leaves us… too heavily dependent upon the law as the working source of morality. The language of the courts and legislatures becomes our only shared means of discourse."

Codes and court decisions become the fundamental arbiter of what is right and wrong. This development can be seen in the evolution-or, as some suggest, the devolution[66]-of legal ethics codes. The earliest American Bar of Association code of professional conduct for lawyers, dating from the early 1900s, was largely inspirational in nature, more like a gentlemanly code of character than a principled guide to decision- making. The 1969 Code of Professional Responsibility" included bottom-line rules of conduct for lawyers, called the Disciplinary Rules, but maintained a link to earlier times by including a number of aspirational goals for lawyers, which were not enforceable, called Ethical Considerations. In the most recent American Bar Association draft rules for lawyers, the Model Rules of Professional Conduct,

from the New Revised Standard Version.

64 1 John 3:16.

65 Harold J. Berman, Faith and Order: The Reconciliation of Law and Religion (1993); Harold J. Berman, The Interaction of Law and Religion (1974);

66 Luban & Milemann, supra note 14, at 42-53. The article contains an excellent overview of the history of lawyer regulation in America.

the Ethical Considerations are conspicuous by their absence. All that remains are the bottom-line rules and the accompanying comments that serve as aids to their interpretation. In the shift from canons of professional ethics, to a code of professional responsibility, to rules of professional conduct, we can trace what Luban and Millemann call the "de-moralization" of legal ethics. Reading or teaching the Model Rules, it is easy to embrace the illusion that rules constitute the whole of the moral life, with the result that legality and morality are conflated, and anything legal is assumed to be moral.[67] When this happens, legal ethics is approached not as a subspecies of moral philosophy or professional ethics, but as a course in substantive law akin to torts or corporations. It is no surprise that the leading treatise on legal ethics is entitled simply The Law of Lawyering.[68]

Rules are important, of course, for a variety of reasons. Rules reinforce what lawyers already know but may be tempted to forget- they warn lawyers not to lie or to falsify evidence. 1 They establish the ground rules for the trade of lawyering-they instruct lawyers what they can say in their advertisements and write on their business cards. At their best, rules provide lawyers with practical guidance as they wrestle with ethical questions. Rules make it possible for lawyers and clients to have reasonably certain standards about what is and what is not expected, required, and prohibited in legal representation. They announce the agreed-upon minimums below which a lawyer can- not fall without incurring sanction, and thereby provide a basis for moral and legal accountability. Rules, however, are only part of the moral life." Many of the rules implicitly recognize this limitation by vesting discretion in lawyers to decide whether and how to act. Thus, the rules themselves envision that lawyers will exercise personal judgment.

Furthermore, while rules can establish legal minimums, they ignore many of the interesting and important issues in legal practice. Rules cannot tell a lawyer whom her clients should be. Rules cannot empower a lawyer to be caring or courageous. They cannot teach a lawyer how to balance a client's lawful interests against the harm that will be done to opponents and third parties. They cannot tell a lawyer whether a tactic or strategy that can be employed should be employed. Moreover, rules provide no guidance for the lawyer who is grappling with questions that the rules themselves ignore-questions such as the ends of lawyering or the lawyer's moral accountability for her actions. No rule can tell a lawyer if the rule itself should be obeyed." If we are to deal with these profound and fundamental questions, we need a more-en- compassing approach to legal ethics and legal practice. This leads to my third point.

67 See James Elkins, Moral Discourse and Legalism in Legal Education, 32 J. Legal Educ. 11, 19-20 (1982).
68 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (2d ed. 1985 with annual supplements).

The Avoidance of Particularity

When we exclude religion from legal ethics, we are tempted to delude ourselves into thinking that we are not members of particular communities but only one "sprawling, inchoate general community." We are encouraged to keep our private values to ourselves or to hide them beneath a veneer of detached and impartial rationality. As Callahan notes, "[time and again I have been told by religious believers at a conference or symposium that they feared revealing their deepest convictions. They felt that the price of acceptance was to talk the common language, and they were probably right."" ° The result is the trivialization and marginalization of religion-it is reduced to the status of a mere "hobby," as Stephen Carter observes in his book The Culture of Disbelief. 51 We thereby risk excluding questions of character and virtue from our moral reflections. We are tempted to ignore the most important things about ourselves-who we are and want to be, what particular communities and traditions have shaped us into the persons we are, how we see our lives lived against the backdrop of eternity.

None of this seems relevant; instead, we feel obligated to speak what Jeffrey Stout calls the "moral esperanto" of autonomy and rights.[69] But if we are unwilling to ask "who am I?" and "who do I want to be?", how can we hope to answer the question "what should I do?" As Stanley Hauerwas observes, "the kind of quandaries we confront depend on the kind of people we are and the way we have learned to construe the world through our language, habits, and feelings.... The question of what I ought to do is actually about what I am or ought to be."[70] For example, my thinking about the duties I owe to my client, or to a third party who may be injured by my actions, cannot be divorced from my understanding of myself as a disciple of Christ called to live out the Gospel message of love and reconciliation.

This broader approach to ethical reflection necessarily encompasses the religious dimensions of the self. Following Paul Tillich, we might conceive of religion as that which concerns us ultimately. Defined that way, religion is one of the most important constituents of a person's self-identity. Our religious values are integrally tied up with- the root meaning of the word religion is to tie, to bind-our deepest wishes, dreams, and fears. As Hauerwas reminds us, our religious convictions are themselves a kind of morality.' They make certain choices inevitable and others unthinkable. A professional ethic that envisions the human person as an autonomous rational agent without ties to particular communities and traditions is an ethic that ignores these foundations of the moral life. It is also an ethic that tends to perpetuate the status quo. As Callahan notes, the culturally-free rationalism that dominates bioethics often leads to "reluctance" Religious thinking provides a challenge to the status quo

69 Jeffrey Stout, Ethics After Babel: The Languages of Morals and Their Discon- tents 74-76 (1988).

70 Stanley Hauerwas, The Peaceable Kingdom: A Primer in Christian Ethics 117 (1983). The recent resurgence of interest in virtue-ethics of virtue owes much to theo- logian Hauerwas and to philosopher Alaisdair MacIntyre.

by addressing the ends and purposes of medicine, law, and the human person. Christianity, for example, affirms that the Gospel stands in judgment over all human institutions, including the legal profession and the justice system.

The Needs of Religious Believers

Finally, the exclusion of religion from legal ethics ignores the personal needs of many lawyers: Many lawyers are religious believers in the conventional sense (and if we adopt Tillich's definition, all are religious).[71] These lawyers want not only to abide by their professional codes of conduct, but to act in accord with their deepest values. They want to live a life of purpose and meaning. For such lawyers, rules and codes are a thin gruel that cannot furnish them with the sustenance they need. As Allen Verhey and Stephen Lammers observe, "Members of religious communities-or many of them, at any rate-want to make [the] choices they face with religious integrity, not just impartial rationality."

For all these reasons, our conceptions of legal ethics and legal practice suffer when we rigidly adhere to a secularist, legalistic, code- dominated mindset. We need to broaden our perspective to make room for religion as well as philosophy and law. I am not alone in this view. Indeed, there are several hopeful signs that legal ethics, like bioethics, may be poised to enter a new stage of development in which religion will be allowed to play a meaningful role. No longer is Professor Thomas Shaffer-who has bucked the dominant orthodoxy for twenty years by bringing an explicitly religious dimension to legal ethics-a solitary voice crying in the wilder- ness.

This issue of the Fordham Law Review is a prime example, as is last year's Texas Tech School of Law's Faith and Lawyering Symposium, a 500-page volume of essays by lawyers and law professors from every imaginable religious tradition.[72] My own book, The Lawyer's Calling: Christian Faith and Legal Practice,' is another example. If we agree that religion has some role to play in our thinking about legal practice, the next question is: What role? What might religion contribute to our thinking about legal ethics and legal practice? There will not be one answer, of course, given the extraordinary variety of religious traditions and the divergent strands of understanding within these traditions. Our religious beliefs are filtered through our unique life experiences, family upbringing, and personality. With this caveat in mind, I propose

71 A 1990 survey of church attendance by "elites" found that 15% of corporate lawyers surveyed attended church weekly, 16% monthly, 46% a few times a year, and 24% never. The figures for federal judges were 17% weekly, 20% monthly, 51% yearly, and 12% never. Michael Novak, Business as a Calling: Work and the Ex- amined Life 44-45 (1996). Attendance at church, of course, is only one indicator of religiosity.

72 Faith and the Law Symposium: A Symposium Precis, 27 Tex. Tech L. Rev. 911 (1996).

now to examine the lawyer- client relationship through the prism of my own understanding of the Christian faith and the inflexibility of law. Consider this a case study of the way in which one believer tries to bring an explicitly religious perspective to bear upon questions of legal ethics and legal practice.

Lawyers, Clients, and Contract

I will look briefly at the relationship between lawyers and clients and how law as a dogma leads to the conflicts there in. I will identify some of the problems that can arise in this relationship, particularly the problem of lawyer or client domination. Then, I will sketch the way in which the legal profession typically deals with this problem of domination-by means of what I call the contractual model of lawyer-client relationships. In Part Three, I will describe and defend a different model rooted in my religious beliefs-a covenantal model-and will compare and contrast it to the contractual model.

The Lawyer-Client Relationship

A core of expectations surrounds the parties to the lawyer-client relationship. According to what David Rosenthal calls the "traditional approach,"[73] clients are expected to be docile and passive. They should trust their lawyers to act in their best interests. They should not ask many questions or take too active a role in their case. In contrast, lawyers are expected to be aggressive, decisive, and competent. "The traditional idea is that both parties are best served by the professional's assuming broad control over solutions to the problems brought by the client." This traditional model, however, has been sharply criticized in recent years. Critics charge that it encourages lawyers to dominate their clients and act paternalistically to- wards them.[74] The reasons for this lawyer dominance are not difficult to under- stand.68 Clients are often vulnerable, troubled persons. They frequently lack an understanding of the language or the nuances of the law. They are strangers in the strange land of the courts. They have little choice but to trust in the competence of their lawyer. Conversely, lawyers have been acculturated to see themselves as "members of an elite ... different from and somewhat better" than those they are paid to serve. As a result, lawyers may see their clients not as whole persons, but as something less, as children perhaps, or as broken objects needing to be fixed." Lawyer domination can lead, inexorably, to lawyer paternalism. It is tempting for the

73 Douglas E. Rosenthal, Lawyer and Client: Who's in Charge? 7-13 (1974). A similar phenomenon has long been recognized in medical circles. The patient, for example, is expected to be passive and trusting of the physician. The classic account of this "sick role" is Talcott Parsons, The Social System 428-79 (1951).

74 David Luban, Paternalism and the Legal Profession, 1981 Wis. L Rev. 454; William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29; Wasserstrom, supra note 14; A good overview of the problems of paternalism can be found in Rhode & Luban

lawyer to treat the client "as though the clients were an individual who needed to be looked after and con- trolled, and to have decisions made for him or her by the lawyer, with as little interference from the client as possible." Lawyer domination discourages a full and frank dialogue between the parties. There is little incentive to discuss moral questions if the lawyer does not view her client as her moral equal. The lawyer may come to bracket her own moral values and see herself not as a moral agent but as a moral neuter whose work is divorced from the rest of her life, including her religious commitments.

Domination, however, is not a one-way street. "[Private practitioners depend wholly on their clients for their livelihood, and this dependence is fundamental in the distribution of power. Furthermore, many clients, especially businesses, are savvy about the legal system and how it works. Such clients are not as dependent upon their lawyer or as vulnerable to manipulation and domination.[75] At times it is the client who controls the relationship or manipulates her lawyer. When this happens, however, the same problems result. Once again the relationship is not one of equality in which the two parties are open to each other. Once again the lawyer brackets her moral values. The lawyer is tempted to become little more than a "hired gun" who will do whatever her client wants as long as the client is paying.[76]

The Contractual Model

One way to deal with the problem of domination is to adopt what I call a contractual model of the lawyer-client relationship In medical ethics, the contractual model is usually identified with the work of Robert Veatch. Veatch has argued that the problem of domination in professional relations can be dealt with by endorsing a relationship of mutual autonomy and respect. Veatch envisions the parties as coming together to fulfill certain limited goals. Each party has specific obligations towards the other. If either party fails to live up to its promises, the other party can go to court and demand recompense for the breach. The relationship is a matter of quid pro quo. Under this contractual model, each party has primary responsibility for making certain decisions. Veatch explains: With the contractual model there is a sharing in which the patient has legitimate grounds for trusting that once the basic value frame-work for medical decision-making is established on the basis of the patient's own values, the myriads of minute medical decisions which must be made day in and day out in the care of the patient will be made by the physician within that frame of reference.[77] This sharing of power assumes a sharing of relevant information so that each side can make the decisions

75 Deborah L. Rhode & David Luban, Legal Ethics 610 (1st ed. 1992

76 Joseph Allegretti, Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun, 24 Creighton L. Rev. 747 (1991).

77 Harold Brody, The Physician! Patient Relationship in Medical Ethics 65-91, 70, (Robert M. Veatch ed., 1989):

within its scope of authority on the basis of the relevant facts.7 9 The contractual model in medicine relies heavily upon the principle of informed consent.'

A similar model applies to the lawyer-client relationship. The lawyer-client relationship is not based solely on contract, of course, and lawyers have certain obligations to clients that go beyond the scope of their contract."1 Nevertheless, for most lawyers, most of the time, it is the contractual model that sets the parameters for their interactions with clients. A lawyer is hired by a client to help resolve a problem, settle a dispute, or plan a transaction. The lawyer and the client agree upon a fee. Each party has certain specific obligations to the other. If either party fails to meet its obligations, the other party may resort to legal remedies. The contractual model of lawyer-client relationships presupposes a doctrine of informed consent. Under the Model Rules of Professional Conduct, for example, a lawyer has the duty to provide the client with all relevant information necessary for the client to make important decisions. Furthermore, the contractual model envisions an allocation of decision-making authority along the lines of Veatch's frame- work for medical decision-making.

The traditional rule of thumb is that ultimate decisions (the "ends" of the representation) are for the client, while tactical decisions (the "means" of the representation) are for the lawyer to decide.' The Model Rules provide that a lawyer "shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued." The contractual model undoubtedly provides certain needed protections for the parties. The model respects the autonomy of lawyer and client. It treats the client like an adult rather than a child.' It puts the client in control of the ultimate goals of the representation and provides a mechanism whereby the parties can hold each other accountable. There are serious problems, however, with the contractual model. Although the parties are viewed as rational and autonomous agents who come together to accomplish a specific end, there is no sense that they are engaged in a joint venture in which they might change and grow together. A contractual model is minimalistic and lives by the letter of the law. There is no place in it for "going the extra mile," for doing what the parties are not required to do, for acting with care, compassion, or friendship. There is an additional defect with this model. We have already seen that in practice one party-often, but not always, the lawyer-can dominate and control the relationship.

Although the contractual model is premised on a theoretical equality of bargaining power, it carefully allocates decision-making authority between the parties, in effect conceding that one or the other party must be in control. Its solution to the problem of domination is to draw lines of demarcation to determine which decisions are for the lawyer and which for the client. While the contractual model speaks the language of equality, it functions in

practice as if weak-willed lawyers need protection from overbearing and manipulating clients or as if vulnerable clients need protection from domineering and paternalistic lawyers. In short, the contractual model encourages that same relationship of "wary strangers" that Callahan criticized in his discussion of the secularization of bioethics. A relationship governed only by con- tract can degenerate into an uneasy alliance in which each side eyes the other suspiciously, jealously guarding her own prerogatives, and trying to protect herself from the manipulations of the other.

From Contract To Covenant

With its emphasis on autonomy and legal rights and remedies, the contractual model embodies a stilted and incomplete understanding of persons and relationships. A different model of lawyer-client relation- ships emerges if we begin from a religious perspective that views human life as both sacred and social.[78] First, humans are sacred. This is because we are created in the image and likeness of God. Despite our fallibility an d sinfulness, human beings are subjects of reverence. Each of us is of unconditional value.[79] Such an understanding has profound implications for how we should treat each other. As Bouma says, "[the biblical message... is that in treating persons we are in an important sense treating God." ' "m The Last Judgment in the Gospel of Matthew makes the point more starkly: "Truly I tell you, just as you did it to one of the least of these who are members of my family, you did it to me." Some of the same awe, respect, and love that we owe to God should be given to our fellow human beings. Indeed, Jesus taught that the greatest of all commandments was to love God and love our neighbor as our- self. The life and death of Jesus reveal that God's love for human beings knows no bounds; likewise, we are called to love one another as God has loved us." Second, human life is not only sacred, it is essentially social.' "In the beginning is relation," says Martin Buber.' We become who we are through our relations with each other. We are shaped and formed-and sometimes deformed-by our relationships. As theologian Richard McCormick says, "[Ojur well-being is interdependent. It cannot be conceived of or realistically pursued independently of the good of others. Sociality is part of our being and becoming.""° In short, I encounter and serve my God as I encounter and serve this person, this client. My client and I are not "wary strangers," isolated and alienated from each other; instead, we share a common destiny that is forged in our encounter with each other. This understanding impels us to move beyond a contractual model of lawyer-client relationships. My client has unconditional value. I am obligated not only to honor my contractual obligations, but to

78 Joseph Cardinal Bernardin, Consistent Ethic of Life 60 (1988).

79 The Westminster Dictionary of Christian Ethics 353 (James F. Childress & John Macquarrie eds., 1986) ("Each individual is infinitely precious to God and made for an eternal destiny.").

revere my client as a human being made in the image and likeness of God. I am called to do more than abide by a contract: I believe that I am called to a covenant with my client."°

The Idea Of Covenant

Covenant is an important theme in both the Hebrew and Christian Scriptures. Indeed, covenant is so central to Scripture that theologian Joseph Allen claims that it "provides a unifying theme in the midst of the multiplicity of the Bible."'' The Hebrew Scriptures are replete with covenants between God and humans. There are God's covenants with individuals-Noah, 1 ' Abraham," 2 and David." 3 Most importantly, there is the covenant at Sinai where the Israelites pledge their obedience to the God who de- livered them from the bondage of Egypt. There are also the prophetic condemnations of Israel, which can only be understood in light of the Sinai covenant that the people have forgotten or ignored.[80] In the New Testament, the concept of covenant is reinterpreted in light of the Incarnation. Jesus is presented as the fulfillment of the Hebrew Scripture promises." Jeremiah had written of a "new covenant" written not on tablets of stone but on the hearts of men and women." For St. Paul, all who have faith in Christ are members of this new covenant." When believers participate in the Lord's Supper, they join in the new covenant of Christ. As Jesus himself said, "[t]his cup is the new covenant in my blood." The promise of Jeremiah becomes a reality in Jesus. The God who covenants with humanity values each human being individually, irreplaceable, and equally. As God's creatures, made in God's image, humans are imbued with the capacity to covenant with God and with each other.' Indeed, human beings are called to reflect God's covenant love for humanity in their relationships with each other.' This is what David Smith calls the "principle of replication": "As God has committed [God's self] to us, so ought we to commit ourselves to each other."'" Human covenants, of course, are not precisely the same as God's covenants.

As Bouma observes, "Human covenants are not all-en- compassing, as is the call to discipleship and their origins are not as one-sided as is God's covenanting with us." '[81] Nevertheless, human covenants do resemble God's more- encompassing covenants in certain essential ways. Joseph Allen suggests that covenant as applied to human relationships has three core characteristics:"

1) A covenant relationship arises through mutual actions of entrusting and accepting entrustment. In a covenant, each of the parties becomes open and vulnerable to the other;"

2) A covenant is a creative act that constitutes a moral community in which the parties have

80 Amos 3 and Hosea 1-3
81 Bouma

responsibilities to and for each other, responsibilities that go be- yond the "letter of the law;' and

3) In a covenant, the parties undertake obligations that will not necessarily end at a specific moment. The responsibilities of covenant members continue over time. The idea of covenant has broad implications for relationships in general and for lawyer-client relationships in particular. I propose now to examine the lawyer-client relationship in light of Allen's three core elements of covenant. How does a covenantal model of lawyer-client relations differ from the typical contractual model? What obligations does the covenantal model place upon lawyers?'3 What possibilities does it offer?

Lawyers And Clients Entrust Themselves To Each Other.

In a covenant, the parties entrust themselves to each other. It is easy to recognize how clients entrust themselves to lawyers. When a client comes to a lawyer, the client is usually facing a serious decision or problem. Often the client is emotionally vulnerable. The client may be unfamiliar with the language and processes of the law. The client has no choice but to place herself in the hands of her lawyer. This entrustment is inevitably accompanied by risk. The law- yer may be incompetent or negligent. She may put her own self-interest before her client's interest. She may treat her client less as an adult than as a child or an object.' Human covenants, however, are founded upon mutual actions of risk and commitment. The lawyer too must make an act of entrustment. This is perhaps the biggest stumbling block to the forging of a covenant between a lawyer and her client. In too many cases, as we have seen, the lawyer dominates and controls her client (or, conversely, is dominated by the client).

It is unrealistic and inaccurate to talk about mutual risk, commitment, and trust when one party sees herself-and is seen by the other-as dominant and in control of the relationship. There can be no covenant unless and until the lawyer is willing to forge a relationship of true equality and mutual respect. It is not enough to approach the relationship as a matter of contract in which each party has certain agreed-upon obligations to perform. Instead, the lawyer must take the risk of encountering her client as a human being of unconditional value, made in the image and likeness of God, with all the uncertainties and risks that this entails. In a covenant, the lawyer may be challenged. She may be hurt. She may even be changed. It is a bit like entering a friendship.' If I am your friend, I must be willing to learn from you and be challenged by you. If I am unwilling to view our relationship in those terms, then I should not pretend to enter into a friendship that does not exist. If I adopt a fundamentally religious perspective on relationships-to repeat my earlier point, if I see human life as essentially sacred and socia1'-I am better able to make this act of entrustment, because I already recognize that

"my client was sent to me by God; God proposes to deal with me through my client.' This understanding frees me to accept the risks and un- certainties of a covenantal relationship with my client.

Lawyers And Clients Constitute A Moral Community

In a covenant the parties form a moral community in which each has responsibilities to the other. Each affirms the other as one loved by God, unconditionally, and possessing unconditional value. Each is answerable to the other.' Theologian William May talks of the reciprocity of covenant: Each side needs the other, each side is not only benefactor but beneficiary.' Lawyers need their clients, not only to earn a living, but to carve out a meaningful and productive life at work. As I suggested earlier, conventional wisdom can imagine only two ways of relating to clients. Either the lawyer is in charge of the relationship, or the lawyer abdicates personal moral agency and becomes the amoral agent of her client. Ironically, these two approaches, which seem the mirror opposite of each other, betray a fundamental similarity. In both situations, the parties are isolated from each other and closed to change. This conventional wisdom has little to offer lawyers and clients in a case where the lawyer has moral doubts about a course of action. The lawyer can quit; or the lawyer can stay, suppress her moral doubts, and continue to fight as hard as she can for her client. This narrow vision of the lawyer-client relationship encourages the illusion that the parties are locked into rigid roles, with nothing to contribute to each other. In a covenant, no one is an island. Lawyers and clients are in it together. Together they are more than they are apart.

Covenant and Conversion

Consider a case in which a lawyer and a client have a disagreement over a moral issue. Perhaps the client is seeking an end that is lawful but-the lawyer believes-immoral, or the client is pressuring the lawyer to adopt a tactic that the lawyer has moral qualms about using. Perhaps, after a full and frank exchange of views, the client will change her mind. A second possibility is that the parties will explore the issue fully yet fail to reach an accord. Perhaps the lawyer will eventually assert her right of "conscientious objection," as Thomas Shaffer calls it, and refuse to act further for the client."' Even in such a case, insists Shaffer, something important has been accomplished, because the parties have listened to and influenced each other, perhaps in ways that could not have been anticipated. But there is a third possibility as well.

Perhaps the lawyer's moral doubts will be dispelled as she listens to her client tell her story. Per- haps the lawyer will come to understand more fully what motivates her client, appreciate

and accept her client's objectives, and choose to continue as her client's companion and lawyer. The lawyer may even have to abandon some of her deep-seated biases and beliefs as she comes to know and respect this human being with whom she is in covenant. If we keep in mind that lawyers and clients form a moral community, we can appreciate the inadequacy of the contract model. The idea of contract cannot capture the richness and open-endedness of the relationship, the possibilities for change and conversion. Rather than speak of the "parties," as we do when we speak of contract, it would be more accurate to talk of the "partners" to a covenant, for the word partner signifies mutual dependence and a joint effort to achieve a common good.'

The Gratuitousness of Covenant

As we saw earlier, a contract model tends to be minimalistic. A lawyer owes her client only what their agreement demands, nothing more. Covenant is not so limited. Our obligations are not so easily discharged. A lawyer in a divorce action, for example, may find her- self listening to her client tell a story of abuse and betrayal. What is called for is not only competent legal service, although that is always required,' but a compassionate heart as well. As William May puts it, there is a gratuitousness to covenant that contract lacks: The parties go beyond the bottom-line and do things for each other because they recognize a duty to serve, not because they are affirmatively required to do so."' It is the difference between a seller's relationship with a buyer and our intimate relation- ships with friends and family members. In a covenant, each partner has obligations that are measured not by explicit commitments but by the needs of the other. While a con- tract model assumes equality in bargaining strength between the parties, covenant is more realistic.

Bouma makes the point well: Conditions such as illness, immaturity, and differing expertise can make covenanted people quite unequal. Perhaps they are equal in dignity and worth, but they are not always equal in their ability to express that dignity and worth. So the inequality of people is as relevant to covenantal responsibilities as is their equality. The in- creased vulnerability of one partner automatically implies greater responsibility on the part of the other. Covenant places limits on the capacity of the more-powerful to take advantage of the weaker. William May argues that this is an important reason for preferring covenant to contract: [T]he reduction of ethics to contractualism alone fails to judge the more powerful of the two parties (the professional) by transcendent standards .... As opposed to a marketplace contractualist ethic, the biblical notion of covenant obliges the more powerful to accept some responsibility for the more vulnerable and powerless of the two partners. The more-powerful

party (often the lawyer) must understand that what she does for and to the other is judged not by the mathematical minimalism of contract but by the "transcendent standards" of God. A lawyer in covenant sees her client as a human being, a human being in pain and emotional turmoil, not as a mere commodity or fee-payer. Covenant provides a check on selfishness and professional domination that contract does not. It reminds us that we encounter our God as we encounter each other.

Lawyers And Clients Have Enduring Responsibilities

A contract usually has a fixed or limited quality to it. Once a party "discharges" the contract, she is released from her obligations to the other party. Covenants are more enduring: Think of a parent's relationship with her child or a wife's relationship with her husband. There is no fixed terminal point beyond which each person's responsibilities magically disappear.

At first glance, the enduring nature of covenantal relationships may seem to exclude many encounters between lawyers and clients. After all, while some lawyers have ongoing relationships with clients, others represent clients on a one-time basis. Once the client's immediate problem has been resolved, the relationship ends. By enduring, however, we do not mean eternal (although God's covenant with humanity meets that condition). As Joseph Allen ex- plains, "[t]he responsibility may endure for a shorter or longer time, but it continues throughout the life of that covenant.' 'So too with lawyers and clients. If a lawyer views her client as a covenant partner, she accepts responsibility for the relationship, not just today or tomorrow, but for as long as it persists. This requires an unswerving allegiance to the other, steadfastness, a constancy of devotion that continues over time. Although the precise demands upon the lawyer may change, her duty of faithfulness to her partner and to their relationship endures. The enduring quality of the lawyer-client covenant reminds us that today's actions have lasting consequences. A word spoken in haste cannot easily be retrieved. A small kindness today may bear rich fruit tomorrow. For good or for ill, the actions of covenant partners influence each other in unforeseen ways. Although the lawyer-client con- tract is finite and limited, covenant has no fixed boundaries.

The Lawyer as Moral Companion

There is an additional dimension of covenant that is implicit in our discussion but deserves further attention. As a grizzled old corporate lawyer once told me, "Covenant is a nice idea, professor, but don't forget that sometimes clients pay me to give them a kick in the pants.' 'Consider again the analogy between covenant and friendship. Lawyers and clients in covenant

are not precisely the same as good friends-we do not buy our friends with money-but they are like friends in that each has made a commitment to be open to and to learn from the other. One of the things I want from a friend is a kindly ear, a willingness to listen and to withhold hasty judgments. But that is not all that I want. I also want honesty and moral companionship from my friend. There are times when a friend, a true friend, will say to me candidly, "Look, that doesn't sound like you. Are you sure that's what you want to do?" A true friend reminds me of the kind of person I aspire to be at my best rather than blindly supporting whatever I choose to do at my worst. In the same way, lawyers can serve as a voice calling clients back to their better selves, reminding clients of their deepest values, loves, and obligations.

A lawyer can serve as a moral guide or moral companion to her clients. Consider a man who comes to a lawyer with a grievance against his son. The client is angry because of his son's announcement that he and his girlfriend are going to have a baby. Marriage is not in their plans. The client, a devout Christian with traditional beliefs, now says to the lawyer, "I want you to rewrite my will and leave my son out of it!" The lawyer could immediately redraft the will. But if the lawyer knows her client well, and if she sees herself in covenant with her client, then she understands that her responsibilities go beyond the pro- vision of technical legal assistance. The lawyer recognizes that she and her client are in a relationship in which they cannot help but influence each other. Like a good friend, the lawyer cannot help but wonder if what her client demands, in the heat of the moment, is really in her client's best interests. Like a good friend, the lawyer will seek to engage her client in a conversation about the proposed change. The codes of professional responsibility permit but do not require this kind of moral conversation.

Model Rule 2.1 provides that a lawyer "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[82] Despite this invitation to engage in moral dialogue, lawyers often refrain from discussing moral concerns with a client. Some lawyers consider themselves to be in control of the representation. They see no reason to involve their client in a discussion of such matters. Others regard their client as in control of the representation. They fear that to raise moral issues would be to impose their own values upon their client." In a true covenant, however, each side must be respected, and each must be free to voice her concerns and worries. It does not violate client autonomy to ask, "Is that really what you want to do?"; or to say, "Let's talk about this some more." Instead of telling the client who wants to disinherit his son what he can do, the lawyer can ask her client to reflect about what he should do. Sometimes the lawyer need only speak a single word: Why? Why do you say that? Why do you want to do that? This is the essence of the lawyer's role as moral companion: to assume the best about

82 Model Rules, supra note 34, Rule 2.1

our clients, not the worst; to create a space for clients to think before they act; and to help clients to act in accord with their fundamental values.

Ultimately, of course, the client has the legal right to disinherit his son. If his lawyer decides not to represent him, the client can find another lawyer to redraft the will. But the lawyer does her client and herself a disservice when she does not at least encourage moral reflection and dialogue. Often the lawyer is uniquely situated to be a catalyst for such moral reflection. A lawyer who represents a corporation on a continuing basis, for example, comes to know her client and its organizational culture. Over time, the client comes to respect and trust the lawyer. With such a history, the lawyer can become a voice for the corporate conscience. When moral questions arise, the lawyer is enough of an insider to be listened to and taken seriously, but enough of an outsider to preserve a needed objectivity and independent moral vision. The lawyer can be a voice that asks "why" when everyone else in the company feels compelled to mumble "yes.""

Saying No to Clients

This raises a related point: There are times when a lawyer must be willing to say "no" to clients. This is necessary not only to preserve the lawyer's own moral values, but also to preserve an essential element in a true covenant: the freedom to say "no." Each side must be given the space to be the kind of person she was meant to be. Each must maintain moral accountability for her own actions within a con- text of shared accountability to and for the other. Neither can become the rubber stamp of the other. This too is part of the lawyer's duty towards her clients. To be willing to say, after discussing a matter fully, "I will not do this. I cannot do what you ask." And to say further, whether explicitly or implicitly, "I'm not sure you want to do it, either." If, on the other hand, a lawyer refuses to voice her moral doubts, those doubts do not disappear. Her moral misgivings go underground and fester, contaminating and subverting her dealings with her client.'" ° If a lawyer truly respects both her client and herself, she must be willing to voice her worries, fears, frustrations, and resentments. To do so will not necessarily threaten the relationship. In the long run, it can strengthen it, just as Yahweh's covenant with Israel was deepened and enriched by the willingness of both sides to express honestly their disagreements and disappointments.

The Costs and Benefits Of Covenant

This preliminary sketch of the covenantal model has left many is- sues unexplored. Consider the following:

1) How do we apply the model to lawyers who have only one client-for example, lawyers for large organizations like corporations?

2) How do we apply the covenantal approach to lawyers who do not have clients at all in the conventional sense-prosecutors, for example, and government lawyers?

3) What are the responsibilities of clients towards their lawyers? For example, how should a lawyer relate to clients who have no interest in forging a relationship of mutuality and equality?

4) More broadly, what are the forces in modem legal practice that make it difficult to nurture and maintain covenantal relationships with clients?

These and other questions must be addressed if we are to gain a fuller understanding of the strengths and limitations of the covenantal model. We should remember, of course, that no one model of the lawyer-client relationship captures the whole of reality. Each has its own advantages and disadvantages; each distorts as well as illuminates. Two points should be made in closing. First, by presenting a covenantal model of lawyer-client relationships, I do not want to give the impression that contract notions are irrelevant. The contract model establishes the bottom line of the relationship. Sometimes that is the only relationship the parties intend; consider, for example, the purchase of an automobile. At other times, covenantal relationships can go awry, and contract stands ready to protect the basic rights of the parties.

As Bouma puts it: The most important and well-intentioned of covenants can break down because of sin, ignorance, or incompetence ....Sometimes the rupture cannot be healed, and people begin talking through third parties-malpractice or divorce lawyers. At such a point, the bare bones of the covenant must be examined-not for resuscitation but for guidance about the minimal duties and privileges implied in the earlier entrustment. Even when the covenant does not rupture, fallen spouses, preoccupied parents, overly busy professionals, confused clients, and rebellious children sometimes need to be reminded of the minimal claims that can be made, claims that can be asserted as rights rather than requested as charity.' The choice, then, is not between contract or covenant. Covenant builds upon and enlarges contract. Lawyers can choose to approach their work more as a matter of covenant than of contract, but in the real and messy world of the law they will inevitably partake in a

bit of both. Second, although there are risks to adopting a covenantal model, I believe that the benefits are worth the risks.

Critics of this approach sometimes claim that it can take too much time and can lead to burnout if lawyers become overly entangled in their clients' troubled lives. Critics charge that covenant can tempt lawyers to assume a competence in matters over which they have little or no expertise. On the other hand, covenant opens the door to a new way of relating to clients. It can give lawyers a sense of connection with their clients. It can help them feel that they are making a difference in their work. Covenant can help tired and disgruntled lawyers regain a sense of meaning and service. Furthermore, clients seem to be happier about their lawyers' work and more satisfied with the results when they have been treated as equal partners in the relationship.'" Client involvement also improves the quality of the representation-the lawyer has a clearer sense of her client's motives and concerns, and a better picture of what her client wants and needs.'

Covenant also allows a lawyer to maintain a sense of moral agency. No longer does she have to live a compartmentalized life where her deepest values are relegated to weekends and evenings. Instead, she and her client are free to discuss moral questions openly because each has the other's trust and is morally accountable to the other. No longer must the lawyer opt either for moral dominance or for moral abdication. For these reasons, it makes sense to supplement or replace the prevailing contractual model of lawyer-client relationships with the covenantal model. While any lawyer can aspire to a covenantal relationship with her clients, it is a particularly appropriate goal for Christian lawyers who wish to integrate their religious values with their work on behalf of clients. If a lawyer wants to bring her faith and her work together, if she wants to love her God and love her neighbor, if she wants to live a life of discipleship and service, she need look no further than the human being who sits across the desk from her.

When discussing law and morality, it is important to define the terms, from below you will probably decide it is not possible to define what law is, but it is possible to describe what it does and what rules apply. This is essentially a philosophical question, which probably has no answer, but some theorists have attempted to do so.

Morality is every individual's ideal self-image (or prescriptions for self-fulfilment or self-protection). This concerns a private conflict between an individual and his conscience. It may often have the same content as an individual's religious views. Sanctions for non-compliance are varying degrees of pangs of conscience. Individual morality will often have the same content as legal rules. Honestly, for instance, is probably the ideal image of the majority of individuals in our society. This morality is supported in judicial terms, for example, in that

theft and fraud are all offenses. However, the law does not enforce morality as such. An individual may find drinking totally unacceptable. One drop on his lips will fire (burn) his conscience. The law does not take cognisance of this internal conflict.

Law and Ethics

Ethics is the science of the rules of moral conduct which should be followed as being good in themselves. There is a close relationship between law and ethics, but there important differences.

First of all, whereas law is enforced by the organs of the state, ethics is not. While the commands of the law are imposed by government and enforced by sanctions primarily exterior, the final decision in moral issues is left to each man's personal conscience, and the sanctions lie in his own heart (save that, where a rule of ethics coincides with one of positive morality, public opinion may provide a sanction). Secondly, law concerns itself primarily with the external behaviour of a person, his overt acts, being interested in the state of his mind, his intention or his motive as a rule only where it manifests itself in an act. Ethics on the other hand, concerns itself primarily with the state of a person's mind, with his thoughts and desires, and is interested in his acts in the main only in so far as they reveal the state of his mind.

Thirdly, whereas law imposes its commands in the interests of the community, the laws of ethics are imposed for their own sake, to achieve virtue. While the law aims at the doing of justice and the maintenance of peace and order in the community, the aim of ethical theory is the perfection of character, institution of law has to do with the regulation of conduct. To a large extent law and ethics overlap, but they do not coincide.

Religion determines the relationship between an individual and a Supreme Being. For a Christian the source of religion lies in the Bible, for a Muslim in the Koran and for someone adhering to African religion it lies in customs handed down, rituals, objects and dances. The ultimate sanction for non-compliance with religious norms is varying forms of the burning fires of hell. Religion is often an emotional subject and can lead to extreme views. This also applies to the relationship between law and religion. On one hand, some people are of the opinion that religion and law should be mutually exclusive. To them religion is a personal matter, only concerned with the individual's private sphere of conscience. It determines the individual's destiny after death. In effect, there is a distinction between state authority and religious authority. And it is not the task of the state to enforce religious norms or convictions on its citizens. However, religious freedom must be made possible by the state, allowing each individual to exercise a free religious choice.

On the other hand, it is sometimes accepted that religion and law should have the same content. This appears in its most extreme form in the fundamentalist Islamic religious states, where law and religion

are equated. The Koran dictates that theft is an offence; an offender's hand must be cut off. The law applies this religious rule in the worldly sphere.

Law and community mores

Community mores (society values) are the norms of a whole community or group within that community. They are collective morals. Etiquette, fashion and views about free love or interracial marriage all form part of this. They differ from religion and morality in that they are not private matters concerning only a specific individual. The sanction for non-compliance is varying degrees of disapproval by other members of society.
Sometimes legal rules and community mores coincide. This applies to the prohibition on killing a fellow human being and the principle that damage caused unlawfully must be compensated.
The law does not take always cognisance of community mores. There may be vast differences. The community may feel that all forms of censorship should be abolished or that taxes should be reduced. The law does not represent the community's values in this regard if it does not reflect these values.

In conclusion, there is a connection between legal laws laid down by a state and certain other norms of behaviour known as laws of morality. From a legal perspective the essential difference between these two sets of rules exists in their respective enforcement. Legal rules are enforced in the courts. Rules of morality depend for their observance upon the good conscience of the individual and the force of public opinion. In any society it is usual to find the rules of morality observed by the majority of its members reflected in the legal laws of that society. The contents of morality or ethics and law overlap to a great extent, e. G. murder, theft and slander; but there are many rules of morality and ethics which the law does not seek to enforce, such as the commandment to honour our parents; and many legal rules which are not intrinsically moral, such as the husband's general liability to pay tax on his wife's income.

This chapter has argued that religion has an important role to play in our thinking about legal practice and legal ethics. My argument has been two-fold. First, I pointed out a number of serious problems that result from adopting a rigidly secularistic approach to the study of lawyers and legal practice. Second, I presented a case study of how religion might be brought to bear upon a specific issue in legal practice-namely, the lawyer-client relationship. I do not claim that the covenantal model I have proposed is the best or only means of envisioning the encounter between lawyer and client. I do claim that religion can help us to see that encounter in new and rewarding ways thus putting away the law

CHAPTER THREE

Law Of Precedent Demystified

A precedent is a judicial decision which contains an underlying principle that has the force of law which subsequently either binds or is persuasive to future courts when considering similar matters arising from similar material facts. The operation of the doctrine of precedents is based on stare decisis which is a Latin term meaning "stand by the previous decision." So when a decision is taken by a higher court, it must bind lower courts in deciding a case founded on similar facts.[83] The principle behind this is that in each case the judge applies existing principles of law, that is follows the example of earlier decisions. It is a common law invention that was developed by courts and jurists with the aim of ensuring consistency, uniformity and predictability of judicial decision making processes.

These precedents are in various categories and types in which they are operative. For instance declaratory precedents; these are ones where the judge applies existing rules of law without extending them. [84] The other category is original precedent; where there are no previous decisions to base on by the judge but has no option but to decide the case according to the general principles of law.

If you are observant, you actually realize that from the above stated categories, the key word of emphasis that perhaps sweeps across is **"existing rules of law."** These are rules that for long have been fixed by the common law and established as a ground for legal determination of issues before legal tribunals. In such a perspective, it now seems clear that before determining any matter, a judge has to focus on the existing rules of law. They are a guiding point to a judge. Then my question arises. Isn't the judge made a puppet of the law? If not, aren't his hands tied to existing rules of law? Indeed the rules have tied the judge's hands. They are not flexible to swing and introduce new matters. Yes we appreciate the inventors of the doctrine but I am in total disagreement with its application especially in this modern era of law.

The norm is as such that it must out way advantage, the law of precedent only re emphasises retrospection and not legal development, therefore the law of precedent has numerous weaknesses that it lays out both practically and theoretically. Common of these are general principles of law, law and justice, schools of law etc Below I will illustrate some of the different weaknesses in these aspects respectively;

83 J.H. Farrah, A.M. Dugdale, Introduction of Legal Methods. London Sweet and Maxwell, 2nd Edition, 1984 Chapter 5.

84 Kiriri Cotton Ltd v R.K Dewani [1958] EA 239.

This ideology of following precedence has been overtaken by events. I believe that it's a it is a clog. It should be revolutionised to accommodate changing circumstances happening in real time rather than depending on out dated nugatory precedents, it only conserves traditional conservatisms and it is time it changed to address the ever changing law and society.

The question before us therefore becomes what are the mishaps and shortfalls of the doctrine of precedent pinpointing how the ideology has been overtaken by events thus becoming amorphous, an enigma and a clog for progress. This book will kick start with a brief background and definition of the doctrine of precedents then proceed to highlight how it has run its course to the extent that it has to be revolutionised.

Society has evolved and Judges must be able to analyze and express their understanding of the idea basing on the prevailing circumstances of society. Why should man be held guilty basing on the set rules that have existed for long? In other words, my contention is that these rules hold the judges captive. Even where they realize that it was an error, deviating from the decision of the Supreme Court is seen as an abomination. The result of this is that once the Supreme Court relied on a principle and made an error in law while accelerating to their final verdict, the other courts shall rely on the same mistake in delivering their verdict not until the supreme court shall override its decision or only if a lower court can distinguish the facts of the case. This can be or may be by establishing the facts of the earlier decision are different from those in the case at hand in a material respect so that the earlier decision ought not to apply.[85]

Then one may argue that an option of revision and overriding the previous decision is existent to insulate my claim but my emphasis, fixed rules and principles should be dumped. Acts of Parliament should be denied an open eye. Judges should decide the matter basing on their understanding and facing on demands of a society. For instance, if a man is presented before a judge claiming that he stole chicken and another is presented on the matter of theft that he stole a neighbor's vehicle. The two in current environment shall be charged with theft which requires the judge to look at the previous decisions on theft before giving his verdict. But this is not my opinion. My contention is that the judge should decide the matter basing on his understanding of the society. Both is theft but that of a vehicle weighs heavier than that of a chicken. Let the judge convict them basing on the weight of the offence without basing on established principles and rules of law. Yes a spade should be a spade not a big spoon.

In other words, this as well saves time for court. No need for lawyers to open law reports to look for persuasive and binding precedents, citing textbooks and Journals. The judge is

85 R.A. Wasserstorm, The Judicial Decision (1961)

a learned friend; I presume he understands the societal demands and he need not to hold captive in the centuries established rules but let him be free to think and decide; if the defendant is not convinced then appeal to the next higher court.

Facing on the types of these precedents is yet another unresolved matter that I would need to clarify especially the binding precedents also known as the vertical precedents. These are found in almost all jurisdictions and encompass judicial decisions that bind future courts when determining a matter legally and factually indistinguishable from one in which the precedent was established. Such precedents must be followed by future courts even when they disapprove of such decisions. As already noted, these precedents find expression in the doctrine of stare decisis. It is sometimes used to describe the doctrine of precedents. It is the saved principle of English law by which precedents are authoritative and binding or mandatory and must be followed.[86]

Of course, as already mentioned the key words of emphasis are authoritative, binding and mandatory and must be followed. This is how the judge's hands are tied and that is how law is fixed generation and generation which notion needs to be altered. In Attorney General v Uganda Law Society[87], Mulenga JSC held that under the doctrine of stare decisis, a court of law is bound to adhere to its previous decisions save in exceptional circumstances where the previous decision is distinguishable or was over ruled by a higher court of appeal or was arrived at per incurium without taking into account a law in force or a binding precedent. In absence of such circumstances, a panel of an appellate court is bound by previous decisions of other panels of the same court.

This doctrine of stare decisis tends to hide in the notion of hierarchy of courts, where the higher courts bind the lower courts and never vice versa.[88] This makes me presume that judges in higher courts understand the law more than those in the lower courts or if not they interpret it best. In my understanding, such a notion is irrelevant. Am not against the idea of appealing or undermining the relevancy of superior courts, my view is that when a judge of a lower court is deciding on a matter, the previous decisions should not bind him. They should be persuasive to him and it should be at his discretion either to borrow a leaf or to determine the matter basing on his wisdom.

Relying on such previous decisions is in one way or the other affecting the legal development. There is no dynamics in the domain. In other words judges don't think for themselves and

86 Osborn, P.G, Osborns Concise Law Dictionary, Sweet and Maxwell, (1927) p.360.
87 [2011] 1EA 1 (SCU)
88 H.E. Morris and James. S. Read: Uganda: The Development of its laws and Constitution. The British Commonwealth: the development of its laws and constitutions, Vol 13. Xvi, 448 pp. London: Stevens and Sons, 1966, 90s.

innovating new ideas has now become a hard rock to crack. Yes the law is fixed yet society isn't static. The general orthodox interpretation of the doctrine of stare decisis is "Stare Rationibus Decidendis" literally meaning, "keep to the ratio decidendi of past cases." In his emphasis Lord Denning expounding on the nature of binding precedents in one of his works summarized its operation as, "…stand by your decisions and decisions of your predecessors however wrong they are and whatever injustice they reflect."

Further in Delay v Lees, Lord Heworth C.J, expressing the binding nature of precedents referred to in this case concluded as follows, "one has to approach the matter on the pure question of law whether Park and Talbot applies and governs this case, I am compelled to take a course and expand on the issue." That is the judge was stopped by the doctrine of stare decisis otherwise his judgment would have been different. In a further analysis of the binding nature, Sir John Salmon remarked that , "A judicial precedent speaks in England with authority, it is not merely evidence of law but a source of it; and the courts are bound to follow the law that is so established, every court is absolutely bound by the decision of all courts superior to itself. A court of first instance cannot question a decision of the court of Appeal nor can the court of Appeal refuse to follow the judgments of the House of Lords.

Besides, the other challenge with the precedent system is that if a higher court overrules a precedent that is quite old, then it is very likely that many cases that have been decided based upon that precedent will return to court. This is affecting Justice and wasting courts time. Take for instance if a man was convicted upon application of such precedent that was based on such rules and laws established and then such a rule is overruled and directly affects the conviction of such a person then it means that if it calls for release of such a person, then justice is defeated. It's my argument that fixed rules and laws should not be a preliquisite for determination of a case simply because simply because they have similar facts; It should be a decision reached according to the understanding and knowledge of the judge. If such laws are to be used then they should be persuasive and the discretion should be at its maximum operation on the side of the judge to determine the matter but not being binding.

Many of the precedents and established rules of law are rigid and do not entertain any forces of flexibility. Look!! Once a rule has been laid down in a superior court, it binds lower courts even if the decision is wrong. What is the implication of this? Besides, it is embedded in the idea that judges do not make mistakes and over adherence to the doctrine may therefore result in carrying forward a wrong passed law where the precedent followed was wrongly reached. For instance in Opoya v Uganda,[89] the two appellants were jointly tried and convicted of robbery. They were sentenced to death by the trial judge who found himself bound by the decision of the Court of Appeal in Kichanjele S/o Ndamungu v R[90] . On appeal, the court did

89 [1967] EA 752.
90 (1941) EACA 64.

not agree that the death penalty was mandatory and declined to follow the Kichanjele case and instead sentenced the appellants to twelve years imprisonment and twelve strokes each.

Are we under looking the fact that this system compromises the law and thus fails to individualize the administration of justice since facts in any two cases can never be 100 percent the same. Ideally, it doesn't make sense of how decisions in other cases committed by different people can be applied in another case committed by some else. Actually, the system is creating so much law making it complex to handle. Much case law is traced in volumes of decisions made over a number of years and the result is large volumes of law reports. The outcome is a lot of decisions exist and some can be missed out by judges and lawyers, so they may overlook some important rule of law required for a particular case.

Will justice then be fully achieved? The doctrine is tiresome and burdensome to lawyers and judges. These have to take a lot of time to look for all precedents that are binding on them before deciding a matter. As already noted in my first paragraphs, these fixed laws limit a court to bring up new ideas and rules for administration of justice and if that is the case, how long shall they last yet the society evolves and generations change. This is because the court has to look up to an earlier decided case and the judges cannot bring in a better rule since a precedent is binding on them.

On top of this is the inflexibility injected in the legal system that makes it hard for courts to execute justice in accordance with the needs of society at any given time as well as bringing slowness of growth. The legal system embodied in the doctrine of precedent depends on constant litigation for rules to emerge, However as litigation tends to be slow and expensive the body of case law cannot grow quickly enough to meet modern demands. Where it is felt that a particular case has long been a precedent operates unfairly, or where the law on an important point is unclear, it is argued by some that appeals to court should be financed at public expenses as it is inequitable that the law should be developed or clarified at the expense of private litigants.

Besides it brings about uncertainty in law. The result of a court case can be uncertain until the final judgment is made. Some judges may be unwilling to depart from a precedent to make change in the law. We cannot as well neglect the Retrospective effect precedent has to be backward looking in the case that sets the precedent. This could be unfair in criminal cases if an offence is made by the judgment. When the offender committed the action it was not unlawful. This is unlike statutory law when an offence is created for the future by an Act of Parliament.

I understand that many jurists attempted to define law but most of their definitions don't appeal to my reasoning apart from Legal Realists and the Sociological school jurists.

I totally opine to the reasoning of the Legal realists and Sociological jurists on the path of law basically what it should be. The legal realists present an argument that law derives from prevailing social interests and public policy. Judges not only consider abstract rules, but also social interests and public policy when deciding a case. Legal realism is characterized as a type of jurisprudence by its emphasis on the law as it currently appears in reality rather than the way it works in the books. To this end, it addresses mainly conduct of judges and the conditions that behavior affects judicial decision-making processes. [91]

As Karl Llewellyn states, "Judges Stand behind judgments, Judges are men; they have human histories as men." Therefore, the law didn't reside in an abstract domain with universal laws or values, but rather inseparable from human behavior and from the ability with judges to decide the law. To understand legal actor's decisions and actions, legal realists turned to the ideas of the social sciences to understand the human relationships and behavior that culminated in a given legal result.[92]

Ideally they don't differ from the sociological jurists who advocate that law and society are related to each other. That law is a social phenomenon because it has a major impact on society. Their idea is to establish a relation between the law and society. This school laid more emphasis on the legal perspective of every problem and every change that takes place in society. This sociological approach to the study of law is the most important characteristic of our age. As Ehrlich noted, "at the present as well as at any there time, the center of gravity of legal development lies not in legislation nor in the juristic decision, but in society itself."[93] They insist that the legal order is a phase of social control and that it cannot be understood unless taken in its whole setting among social phenomena. It would therefore be seen that sociological jurisprudence is a multifaceted approach to resolve immediate problems of society with tools which may be legal or extra-legal and techniques which promote harmony and balance of interests of society. This is what law should be like not fixed regulations and rules developed over time.

According to Salmond: precedents in a loose sense, includes merely reported case law which may be cited and followed by courts.' In a strict sense, that case law which not only has a great binding authority but must also be followed.[94] it is imperative to note that precedents may be original, binding or persuasive.

91 Vividh Jain. A student of the Institute of Law, Nirma University.
92 Ayush Verma. Legal Realism and Legal Positivism. Available at https://www.blog.ipleaders.in
93 Von Ehrlich. Principles of Sociology of law.1936.
94 Salmond, J. W. (1900). Theory of judicial precedents. LQ Rev., 16, 376.

An **original precedent** ensues when a point of law in a case has never been decided before, then whatever the judge decides will form new precedent for future cases to follow.[95]The classic example is the case of **Donogue v Stevenson**[96], where the plaintiff sued the defendant after a friend of the plaintiff bought her a drink from the defendant. The drink contained decomposed snail and plaintiff became ill after drinking it. The House of Lords stated that the manufacturer is responsible (had a duty of care) towards their customers although the customers did not have any contract with the manufacturers.

The **doctrine of binding precedent** refers to the fact that, within the hierarchical structure of the courts, the decision of a higher court will be binding on a lower court.[97] Every court in the hierarchy must follow the prior decisions of courts higher than itself even if the decision is wrong. It may not decline to follow the higher courts' decision on any ground. **Justice Mulenga JSC** in the case of **Attorney General v Uganda Law Society**[98] observed that, "*Under the doctrine of stare decisis which is a cardinal rule in our jurisprudence, a court of law is bound to adhere to its previous decision save in exceptional cases where the previous decision is distinguishable or was overruled by a higher court on appeal or was arrived at per incuriam without taking into account a law in force or a binding precedent. In absence of any such exceptional circumstances a panel of an appellate court is bound by previous decisions of other panels of the same court.*"

A **persuasive precedent** is one which is not binding on a court but which may be applied.[99]Case in point decisions of courts lower in the hierarchy for instance, the Court of Appeal may follow a High Court decision, although it is not bound to do so; decisions of foreign courts; obiter dicta of courts higher in the hierarchy. It is prudent to note that persuasive authority may also be found in legal writings in textbooks and periodicals, where there is no direct authority in the form of decided cases. In the case of **Bukenya Church Ambrose Vs Attorney General**[100], **H.W.R. Wade on Administrative Law 6th Edn. P. 41** was cited to demonstrate that the Chief Justice had acted without authority in creating Directions under Article 50. It was stating that, "***Any administrative act or order which is ultra vires or outside jurisdiction is void in law that is deprived of legal effect. This is because in order to be valid it needs statutory authorisation and it is not within the powers given by the Act, it has no legal leg to stand on***."

Distinguishing cases as a mechanism of avoiding the doctrine of precedent pinpointing how the ideology has been overtaken by events thus becoming an enigmatic clog for progress. It is imperative to note that even where precedents may ordinarily be binding in determining a certain case with similar facts in certain issues, courts may technically avoid following

95 Collier, C. W. (1988). Precedent and legal authority: A critical history. Wis. L. Rev., 771.
96 [1932] UKHL 100
97 Marshall, G. (2016). What is binding in a precedent. In Interpreting precedents (pp. 503-517).
98 Constitutional Appeal No.3 of 2006
99 Barros, J. R. Reasoning with persuasive precedent: the role of persuasive authority in the law. Teoria Jurídica Contemporânea, 1(2), 194-213.
100 **Constitutional Petition No 26 of 2010**

such precedents by way of distinguishing. In the simplest sense, distinguishing cases "involves showing that the holding of one case" need not necessarily dictate the "holding of another."[101]There are several ways to show why one case need not dictate the result of the other. First, rules of procedure and similar norms may provide a workaround. Second, the adverse language in an opinion may be non-binding dicta within an otherwise binding opinion. Third, and most important, your case and a prior binding case may be sufficiently factually distinct to prevent the binding case's application to your case.

It is from this back drop that it can be argued that doctrine of binding precedent has in fact slowed down the pace of change in the legal system and thus becoming disadvantageous. As methods available to a judge to avoid following a wrong decision are insufficient as can be well illustrated in the **Paal Wilson & Co. A/S v Partenreederei Hannah Blumenthal** case[102], where **Lord Denning** did not want to follow **Bremer Vulkan Schiffbau v South India Shipping Corporation**[103] and tried to distinguish it. The House of Lords reversing Lord Dennings decision on the ground that Bremer Vulkan and Paul Wilson cases could not be distinguished. Even when the decision of the House of Lords is per incuriam, the Court of Appeal can face a difficulty in not following the decision of the House of Lords as a lower court cannot state that the decision of a superior court was given per incuriam. The inflexibility of following wrong decisions of the House of Lord by the Court of Appeal was strongly felt by Lord Denning in his campaign that the Court of Appeal should be given greater freedom to depart from obvious and glaring mistakes of the House of Lords, otherwise the doctrine of Binding Precedent will surely continue in many cases to result in injustice and slow down the pace of change in the legal system even in those situations where there is a desirability of change.

In Glanville Williams' edition of Salmond on Jurisprudence[104], The argument proceeds by the following steps. First, the binding force of the rule in **London Tramways v. L.C.C**[105] that the House is bound by its own decisions cannot itself be derived from the binding force of that case as a precedent. For we cannot know that the rule laid down in that decision was binding until we know that the House is bound by its own decisions. Second, and consequently upon this mere circularity, the House remained free, after the London Tramways Case, to declare that it was not bound by its own decisions, and to proceed first of all to overrule that very case. The proofs that this either could, or that it could not, be an effective legal overruling of the London Tramways Case would again both be circular. Third, the operation of the rules of

101 Anensom, T. L. (2007). From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law. Lewis & Clark L. Rev., 11, 633.
102 [1983] 1 AC 854, p 913
103 [1981] 1 All ER 289
104 Williams, G. (1957). Salmond on jurisprudence. Sweet & Maxwell, London
105 [1898] AC 37

precedent cannot, in view of the above, derive from the fact that rules of precedent are legal rules. Fourth, such binding force as the rules of precedent have, must therefore be based not on any binding force as rules of law, but on their mere standing as "rules of practice" or "tradition" of the judges.[106] As Williams points out, the idea that the doctrine of binding precedent can be supported by that very doctrine is reminiscent of the absurd idea that *a person can lift himself by tugging on his own bootstraps*.[107]It is from this back drop that it can be argued that doctrine of binding precedent has in fact slowed down the pace of change in the legal system and thus becoming disadvantageous.

According to Professor Kornhauser, the proper approach to the issue of stare decisis is by pondering the question of what justifies adherence to a prior legal decision known to be wrong.[108] His argument relies on the assumption that "*every justification of stare decisis must dissolve the paradoxical directive that a judge adhere to a prior decision she knows to be wrong*."[109] Thus, central to Professor Kornhauser's model is the assumption that judges actually know what the socially desirable outcome is. If judges know this, they can, therefore, weigh the social costs of making an erroneous decision that conforms to the principle of stare decisis, against the social costs of violating the principle. By phrasing the question in this way, however, Professor Kornhauser presumes that judges enjoy a far greater degree of certainty about the socially desirable outcome in a particular case than they actually do. This presumption causes Professor Kornhauser to miss the important point that stare decisis is an enormously efficient mechanism for conveying information. Stare decisis enables judges to leverage a single skill. That is the ability to tell when like cases are alike-into a facility for deciding a wide variety of cases that involve substantive legal issues about which the judges may know next to nothing. In a complex world dominated by courts of general jurisdiction, in which lawyers may specialise but judges are expected to master hundreds of disparate areas of law, this attribute of stare decisis should not be minimised.[110]

By its very nature, Stare decisis is a **cop out** which avails a basis for judicial decision making when **judges are oblivious to proper recourse in any given case**. To assume, as Professor Kornhauser does, that we can know that a prior decision is wrong removes much of the economic justification for the concept of stare decisis. The idea of stare decisis requires that we appreciate the intractable problem of uncertainty that plagues judges when they decide cases. For a judge, whether and how to apply the doctrine of stare decisis inevitably involves not only an assessment of the law of a case as applied to a particular set of facts, but also a

106 Stone, J. (1969). 1966 and All That! Loosing the Chains of Precedent. Columbia Law Review, 69(7), 1162-1202.
107 Macey, J. R. (1989). The internal and external costs and benefits of stare decisis.
108 Kornhauser, L. A. (1989). An ecomomic perspective on stare decisis. Chi.-Kent L. Rev., 65, 63.
109 Ibid
110 Ibid

judicial determination of the probability of error given the circumstances of the case.[111]The problem is that courts face severe constraints in terms of resources, time and expertise. In a world of increasing technological complexity, where the stock of information is increasing exponentially, the need for specialisation is acute. All of these factors are sources of judicial error that stare decisis can mitigate. It is from this back drop that it can be argued that doctrine of binding precedent has in fact slowed down the pace of change in the legal system and thus becoming disadvantageous.

The doctrine of precedent is **prone to immortalising judicial cowardice** especially in fragile democratic dispensation like Uganda whose rule of law is always suffocated by political interests which has manifested in the application of the Political Doctrine Question. **Chief Justice Udo Udoma** in **Uganda v. Commissioner of Prisons, Ex Parte Michael Matovu**[112]observed that, "*...any decision by the judiciary as to the legality of the government would be far reaching, disastrous and wrong because the question was a political one to be resolved by the executive and the legislature which were accountable to the constitution, but a decision on the validity of the constitution was distinguishable and with the court`s competence.*" It is prudent that such cowardice has been immortalised as manifested in the case of **The Institute of Public Policy Research (IPPR) (Uganda) v The Attorney General** which concerned an attempt by the Ministry of Foreign Affairs to sponsor a scheme of exporting Ugandan doctors and nurses to Trinidad and Tobago. IPPR applied for an injunction to stop the government from proceeding with the plan, arguing that the decision to recruit, deploy and export over 250 highly qualified healthcare professionals was illegal and unconstitutional. **Justice Elizabeth Musoke** rejected the application, arguing that IPPR had failed to establish a prima facie case and furthermore that the issues involved "*rotated around the political question doctrine.*" In other words, the judge argued, "*... certain disputes are best suited for resolution by other government actors*."

The doctrine of precedent **promotes dictatorship by sanctioning the Executive's extra-constitutional abuse of power**. It can be argued that the decision in **Uganda v. Commissioner of Prisons, Ex Parte Michael Matovu** (supra) opened the proverbial pandora's box for many decades of judicially-sanctioned dictatorships and political turmoil in Uganda. What Oloka-Onyango described as the "ghost" of Ex parte Matovu continued to haunt the country for decades for instance **Article 3 of the 1995 Constitution** (entitled "Defence of the Constitution") prohibits for any person or group of persons to take or retain control of the Government of Uganda, except in accordance with the provisions of this Constitution.[113] It further asserts that any person who, singly or in concert with others, by any violent or other unlawful means, suspends, overthrows, abrogates or amends this Constitution or any part

111 Ibid
112 [1966] 1 EA 514
113 Onyango, O. (2015). Ghosts and the Law. Available at SSRN 2691895.

of it or attempts to do any such act, commits the offence of treason and shall be punished according to law.[114] This was reechoed by **Justice Kanyeihamba** in **Attorney General v Tinyefuza**[115] noted that, "*the rule appears to be that courts have no jurisdiction over matters which arise within the constitution and legal powers of the Legislature or the Executive. Even in cases where courts feel obliged to intervene and review legislative measures of the legislature and administrative decisions of the executive when challenged on the grounds that the rights or freedoms of the Individuals are clearly infringed or threatened, they do so sparingly and with the greatest reluctance.*"

Precedents are rigid to alter once followed. Stare decisis is a by product of common law. When judges decide cases, they apply the rationale of prior cases to the case before them. Therefore, it simply is not possible to separate a discussion of the value of stare decisis from a discussion of the value of the common law itself.[116] Far from merely providing judges with a useful decision-rule, the doctrine of stare decisis reflects the fundamental values of the legal process and the primordial tension within the common law between change and stability.[117] It is paramount to note that Common Law was plagued with rigidity and unfairness to the extent that Maxims of Equity were introduced to provide "*fresh to the dry bones of Common law*."[118] It is prudent to note that **Lord Denning MR** assertion in **Eves v Eves**[119] that: "*equity is not past the age of child bearing*" has *not stood the test of time* as evident in cases law. In the words of **May LJ** in **Burns v Burns**: "*…as Parliament has not legislated for the unmarried couple as it has for those who have been married, the courts should be slow to attempt in effect to legislate themselves."*[120] In the context of proprietary estoppel, **Megaw LJ** ventured to suggest in **Western Fish Products v Penwith District Council**[121] that: "*…the system of equity has become a very precise one. The creation of new rights and remedies is a matter for Parliament, not the judges."***Harman J** in **Campbell Discount Ltd v Bridge**[122] stated that equitable principles were: "*too often bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion."*Similarly, **Dillon J** in **Springette v Defoe**, noted that: "*the court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair.*"[123] It is from this backdrop that is can be argued that equity and the doctrine of precedent are past the age of child bearing.

114 Oloka-Onyango, J. (2017). When courts do politics: Public Interest law and litigation in East Africa. Cambridge Scholars Publishing.
115 (Constitutional Appeal-1997/1) [1998] UGSC 74 (28 January 1998)
116 Ibid
117 Macey, J. R. (1989). The internal and external costs and benefits of stare decisis.
118 Lyon, J. N. (1971). Drybones and Stare Decisis. McGill LJ, 17, 594.
119 [1975] 1 WLR 1338, CA
120 [1984] Ch 317
121 [1981] 2 All ER 204
122 [1962] A.C. 60
123 [1992] 2 FCR 561

The legislature is entrusted to alter the state laws and impose socially optimal solutions to meet the current challenges and problems without constraints to preserve certainty of the law. *"What is good for the goose is good for the gander"* especially given the fact that judges are generally more informed and educated pertaining to problem resolution. The classic example is the landmark case of **Donoghue v Stevenson** (supra) were the court decision laid foundation of the modern law of negligence, establishing general principles of duty of care. Prior to this case, liability for personal injury in tort usually depended upon showing physical damage inflicted directly (trespass to the person) or indirectly (trespass on the case). The argument that strict form of stare decisis has the advantage of ensuring certainty of the law is defeated by the fact that legislature is entrusted to alter the state of the law to meet the current challenges of the world.[124] Thus, the doctrine of precedence should be abandoned as it has become an enigmatic clog for progress.

According to Ronald A. Heiner, the fundamental question that needs reconciliation is whether people still prefer greater stability to less predictable judgments even if the latter actually produced superior results.[125] For instance, take the biblical account of the "wisdom" of King Solomon.[126] Recall his (unexpected) method of resolving a dispute between two women, both of whom professed to be the mother of a newborn baby (that is, to slice the baby in two and give half to each woman). Of course, it turned out that Solomon's method produced the best possible result in that case: the real mother relinquished her claim, thereby revealing her true character and regaining possession of her (whole) baby. The effect of this kind of result was to spread Solomon's fame to "all nations round about.[127] People did not shy away from his tribunal; instead "all the earth sought to Solomon, to hear his wisdom."[128] Consider also a deeper aspect of this story. Even assuming that Solomon's clever judgments always produced unbeatable results, would we wish his procedures to be imitated by other, less "wise" judges?[129] For example, would we want the baby-slicing procedure to be imitated in resolving other "similar" disputes over child custody? Would the results over a number of such cases turn out as favourably in the hands of judges other than Solomon?[130] In short, would we want Solomon's judgments to serve as a basis of precedent for judges who are not given any special endowment of wisdom?[131] It is from this backdrop that it can be argued that the doctrine of precedent is generalised and not specifically tailored for unique circumstances of each case.

124 Macey, J. R. (1989). The internal and external costs and benefits of stare decisis.
125 Heiner, R. A. (1986). Imperfect decisions and the law: On the evolution of legal precedent and rules. The Journal of Legal Studies, 15(2), 227-261.
126 1 Kings 3:16-27.
127 1 Kings 4:30-31.
128 1 Kings 10:23-24.
129 Heiner, R. A. (1986). Imperfect decisions and the law: On the evolution of legal precedent and rules. The Journal of Legal Studies, 15(2), 227-261.
130 Ibid
131 Ibid

There are many conflicting precedents which make it difficult to apply the right case.

According to **Winder**: "When precedents of a kind which are normally binding on the Court are in conflict with one another, the obligation on the Court, if any, is uncertain, although the problem is not a new one."[132] The locus classicus on the subject is **Young v. Bristol Aeroplane Co. Ltd**.[133]In this case, while reiterating the general rule that the Court of Appeal was bound by its own earlier decisions, **Lord Greene M.R**. propounded three exceptions to the rule. He said: "*The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow; the Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; the Court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam*."[134]

The first exception that: "*the Court is entitled and bound to decide which of the two conflicting decisions of its own it will follow*". The freedom of choice between conflicting decisions allowed to the Court of Appeal in **Young v. Bristol Aeroplane Co. Ltd** will also extend to lower courts because "*when the authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them as the schizophrenic court itself*."[135]

The view that a court has complete freedom of choice in following what it considers to be the `better' of the two conflicting decisions has the support of judicial dicta even earlier to **Young's decision**. Thus, in **Hampton v. Holman**, **Jessel M.R.** stated: "*Now I take it that both the cases to which I have referred are not to be reconciled with Hayes v. Hayes (1828) 38 F.R. 822, at all events. They differ from it so far as to leave me at liberty now to say that Hayes v. Hayes is not sound law.*"[136]**Kay J.** made a similar observation in **Miles v. Jarvis**: "*the question is which of these two decisions I should follow, and, it seems to me that I ought to follow that of the Master of the Rolls as being the better in point of law*."[137]

An important question that requires careful consideration is whether freedom to choose the better of the two conflicting decisions would apply only when the later decision was rendered in ignorance of the earlier one or even in complete cognisance of it. In **Young's case**, **Lord Greene M.R**. said that the freedom of choice would apply "*where the court has acted in ignorance of a previous decision of its own or of a Court of coordinate jurisdiction which covers the case before it.*"[138] But in **Fisher v. Ruislip Northwood U.D.C**[139] the court appears to have invoked

132 Winder, W. H. D. (1946). Divisional Court Precedents. Mod. L. Rev., 9, 257.
133 [1944] 1 KB 718 (CA).
134 Simpson, A. B. (1960). The ratio decidendi of a case and the doctrine of binding precedent. Oxford University Press.
135 Ibid
136 (1877) 5 Ch D 183.
137 (1883) 24 Ch D 633.
138 Young v. Bristol Aeroplane Ltd., [1944] 1 KB 718 (CA).
139 (1945) 1 KB 584.

freedom of choice even when the later decision has noticed the earlier one and differed from it. It is from this back drop that it can be argued that doctrine of binding precedent has in fact slowed down the pace of change in the legal system and thus becoming disadvantageous.

Some situations are not recognised under precedent as they are not taken into account.

Prior to **Donogue v Stevenson**[140], liability for personal injury in tort usually depended upon showing physical damage inflicted directly (trespass to person) or indirectly (trespass on the case). Subsequently, being made ill by consuming a noxious substance did not qualify as either, so the orthodox view was that Mrs May Donoghue had no sustainable claim in law. However, the decision fundamentally created a new type of liability in law which did not depend upon any previously recognised category of tortious claims. This was an evolutionary step in the common law for tort and delict, moving from strict liability based upon direct physical contact to a fault-based system which only required injury.

The existence of decisions reached per incuriam. A decision which is reached *per incuriam* is one reached by carelessness or mistake, and can be avoided. In **Morelle v Wakeling**, **Lord Evershed MR** stated that "*the only case in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned*".[141]In **Secretary of State for Trade and Industry v Desai**[142], **Scott LJ** said that to come within the category of per incuriam it must be shown not only that the decision involved some manifest slip or error but also that to leave the decision standing would be likely, inter alia, to produce serious inconvenience in the administration of justice or significant injustice to citizens. It is imperative however to note that this rule does not permit the Court of Appeal to ignore decisions of the House of Lords. In **Cassell v Broome**[143], **Lord Denning MR** held the House of Lords' decision in **Rookes v Barnard**[144] to be per incuriam on the basis that it ignored previous House of Lords' decisions. He was rebuked sternly by the House of Lords who considered that the Court of Appeal 'really only meant' that it 'did not agree' with the earlier decision: "*Even if this is not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords*" per **Lord Hailsham**.

People may not agree on what the judicial precedent actually is in a case. Even when a judicial precedent set a clear line on the expectations involved in a case for future consideration, there is no

140 [1932] UKHL 100
141 [1955] 2 QB 379
142 [1992] B.C.C. 110 at 118
143 [1972] AC 1027
144 [1964] AC 1129

guarantee that another judge will see the law in the same light.[145]There can be differing opinions on what the actual purpose of a ruling happens to be, creating a measure of uncertainty that can never be resolved until the next ruling is issued. Once that occurs, another judge can step in and interpret for the situation in a third way.Judicial precedent might offer some cases a measure of consistency and support, but it can also be worthless when the opinions of those involved differ by a significant margin.

Every case must face uncertainty until a final ruling is made. Because our court system is not bound by any previous rulings in a current case (unless it is a lower court ruling on what a higher court decided already), the results of any given situation will remain uncertain until the final ruling or appeal judgment is made. There are some judges who are more than willing to depart from a precedent because they wish to do what is right for the individuals involved in the case they are hearing. Then there are others who treat judicial precedent as it is it is part of the laws passed by the legislature, unwilling to depart from it to make changes in the law.

It forces the justice system to look backwards instead of looking toward the future. A judicial precedent must always be looking backwards for it to create a standard in the first place. If someone finds themselves violating a rule based on what a judge has ordered in the past, that it creates an unfair system of justice because the offence comes from the judgment instead of legislation. This type of system does not occur in the Uganda, but it is possible to have it happen in other countries. That is why a system of statutory laws which look for future acts as criminal offences is usually considered to be a fair system of justice. Instead of searching through thousands of different legal rulings to see if someone has done something wrong, statutory ask create legislation which become part of the public record. In the case of **The Institute of Public Policy Research (IPPR) (Uganda) v The Attorney General** which concerned an attempt by the Ministry of Foreign Affairs to sponsor a scheme of exporting Ugandan doctors and nurses to Trinidad and Tobago. IPPR applied for an injunction to stop the government from proceeding with the plan, arguing that the decision to recruit, deploy and export over 250 highly qualified healthcare professionals was illegal and unconstitutional. **Justice Elizabeth Musoke** rejected the application, arguing that IPPR had failed to establish a prima facie case and furthermore that the issues involved "*rotated around the political question doctrine.*" In other words, the judge argued, "*... certain disputes are best suited for resolution by other government actors*." By doing so, the justice system to look backwardsand applied the case of **Uganda v. Commissioner of Prisons, Ex Parte Michael Matovu** (supra).

145 Dennis, J. L. (1993). Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent. La. L. Rev., 54, 1.

This process can introduce unnecessary restrictions into the law. Judges can rule on specific cases in ways that a legislative body would never anticipate. If such a situation occurs, then the process of judicial precedent can introduce unnecessary restrictions into the law. Although it is necessary for legal systems to stay up-to-date with the changing circumstances in society, this disadvantage often makes it difficult, if not impossible, for judges to develop the legal doctrine that is necessary to provide a justifiable outcome. Instead of looking at the present circumstances of a case, this philosophy can cause judges to rely on previous decisions which may not apply under the current circumstances.

Judicial precedents can create more applicable decisions for a case than is necessary. One of the significant disadvantages of judicial precedent is that the total volume of cases which exist in the law may result in too many of them being available to consider. This issue can cause confusion because attorneys on both sides could potentially offer a precedent from case law that justifies their position to the court. It would then be up to the judge to determine which side has firmer ground to stand on when making their arguments in an adversarial system. The classic example is the decision in **Donoghue v Stevenson** (supra) effectively established tort law as separate from contract law. However, it is important to remember that Donoghue was a milestone in a new principle which needed refining, as **Lord Reid** said: '*the well known passage in Lord Atkin's speech should, I think, be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances.*'

The next major development in the 'neighbour principle' came from **Hedley Byrne v Heller**[146] which concerned economic loss. However, the locus classicus of the 'neighbour test' is found in another economic loss case called **Caparo Industries v Dickman**: What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.[147]It was argued unsuccessfully in **Mitchell and another v Glasgow City Council**[148] that because Caparo was concerned with economic loss it had little application to personal injury claims; Lord Hope said that, "*….the origins of the fair, just and reasonable test show that its utility is not confined to that category.*"

APPLICATION OF THE DOTRINE OF PRECEDENT

Outside rules can change how the doctrine of judicial precedent applies Case in point

146 [1964] AC 465
147 [1990] UKHL 2
148 [2009] UKHL 11

Article 2(1) of the Constitution of Uganda 1995 is to the effect that the Constitution is the supreme law of Uganda and has binding force all authorities and persons throughout Uganda. If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.[149] It is therefore paramount to note that doctrine of precedent has seen significant weakening because of the way that principles and rules must now apply. They must be read in such a way that they are compatible with whatever rights are contained in the Constitution, which means amendments are necessary to change any issues which may create a conflict. This outcome makes it possible for the lower courts to overturn higher court rulings because of the outside legislation mandating domestic change.

OVERRULING A PREVIOUS CASE AS A MECHANISM OF ALTERING PRECEDENTS

Overruling is the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a previous case. Overruling can occur if the previous court did not correctly apply the law, or because the later court considers that the rule of law contained in the previous ratio decidendi is no longer desirable.[150] It is strange that, within the system of stare decisis, precedents gain increased authority with the passage of time. As a consequence, courts tend to be reluctant to overrule longstanding authorities even though they may no longer accurately reflect contemporary practices or morals.[151] While old principles are not usually good in dentistry or computer science, they are often seen that way in law. In addition to the wish to maintain a high degree of certainty in the law, the main reason for judicial reluctance to overrule old decisions would appear to be the fact that overruling operates retrospectively, with the effect that the principle of law being overruled is held never to have been law. It has to be emphasised, however, that the courts will not shy away from overruling authorities where they see them as no longer representing an appropriate statement of law.

For instance before the landmark case of **Brown v Board of Education of Topeka**[152], race relations in the United States had been dominated by racial segregation. Such state policies had been endorsed by the United States Supreme Court ruling in **Plessy v Ferguson**[153], which held that as long as the separate facilities for separate races were equal, state segregation did not violate the Fourteenth Amendment ("no State shall ... deny to any person ... the equal protection of the laws").[154] In **Brown v Board of Education of Topeka** (supra) the U.S

149 Article 2(2) of the Constitution of Uganda, 1995
150 Gerhardt, M. J. (2011). The power of precedent. Oxford University Press.
151 Ibid
152 347 U.S. 483 (1954)
153 163 U.S. 537
154 Patterson, J. T., & Freehling, W. W. (2001). Brown v. Board of Education: A civil rights milestone and its

Supreme Court in ruled that U.S state laws establishing racial segregation in public schools are unconstitutional, even if the segregated schools are otherwise equal in quality. The Court's unanimous decision stated that "*separate educational facilities are inherently unequal*", and therefore violate the Equal Protection Clause of the Fourteenth Amendment of the U.S Constitution.

The ratio decidendi of any case is based upon the material facts of the case. This opens up the possibility that a court may regard the facts of the case before it as significantly different from the facts of a cited precedent, so it will not find itself bound to follow that precedent.[155] What is reasonably distinguishable depends on the particular case and the particular court some judges being more inclined to 'distinguish' disliked authorities than others.[156] In **Jones v Secretary of State for Social Services Lord Reid** (supra) stated: "*It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing, they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty...*" At the other extreme, **Buckley LJ** in **Olympia Oil v Produce Brokers** stated: "*I am unable to adduce any reason to show why that decision which I am about to pronounce is right ... but I am bound by authority which, of course, it is my duty to follow ...*"[157]

Statutes, as a form of parliamentary legislation, are considered more binding and applicable than precedents. However despite the above mentioned facts, it is the case law created by judges that constitutes the cornerstone of the Legal system. It is imperative to note that a statute once dealt with in case will be interpreted as such by judges in the future. A lawyer, when dealing with a legal issue, will search reported cases even if the issue is already regulated by statute. Much as statutes are formed on basis of theory, case law is too rigid, complex and may sometimes cause injustice. It is from this backdrop that it can be argued that the doctrine of precedent has been overruled by events thus being relevant.

Much as the doctrine of precedent makes it easier for the courts to make decisions when the case before them is a reflection of previously-decided law, it has been overtaken by events thus becoming amorphous, enigma and a clog for progress as appreciated in the above essay. The law should therefore revolutionise to accommodate changing circumstances happening in real time rather than depending on the doctrine of precedence. Legal associations, lecturers of law and researchers should focus on this. Society does not need fixed rules, regulations,

troubled legacy. Oxford University Press.

155 Saha, T. K. (2010). Textbook on legal methods, legal systems and research. Universal Law Publishing.

156 Simpson, A. W. B. (1957). The ratio decidendi of a case. *The Modern Law Review, 20*(4), 413-415.

157 HL 15 Nov 1915

and laws in the legal systems but a dynamic system to suit the changing climate and meet generation demands. My advocacy is judge's freedom to decide matters basing on their understanding or knowledge of the societal demands and expectations other than having mindsets fixed on one point of developed, fixed and established precedents.

General principles of law[158]

General principles of law are basic rules whose content is very general and abstract, sometimes reducible to a maxim or a simple concept. Unlike other types of rules such as enacted law or agreements, general principles of law have not been "posited" according to the formal sources of law. Yet, general principles of law are considered to be part of positive law, even if they are only used as subsidiary tools. They constitute necessary rules for the very functioning of the system and, as such, are inducted from the legal reasoning of those entitled to take legal decisions in the process of applying the law, notably the judiciary. They also constitute integrative tools of the system as they fill actual or potential legal gaps.

In international law, general principles of law have been the object of much doctrinal debate based on the different meanings attributed to the notion and the theoretical problems that they pose. Much confusion derives from the use of the expression "fundamental principles of international law" that is at the top of the legal system and originates in treaty or custom (e.g., the principle of sovereign equality of states or the principle of the prohibition of the threat or the use of force) and that will not be dealt with here. Given the wording established in Article 38, paragraph 1(c) of the Statute of the International Court of Justice ("general principles of law as recognized by civilized nations"), the question of the origin of general principles of law as applied at the international level has also been a matter of controversy.

The common perception is that these principles find their origin in the domestic legal systems. Once there is the conviction that some of these general tools are commonly shared principles that can be found in the domestic systems, they can also be applied in international law. They are logic inferences that can be found in any legal system: the principle of reparation for caused damage, the principles of interpretation of rules, or those used for the resolution of conflicts of rules, none is presumed to be ignorant of law or "*nemo censitur ignorare legem*"; the principle of non-retroactivity or non bis in idem"-many of them known through Latin maxims are good examples.

158 Harold J G Introduction to law and the legal system, (London: Houghton Mifflin company, 1975);

Law and justice

What does it mean to assert that judges should decide cases according to justice and not according to the law? Is there something incoherent in the question itself? That question will serve as our springboard in examining what is, or should be, the connection between justice and law and its weaknessess.

Legal and political theorists since the time of Plato have wrestled with the problem of whether justice is part of law or is simply a moral judgment about law. Nearly every writer on the subject has either concluded that justice is only a judgment about law or has offered no reason to support a conclusion that justice is somehow part of law. This section attempts to reason toward such a conclusion arguing that justice is an inherent component of the law and not separate or distinct from it. From the earliest times justice was regarded as an ideal of any legal system. Justice does not have a fixed content. If the ancient Greek philosopher Aristotle is taken as a starting point, we can distinguish between distributive and corrective justice. Distributive justice means that there must be an equal distribution among equals. Corrective justice aims at restoring inequalities. An essential element of justice that is apparent from this is the emphasis on equality[159].

Most people would accept that justice should be the aim of any legal system. Nevertheless, some legal systems exist without any apparent notion of justice. One only has to think of the totalitarian regimes in Iraq under Saddam and Russia under Stalin, where the law was simply a means of repression, not a means of doing justice. Aristotle taught that "fairness" is the basis of justice that we find in two forms: Distributive Justice and Corrective Justice. However, this simply replaces 'what is just?' with what is fair?' Justice might be apportioned according to merit; to worth, to need, to status, or according to entitlement; but whichever criterion we use, subjective facts come into play.

The law is said to be a means to an end and for substantive justice to exist not only must the procedures by which the law is applied be seen to be fair but also the content of the law that is, the social ends to be achieved. The analysis of substantive justice brings us back to such questions as to role of law in society and the relationship of law and morality. But does the law always embody justice? In this regard one may distinguish between adjective (procedural) and substantive (material) law. Adjective law is comprised at the legal rules and processes according to which a court reaches a decision or solution. Substantive law consists of the material legal rules.[160]

159 Harris P An introduction to law 4th ed. London: Weidenfeld, 1993

160 Waddams S M Introduction to the study of law, 4th ed, Toronto: Carswell, 1992.

Schools of law

Positivism

Positive law is a legal term that is sometimes understood to have more than one meaning. In the strictest sense, it is law made by human beings, that is, "law actually and specifically enacted or adopted by proper authority for the government of an organized jural society." This term is also sometimes used to refer to the legal philosophy, legal positivism, as distinct from the schools of natural law and legal realism.

Various philosophers have put forward theories contrasting the value of positive law relative to natural law. The normative theory of law put forth by the Brno school gave pre-eminence to positive law because of its rational nature. Classical liberal and libertarian philosophers usually favor natural law over legal positivism. Positive law to Rousseau was freedom from internal obstacles. Positive law generally means the body of rules applicable in a given place at a given moment. This is a made law. The Ugandan positive law is the whole body of different rules applicable in Uganda to this day. Basically, positivism, expressed in its simplest terms, regards valid law as the command of the sovereign law giver, enforced through a system of sanctions imposed by the sovereign. But, there is not however, a single universally accepted view of analytical positivism. Rather, there are many schools of positivist thought characterized by a common thread running through them. This common thread is a scientific attitude which, as Bodenheimer states, rejects a priori speculations and seeks to confine itself to the data of experience. Generally, positivists such as Austin hold the view that there must be a strict separation between law and morality. Or, restated, the positivists emphasize what is the law, over considerations as to what ought to be the law.

A positivist might ask whether a given law is good law or a bad law, but it is purely a secondary consideration. In other words, legal validity depends only upon legal criteria and not upon moral criteria. A positivist will regard a bad law in the same way in which he will regard a good law. Positivism probably represents the most widely held view of law, although obviously there is none view of positivism that is satisfactory to all proponents who subscribe to this school of jurisprudence.

Positive Law: a thought by Thomas Hobbes, Jeremy Bentham, John Austin[161]

During the 16th and 17th centuries England was consumed by religious, political, and social upheaval that included a civil war and the beheading of a king. It was a period of extreme violence, fear, and lawlessness. The theory of natural law-that law is based on divine revelation and that it was put in place for moral improvement-did not seem to accord with the contemporary reality of life. Out of this chaos developed a new theory about justice and the law. Philosophers such as Thomas Hobbes and John Locke recognized that in order for stability and order to return to England there must be a new definition of law. This theory would eventually become known as positive law. To support that definition, let us consider the following points of view:

- Positive law is the belief that law is established by the state, for the benefit of the state as a whole.
- Positive law has no moral purpose other than to ensure the survival of the state and its citizens.
- Obedience to the law is no longer a matter of conscience, as it had been for Socrates or Aquinas. To disobey the law was a crime and anyone who broke the law was subject to punishment.
- In positive law there is no distinction between law and justice – justice means conformity to the law. Law and justice are one in the same.
- The condition that human laws conform to certain standards of morality and justice in order to be valid is abandoned. The only real morality is in human obedience to state law.
- There was no longer a debate over who had authority over the law, the church or the state. From this point forward the church would always be subservient to the laws put forward by the state.

Thomas Hobbes

Hobbes was interested in the nature of man, and what effect this had on society. Hobbes concluded that the state of nature was nothing more than a state of perpetual war, and man was a nasty, brutish, and violent creature. In the interest of survival and self-preservation people were forced to surrender their natural rights to a king or sovereign. The king alone should have the power to create laws. This could be the only way to ensure survival. People would obey these laws because refusing to do otherwise would mean a return to chaos and a state of perpetual war. In his book *Leviathan*, Hobbes advocated a strong leader who could rule over society and therefore prevent the return to man's natural state of greed, violence and anarchy.

161 Lloyd D & Freeman M D A Introduction to jurisprudence, 5th ed. (London: Stevens 1985)

Jeremy Bentham (utilitarianism)

Like Hobbes, Bentham was interested in the nature of man. Bentham felt that humans were motivated by the desire to achieve pleasure and avoid pain. Therefore it made sense to judge laws on their ability to provide happiness to citizens. For Bentham it was clear that for a law to be just it would provide "the greatest happiness to the greatest number of people". This theory became known as utilitarianism. Laws would be evaluated by their utility (usefulness) to society.

John Austin

Austin was a contemporary of Bentham and was influenced by concept of utilitarianism. He used utilitarianism as the basis for his ideas, which would lay the foundation of modern positive law theory. Austin felt law should be completely separated from morality. He argued that judging laws on a moral basis was subjective (based on personal feelings/emotion) and would potentially lead to anarchy because individuals would be free to select those laws best designed to meet their needs while disregarding the others. Positive law provides an objective standard for human conduct: a legal norm applying equally and impartially to all individuals. Rule of Law: this concept left little room for civil disobedience, but for Austin "the mischief's inflicted by a bad government are less than the mischief's of anarchy". For Austin laws could not be judged on whether they were bad or good but on useful they were to society-their social utility.

The theory of natural law

Natural law is a philosophy that certain rights or values are inherent by virtue of human nature, and universally cognizable through human reason. Historically, natural law refers to the use of reason to analyze both social and personal human nature to deduce binding rules of moral behavior. Natural law begins with the premise that all of our rights come from God or nature and are inherent to our being. Positive law, on the other hand, believes that our rights are granted by the government, society or other men and therefore can be taken back by them as well. Positive law is the basis for the concept of social justice which attempts to subvert natural law and create artificial equality through regulations or force. This goes against the very essence of human nature. In other words, laws created by men are always secondary to natural law which emanates from human nature itself.

The main characteristic of natural law is that a natural law is the law and a positive contrary to the law of nature is not the law. The central notion is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered

by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. Natural law is a body of ideal rules of human conduct considered as superior to those of positive law and compulsory even to the legislature. These rules are not man-made-rules. They actually derive from the nature. These rules are immutable (unchangeable) and universal. It is worth noticing that the doctrine of natural law led to the current developments in human rights law.

Natural law theorists are those jurists who believe in some higher system to which mere positive law should conform. For example, saint Thomas Aquinas stated in *summa theologica* that "an unjust and unreasonable law and one which is repugnant to the law of nature, is not law but a pervision of law". The opposite of course, is believed by a positivist, namely, that the valid law is the positive law of the land, regardless of the invocation of a natural law. Moreover, as Lloyd stated elsewhere, "we have a feeling of discontent with justice based on positive law alone, and strenuously desire to demonstrate that there are objective moral values which can be given a positive content.[162]

The problem of course, with natural law is defining the particular nature of the natural law to which the positive law must conform. The danger is that anyone can invoke his version of the natural law in order to suit his purposes. Historically, natural law thoughts can be traced to the ancient Greek and Roman philosophers, including Plato, Socrates, and Aristotle. Many years later, St Thomas Aquinas, inspired by Aristotle, developed a natural law theory based upon Christian theology. In short, Aquinas believed that there existed God-given objective moral values.

To inquire as the content of the natural is essentially to investigate the written philosophy of the various theorists. The writings often (but not always) reflect the historical period in which a particular philosopher wrote. For example, after the Reformation, philosophers such as Hobbes, Locke, Spinoza, Montesquieu, Grotius and Rousseau emphasized reason as the source of the natural law and placed less reliance on a theological content in the natural law. The American constitution (which was influenced by the philosophies of Locke and Montesquieu) is an example where the natural law is set out in statutory form and becomes the central component of the positive law of the land, to which all other positive laws must conform. A similar example, on the international level, of incorporating the natural law as a central component of the international positive law to which all other international laws must conform, is the Universal Declaration of Human Rights, enacted by the United Nations.

The natural law may also be incorporated into a custom of usage, or prevailing attitude, such

162 (The idea of law: 1973).

as the common law notion of natural justice. The particular conception of the natural law in all of the foregoing examples relates to a value-oriented perception of the natural law. In this model, law and morality should be mutually inclusive. The actual state of the law must conform to the ideal state of the law.

The term "natural law" is ambiguous. It refers to a type of moral theory, as well as to a type of legal theory, but the core claims of the two kinds of theory are logically independent. It does not refer to the laws of nature, the laws that science aims to describe. According to natural law moral theory, the moral standards that govern human behavior are, in some sense, objectively derived from the nature of human beings and the nature of the world. While being logically independent of natural law legal theory, the two theories intersect.

PURE THEORY (HANS KELSEN)

In his theory of law, Kelsen (1957) conceived of law as norms. He believes his theory of law is pure because his concept of law is not derived from external substance and is devoid of any substantive meanings or material elements. In determining the validity of legal norms, he identified the justification for each individual legal norm as traceable to the basic norm through a hierarchy of norms. According to his theory, the validity of the legal norm is established by appeal to the appropriate higher-level-norm, whose own validity is established, in turn, by appeal to its higher level. This tracing is done through to and until the highest level of norm in the legal system is reached and this is usually the constitution. An appeal is further made from the constitution to an earlier constitution through to the first historical constitution.

The establishment of the validity of a legal norm therefore ends with the first historical constitution, as the constitution is itself the highest source from which all other lower norms are derived and there is therefore no further appeal to any higher level of positive or natural law. Consequently, the validity of the Constitution can only be derived from a non-legal norm which he terms the basic norm (Kelsen, 1992). In his words, Kelsen (1945) stated that; "The basic norm …… is nothing but the fundamental rule according to which the various norms of the order are to be created Kelsens theory therefore presupposes a basic norm which confers validity to the framers of the first constitution and thereafter on all legal systems deriving validity from this first constitution. Even though the basic norm is an authorizing norm, granting validity to all lower norms, it is in itself neither a man-made norm nor created by any legal authority. It is a hypothetical foundation, a me.2
ntal presupposition and a product of thought that does not describe an existing situation (Kelsen, 1934; Paulson, 1992). Kelsens theory of law, however fails to provide a clear

understanding of law as the search of the grund norm seems to go ad infinitum without a clear end existing only in theory without any proof of its applicability in practice. Vaihinger (1935) observed that, the basic norm cannot even qualify as a hypothesis as a hypothesis is usually based on assumptions which could be verified by empirical evidence. Unfortunately the basic norm could not be verified by any empirical evidence and therefore false as reality does not agree with it. It can only be described as a fictitious concept as its existence cannot be verified. As a result of the fictitious nature of the basic norm, the theory could not be defensible leading to the overturn of the Pure Theory of Law as propounded by Kelsen (Paulson, 1992). But for the absence of an explicit justification and source of the basic norm, Kelsen's theory of law and the legal norm would have been the closest and true theory to the explanation of law. It seems to have been the most pure theory of law ever developed as it relies on strictly pure legal concepts without any reliance on any socio-historic factors.

The above notwithstanding, Kelsen's pure theory of law has achieved a certain notoriety in jurisprudence. This notoriety arises from its use by the courts of some sovereign jurisdictions in analyzing difficult political and constitutional issues created in the aftermath of revolutions. For instance in the 1958 case of ***The State v. Dosso, P L D 1958 S C (Pak.) 533*** where an annulment and abrogation of the Constitution was made by a successful military revolution leader, the court was of the view that; "where a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution, then such a change is a revolution and its legal effect is not only the destruction of the Constitution but also the validity of the national legal order, irrespective of how or by whom such a change is brought about" The pure theory of law gained some recognition in the above case when Qaiser Khan, J. indicated that:

A Constitution or the basic norm could be annulled, abrogated, destroyed or suspended in two ways, one by a Constitutional act, that is to say, by the method provided for in the Constitution for changing or replacing it and the other by an un-Constitutional act, say revolution or coup d'etat, which is known as extra-Constitutional act. In the instant case the Constitution of 1973 was put in abeyance, that is to say, suppressed for the time being by the Chief of the Army Staff by an extra-Constitutional act of issuing a Proclamation declaring himself as the Chief Martial Law Administrator. …….. Now the validity or invalidity of this action could not be tested on the basis of the Constitution of 1973 as it was no longer there having been suppressed and there was no other superior norm on the basis of which it could be tested. ……."

The Ugandan case of ***Uganda v. Commissioner for Prisons, ex parte Matovu, 1966 E.A***, took recognition of the decision in the State v. Dosso's when it held that;

"Applying the Kelsenian principles, which incidentally form the basis of the judgment of the supreme court of Pakistan ……, our deliberate and considered view is that the 1966 constitution is a legally valid constitution

and the supreme law of Uganda, and that the 1962 constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the laws of Uganda it having been deprived of its de facto and de jure validity. The 1966 constitution, we hold, is a new legal order and has been effective since April 1966 when it first came into force".

The theory of law as applied in the above cases was declared wholly unsustainable in the Pakistan case of ***Miss Asma Jillani v. Government of Punjab & Anr, P L D 1972 Supreme Court 139***, where it was held to be wholly unsustainable and cannot be treated as good law either on the principle of stare decisis or otherwise. According to the court, the proclamation of martial law does not by itself involve abrogation of civil law and functioning of civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the
fundamental law of the country. Accordingly the commander of Armed Forces is bound by his oath to defend the constitution. The court in State v. Dosso which laid down a novel juristic principle of far reaching importance seemed to have misconstrued the theory of law as propounded by Kelsen. A critical examination of the pure theory of law suggests that Kelsen did not establish a principle of legal theory of general or universal application but merely traced the source of a higher order giving validity to a certain legal system. He sought to identify what law is and the legitimacy of law. In contrast to the above cases, the Privy Council in ***Madzimbamuto v. Ladner Burke (1978) 3 WLR 1229,*** held that the 1965 constitution was not valid since it had not been made by lawful means and Mr. Smith's Government was not in full and effective control of Southern Rhodesia. The Privy Council thus failed to recognize the terminating effect of a revolution on a civilian and constitutional government. It seems the Privy Council in making its decision did not accept the universal application of the pure theory of law, particularly when it involves an unconstitutional overthrow of a lawful civilian government.

It appears the pure theory of law as propounded by Kelsen failed to consider the sociological factor of moral values and justice as was seen in the case of Begum Nusrat Bhutto v. The Chief of The Army Staff & Federation Pakistan, PLD1977, SC 657. The Supreme Court in this case unanimously held, dismissing the detention petition as not being maintainable. The court observed that Kelsens pure theory of law is not universally accepted, and is not consistent for full application in all revolutionary situations. Accordingly, the theory is open to serious criticism on the ground of excluding from consideration sociological factors of morality and justice. Legal consequences of an abrupt political change by imposition of Martial Law have to be judged not by application of an abstract theory of law in vacuum but by the consideration of total milieu preceding the change. According to the court, the theory has no relevance where breach of legal continuity is admitted or declared to be of a pure temporary nature and for a limited specific purpose because such phenomena is one of theory to such transient and limited change in the constitutional continuity of a country is inappropriate.

STOICISM

School of philosophy in Greco-Roman antiquity

Inspired by the teaching of Socrates and Diogenes of Sinope, Stoicism was founded at Athens by Zeno of Citium *c.* 300 BC and was influential throughout the Greco-Roman world until at least AD 200. It stressed duty and held that, through reason, mankind can come to regard the universe as governed by fate and, despite appearances, as fundamentally rational, and that, in regulating one's life, one can emulate the grandeur of the calm and order of the universe by learning to accept events with a stern and tranquil mind and to achieve a lofty moral worth. Its teachings have been transmitted to later generations largely through the surviving books of Cicero and the Roman Stoics Seneca, Epictetus, and Marcus Aurelius.

Jurisprudence may be divided into three branches: analytical, sociological, and theoretical. The analytical branch articulates axioms, defines terms, and prescribes the methods that best enable one to view the legal order as an internally consistent, logical system. The sociological branch examines the actual effects of the law within society and the influence of social phenomena on the substantive and procedural aspects of law. The theoretical branch evaluates and criticizes law in terms of the ideals or goals postulated for it.

Marxist Jurisprudence

In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations constitute the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness.

Karl Marx, *Preface to A Contribution to the Critique of Political Economy*, 521.[163]

Marxist jurisprudence posits that legal relations are determined by the economic base of particular kinds of society and modes of production.[164] Marxist thoughts primary focus rests on political economy and the corresponding power relations within society, providing the most extensive critique to date of liberal tradition on which many of our legal presuppositions are founded. To this end, this essay examines law, its structure, motivation and consequences for justice and rights from a Marxian jurisprudential perspective.

163 Marx, K., 'Preface to A Contribution to the Critique of Political Economy' in Karl Marx and Frederick Engels Selected Works, Moscow: Progress Press, 1989 521.

164 Balbus, I., 'Commodity Form and Legal Form' in Reasons, C., The Sociology of Law, Toronto: Butterworths, 1978 83.

Marxism and Law

Your ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economical conditions of existence in your class.

Karl Marx, The Communist Manifesto.

Law is not of central concern to Marxists jurisprudentialists, as law in the capitalist mode of production is seen as an instrument of class oppression perpetuated as a consequence of its particular historical, social and economic structures. Indeed, wishing to avoid liberal predisposition towards legal fetishism, Marxists deny the degree of importance jurisprudence typically affords law in analyses of the composition and determination of social formations.[165]

What is Marxism?

Marxist theories of political economy, expounded upon the notions of Karl Marx (1818-83) and Friedrich Engels (1820-95), consider law an instrument of class oppression that benefits the ruling class through oppression of the proletariat. The common law system of criminal and civil law, which protects personal and private property rights, as well as facilitating predicability in social life, is regarded as "no more than a system of coercion designed to protect bourgeois ownership of the means of production".[166] Yet, despite Marx and Engels' failure to develop a systematic approach to law[167], and claims of failure in Eastern Europe and the Soviet Union, Marxism's materialist emphasis, particularly concerning the notion of alienation and its consequences as outlined by Ollman[168], assists its contemporary paucity.[169]

Historical Materialism

> *Men have history because they must produce their life, and because they must produce it moreover in a certain way: this is determined by their physical organisation; their consciousness is determined in just the same way.*

165 Collins, H., Marxism and Law, Oxford: Oxford University Press, 1987 98.
166 Barry, N., An Introduction to Modern Political Theory, London: Macmillan, 1989 53.
167 Cain, M., and Hunt, A., 1979, Marx and Engels on Law, London: Academic Press.
168 Ollman, B.,1976, Alienation; Marx's Conception of Man in Capitalist Society, Cambridge: Cambridge University Press.
169 Collins, H., op cit., 10.

Marx, The German Ideology

The determinist relationship between the economic base and social superstructure, known as Historical Materialism, is first described in *The German Ideology*.[170] Historic materialism contends that the catalyst behind societal evolution is materially determined, being predicated on contradictions between the forces and means of production. As "it is not consciousness that determines life, but life that determines consciousness"[171], law is a reflection of the economic base, rather than the reserve as liberals such as Dworkin would propose. Under increasing industrialisation Marx foresaw crystallisation of society into two classes; bourgeoisie and proletariat. These relations of production developed due to particular forces of production under the capitalist mode of production that coerced the bourgeoisie to extract surplus value as profit from the proletariat. Laws, as Marx detailed in *Capital*, as one element of the social superstructure, assisted in forcing down wages.[172]

Collins characterises two Marxist approaches; crude materialism, in which law is simply a reflection of the economic base; and secondly, class instrumentalism; in which rules emerge because the ruling class want them to.[173] This distinction continues as an area of debate, as demonstrated by O'Malley's attacks of Quinney and Chambliss' crude materialist claim that law is a direct tool of powerful classes or groups, favouring the more interactionist, and less conflict premised theory of legislative change.[174] The Relative Autonomy Thesis is such a theory. Contemporary Marxists such as Marcuse, suggest mechanisms analogous to the *Factory Acts* and *Vagrancy Acts* remain instruments of the ruling class perpetuating conditions reinforcing this arrangement, especially in relation to the alienating nature of modern technological rationality.[175]

Base and Superstructure in the Capitalist Mode of Production

Much of our law, such as Contract, Property and Commercial Law, is predicated on the existence of the capitalist mode of production. As Marx's major project was the critique of capitalism, irrespective of a belief in revolution, Marxism has a great deal to notify us of in our contemporary jurisprudence. Marxism postulates that in the social production of their existence, people, independent of their will, enter into definite relations of production appropriate to a given stage in the development of the materials forces of production.[176] Consequently the societal superstructure, including but

170 Marx, K., and Engels, F., 1976, The German Ideology, Moscow: Progress Press.
171 Marx, K., The German Ideology, Moscow: Progress Publishers, 1976 42.
172 Marx, K., 'Bloody Legislation against the Expropriated, from the end of the 15th century: Forcing Down Wages by Acts of Parliament' in Capital, 1986 686.
173 Collins, H., Marxism and Law, Oxford: Oxford University Press, 1987 24.
174 O'Malley, P., 'Theories on Structure Versus Causal Determination' in Tomasic(ed.) Legislation and Society in Australia, Allen and Unwin, 1980 140.
175 Marcuse, H., One-Dimensional Man, Boston: Beacon Press, 1968 xv.
176 Marx. K., Preface To 'A Contribution to the Critique of Political Economy' in KarlMarx and

not dominated by law, amongst other hegemonic devices, is determined by the economic base and the organisation of power in society.[177] Marxist jurisprudence concentrates on the relationship between law and particular historical, social and economic structures, seeing law, unlike liberal theory, as having no legitimate primacy. Frequently encountered legal rules and doctrine, argue Gramsci[178] and Althusser[179], establish modern liberal jurisprudential hegemony.[180]

Scientific Socialism

Marxist epistemology, with dialectic materialism as the centre piece of Marxism's scientific claim, proclaims in real life, where speculation ends, positive science; the representation of the practical activity, of the practical progress of development of men, begins.[181] Whilst Marx's materialism does not refer to the assumption of a logically argued ontological position, Marx adopts an undoubtedly Realist position, in which ideas are the product of the human brain in sensory transaction with a knowable material world.[182]

These claims contrast with those of natural lawyers such as Aquinas who believe religion should normatively guide law; those desiring utilitarian tendencies such as Austin and Bentham; or objective consistency as some positivists such as Hart, or perhaps integrity, as perhaps only Dworkin can fully endorse. Nevertheless, whilst debate as to the scientific credentials of Marxism continue, Collins claims Marxism's desire for class reductionism to explain the dynamic interaction between man and nature risks misconstruing the diversity of social phenomena in order to confirm the 'rigid systemic framework of historical materialism'.[183]

Law and the Dictatorship of the Proletariat

Law, morality, religion, are to him so many bourgeois prejudices, behind which lurk in ambush as many bourgeois interests.

Friedrich Engels Selected Works, 1989 521.

177 Collins, H., op cit., 9.
178 Gramsci, A., Selections from the Prison Notebooks, London: Lawrence and Wishart. 1971 195.
179 Althusser, L., For Marx, London: New Left Books, 1977 114.
180 Collins, H., Marxism and Law, Oxford University Press, 1982 50.
181 Marx, K., The German Ideology, Moscow: Progress Publishers, 1976 38.
182 Giddens, A., Capitalism and Modern Social Theory: An Analysis of the writings of Marx, Durkheim and Weber, Cambridge: Cambridge University Press, 1971 21.
183 Collins, H., op cit., 45.

Karl Marx, the Communist Manifesto.

Marxism saw development of the relations of production dialectically, as both inevitable, and creating hostility. Accelerated by increased class consciousness, as the contradictions of capitalism perforate the bourgeois hegemony, inevitable revolution and a dictatorship of the proletariat would facilitate "socialised production upon a predetermined plan."[184] Given the scientific nature of Historic Materialism, and upon recognising the role the state and its laws supply, the proletariat will seize political power and turn the means of production into state property[185], then according to Marxist jurisprudence, "As soon as there is no longer any class to be held in subjection; as soon as class rule and the individual struggle for existence … are removed, nothing more remains to be repressed."[186]

Communism and the End of Law

The meaning of history, that man's destiny lies in creation of a Communist society where "law will wither away"[187] , as men experience a higher stage of being amounting to the realisation of true freedom, will after transition through Socialism, be achieved.

Justice and Rights

Communism abolishes eternal truths, it abolishes all religion, and all morality, instead of constituting them on a new basis.

Karl Marx, The Communist Manifesto.

Marxism argues there is no absolute concept of justice, justice being dependent on the requirements of a given mode of production.[188] Lukes claims Marx believes justice, "Does not provide a set of independent rational standards by which to measure social relations, but must itself always in turn be explained as arising from and controlling those relations".[189]

Marxism believes that rights are simply a bourgeois creation, and that justice is something only the rich can achieve in capitalist modes of production. Anatole France (1894) encapsulated this distinction between formal and substantive justice as entitlement, drawing attention

184 Engels, F., Socialism: Utopian and Scientific, Moscow: Progress Publishers: 1954 79.
185 Ibid., 73.
186 Ibid., 73.
187 Marx, K., The German Ideology, Moscow Progress Press, 1976 51.
188 Wacks, R., Jurisprudence, London: Blackstone Press, 1987 175.
189 Lukes, S., Marxism, Morality and Justice' in Parkinson, G., Marx and Marxisms, Cambridge: Cambridge University Press, 1982 197.

to "the majestic egalitarianism of the law, which forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal bread."[190] Formal justice as entitlement therefore allows equal opportunity to the individual without any reference to the unequal ability to use it, with rights only being anti-socialist if individuals are taken to be "inherently and irredeemably self-interested."[191]

Marxist dispute over how rights and justice will operate in practice are answered by the materialist proposition that the "distribution of burdens and benefits should not be taken in accordance with a book of rules, but in the light of the objectives of social policy."[192] Campbell distinguishes between Socialist and Bourgeois Rights, arguing that an interest based theory of rights, rather than the contract based notions such as Pashukanis' incorporated in his commodity exchange theory of law[193], allow protection of the individual[194], thereby negating the logical connection between rights and justice.[195]

Marxist jurisprudence and Marxist critiques of law provide invaluable challenges to our thinking as people under law in a liberal democratic society. This essay is only the briefest of introductions in a field rich with reflections concerning the assumptions we construct into our law. Whether you accept the claims of its doctrine, its influence on shaping the society we live in is more significant than most of us realise.

The principle of legality[196]

A central tenet of human rights law that applies directly to the criminal law system is the principle that prohibits retroactive application of crimes and penalties. To incur criminal responsibility, behaviour must be prohibited and carry criminal sanction at the time of conduct. This is known as the principle of legality or *nullum crimen sine lege* and *nulla poena sine lege*.

The principle of legality is at the heart of all modern criminal law systems. It requires that all criminal prosecutions have to be based on pre-existing legal norms neither crime nor punishment without law).

190 Gamble, A., An Introduction to Modern Political and Social Thought, Hampshire: Macmillan, 1987 101.
191 Campbell, T., Justice, London: Macmillan, 1988 189.
192 Campbell, T., The Left and Rights, London: Routledge and Kegan Paul, 1983 33.
193 Warrington, R., 'Pashukanis and the commodity form theory' in Sugarman, D., Legality, Ideology and the State, London: Academic Press, 1983 43.
194 Campbell, T. 1983, op cit., 123.
195 Ibid., 124.
196 Waddams S M Introduction to the study of law, 4th ed, Toronto: Carswell, 1992.

This principle is set out in a number of legal instruments of domestic law as well as of international law. Examples include the Constitution, article 29 (4, 5, 6); the penal code, article 3; the Universal Declaration of Human Rights, article 11 (2); and finally the International Covenant on Civil and Political rights (ICCPR) in its article 15.

However, this principle may be expressed in different forms by different regional legal systems. This principle has been upheld by the European Court of Human Rights (ECHR). For example, in the case *S.W. v. United Kingdom*, the ECHR held that the principle of legality should be "construed and applied [...] in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment".

To this end, the ECHR notes that criminal law cannot be construed by analogy, but must be clearly defined. Although this section has described the approach of international courts to the principle of *nullum crimen sine lege*, other jurisdictions may take a different approach. Countries differ in their approach to custom as a source of national criminal law. For example, some national jurisdictions do not accept non-written criminal law, including custom, but others do therefore one may cite this as a weakness in the law of precedents generally.

The principle of double jeopardy[197]

This principle is one of the important Human rights norms. This prohibits a person for being tried twice for the same conduct, and stems from concerns of fairness to defendants and motivation for thorough investigations and prosecutions. The Ugandan constitution and other national statutes used by tribunals directly reflect this principle. The Ugandan Penal Code says that an individual may not be punished twice for the same offence.

International conventions that are upon Uganda go somewhat further preventing a second prosecution not only where an individual has been convicted but also where a person has been tried and acquitted. However, these rules do not prevent an individual from being charged a single prosecution with several related offences. In the case of *Sergey Zolotukhin v. Russia*, the European Court of Human Rights held that the test for deciding if the two offences are the same must focus on a comparison of the facts of the cases irrespective of the legal characterization under national law. However the difference is in the approach of different offenders in different nations and the weight of their crimes, for justice to stand there must be an element of fairness especially on the victim. This principle therefore can't be applicable if a person hasn't felt relieved by the application of justice. One of the rationales of punishments is retribution.

197 Waddams S M *Introduction to the study of law,* 4th ed, Toronto: Carswell, 1992.

CHAPTER FOUR

The Law as a Clog[198]

Despite the long-standing and close connection between matters of law and justice and the superhero narrative, the exploration of what those interconnections bring on board is visually in the negative at a larger percentage. The law affects our lives and we are all presumed to be equal before the law, but there are stark inequalities in people's experiences of the law. I have not seen a place without any rule governing them and in all those places defaulted law by any citizen of a state has its punishments. This is not bad; but is justice properly administered? Indeed law is a general course for all the citizens of all nations and it is the duty of everyone to know the law guiding his society.

Can you imagine a world that was not regulated by law? A world that was not ordered by either man made law or the laws of nature. Such ideas are unthinkable; our tenuous existence would likely fall apart if we admitted the possibility of a lawless reality[199]. But that said, the burden of law on society cannot be neglected. Despite it being praised as a source of social control, it is a clog on society. As Dickens wrote, it is an ass indeed. Even though it is presumed to be important, it does not perform well at large. In this chapter, I intend to explore the burden imposed by law on society and how it has left the society in hatred towards its operation and position.

The law is an ass in such a situation where the application of the law as it would likely result in absurdity or in other words when the interest of justice is concerned, strict application of such law enacted to a particular circumstance would result in miscarriage of justice or where the application of the law in strictness would lead to unimaginable injustice when such matters or cases are brought before a court of law to decide to decide on the matter.[200]

In most of the democratic countries, there is a grand norm which is the constitution from which other laws derive validity. These Constitutions provide for equality before and under the law; the inspiration comes from the Bible, "You shall do no injustice in judgment; you shall not be partial to the poor or defer to the great, but in righteousness shall judge your neighbor." Justices of the courts of law take oaths to "do equal justice to the poor and the rich." Unfortunately, despite all these guarantees, the poor have continued to meet less justice as the rich (or reasonably well off) in our courts. Justice Black noted that, "there can be no

198 Let's kill all the lawyers- Henry IV (William Shakespeare)

199 Richard Quinney. The Ideology of Law: Notes for a Radical Alternative to Legal Oppression. Issues in Criminology, Vol 7, No 1(Winter, 1972). Published by Social Justice/ Global Options.

200 Unini Chioma. (2020). The Roles of A court of Law If Law is an Ass. Available at https://www.thenigerialawyer.com

equal justice where the kind of trial a man gets depends on the amount of money he has."

The courts do little to help the poor, in theory, the law is not supposed to discriminate in any ones favor. In practice, the rich tend to do well in the courts because the poor cannot afford to go to law themselves because the law said to favor property owners. As Anatole France, a French novelist sardonically put it, the majestic equality of the laws prohibits the rich and the poor alike from sleeping under the bridges, begging in the streets and stealing broad but when committed, who is handled and how. Indeed, Anarchasis was right was he said that, "written laws are like spiders web; they will catch, it is true, the weak and the poor, but would be torn in pieces by the rich and the powerful."[201]

This was said way back in the 6th Century B.C and thus outlook towards the law has persisted among a large section of thinkers, philosophers and intellectuals ever since and ended up manifesting even currently in our legal systems. Rousseau proclaimed that, "man is born free, but everywhere, he is in chains." The people especially in France in the late 18th century got frustrated with the oppressive laws which were constantly being framed by the rulers of the Bourbon dynasty, under the direct influence of the bourgeoisie classes. These laws were framed to the advantage of the men in power-the ruling classes, the nobles and the aristocrats to the prejudice of the proletariats i.e. the poor people.[202] They had no reason to doubt the unfairness of the law drafted. Perhaps this has maintained in society up to modern legal system. The lower class can achieve justice the same way the wealthy do.

For instance, problems of equal criminal justice extend to the near poor and the average wage-earner as well as the indigent, and that such problems begin well before trial and continue after the appeal but there is no doubt that whenever a crime is committed, the police conduct a roundup of suspects and do so in poor neighborhood, rarely in middleclass communities. The result of this is that more poor are arrested than the rich. No one cares, they are tortured and forced to accept crimes. We do not know how many of these people lose or fail to obtain jobs because of an arrest record resulting from guiltiness involvement in such episodes. Nor do we know how many how many poor people are even aware of their rights in such situations; for example their right to consult an attorney, to sue for false arrest or to have their arrest records expunged in jurisdictions where it is applicable.[203]

Whenever the arrest has been affected, the accused who is poor must often await the disposition of his case in jail because of his inability to raise bail; while the accused who can

201 Anarchasis as quoted by Plutarch in Parallel Lives, Solon.
202 Antidrigo. Barbaric, Mystical, Bored: Law As A Tool For Oppression. The Marxist Discourse. Available at https://www.atindriyo.blogspot.com.
203 The New York Times: Equal Justice for the poor, Too; Far too often, money-or the lack of it-can be the deciding factor in the courtroom, says Justice Goldberg who calls for a programe to insure justice for

afford bail is free to return to his family and job. Those that cannot afford bail are supposed to be imprisoned until acquitted by court. Besides in most cases, the lawyers representing the poor at most times have few, if any of the investigatory resources available for him to be released or win a civil case. He may also be limited in his ability to subpoena necessary witnesses to appear at trial.

That is how the law is complicated on the side of the poor. At most cases, the judges are bribed by those well off to receive the verdict in their favor which means law is embedded in the hands of the wealthy making the judges a mere peg on which to hang cases.

Lawrence Friedman says; Legal actions may be used to harass individuals or to gain revenge rather than redress a legal wrong. It may reflect biases and prejudices or reflect the interest of powerful economic interests. Indeed law has been exploited to harass individuals or to gain revenge rather than redress a legal wrong. This is how it is being used against the people. Simply because the law says so, many citizens have been left out suffering. For instance, the Public Order Management Bill was passed despite fierce criticism from religious leaders, opposition MPs and public as well as rights groups as a limitation to public protests. This was to require police approval if three or more people want to gather publicly to discuss political issues[204].

The police must receive written notice of public meetings seven days in advance and they may only take place between 6:00 to 8:00. The other notable is that police is entitled to turn down requests on grounds that the venue is already being used, is considered unsuitable or any other reasonable cause. In the end, the law is being used to oppress the natives especially those that oppose the government. In 1966, Dr. Obote forced the legislature to pass the Emergency Power Regulations after the High court nullification of Deportation Ordinance. Notable about this law was that it was specifically to operate against five people that were a stumbling block to his government.[205] It continues to harm society especially the dysfunctions of law.

Law does not always protect individuals and result in beneficial social progress. Law can be used to repress individuals and limit their rights. As already noted when it is enacted by those with authority. The respect that is accorded to the legal system can mask the dysfunctional role of the law.[206] The Constitutions of all counties do call for obedience of the people towards the Law and because of this, many of the laws are used by the totalitarian regimes as an

all Americans. Original context March 15, 1964, Section SM, Page 24.

204 BBC News. Uganda Public Order Management Bill is blow to political debate. August 2013 available at http://www.bbc.com

205 Kanyeihamba . G. W. Evolution of Constitutional Law and Government.

206 Lippman, M.R. (2015). Law and Society (pp.11) Thousand Oaks, CA: SAGE Publications.

instrument of repression. These governments theoretically permit no individual freedom and that seek to subordinate all aspects of individual life to the authority of the state. For instance, Benito Musolini coined the term totalitario in the early 1920s to characterize the new fascist state of Italy which he then described as, "all within the state, none outside the state and none against the state."[207]

Most of such governments utilize such opportunity to adopt laws that are oppressive to the citizens simply because they intend to have open ears from their subjects. No doubt, it is the law that fixes this. Take for instance if laws were not in place. Who would compel someone to oblige such? They make laws and call upon people to obey them, failure to do may cause undesirable ramifications. Isn't law a burden to society? Indeed it is an ass. In Uganda, the government recently enforced the removal of the term limit following a meeting held at the National Leadership Institute "Kyakwanzi" to have the Constitution amended to remove the term limits.

Parliament amended the Constitution in 2005 to remove the presidential term limits when president Museveni was in his second and final five year elective term. [208]Indeed the law was passed by Parliament but what was its impact? In 2017, the same government came back with the motion amend the same Constitution in a move to eradicate the age limit. [209]

But what has been its outcome? Imparting a regime on to the natives, gross violation of human rights, usurpation of powers of the legislature and the judicial organs of government by the executive. Because the law says so, so it is. The burden of the law to the natives is a sad story to narrate. The funny thing about this is that both those who resist and those who seek reform invoke the law, the former wishing to maintain existing law and the later demanding new laws. Many reforms and many changes are directly dependent on changes in the law and cannot be obtained without such changes.[210]

The unforgettable side of law is its sufferance from excessive formalism. Great emphasis is being placed on the form of law rather than its substance. Undue formalism causes unnecessary delay in dispensation of Justice. The side effect of this is that a lot of paper work required cannot be afforded by the poor. Because of this, few can acquire justice especially the wealthy guardians. How now can law be accessed by the poor? It has become expensive indirectly and directly affecting justice. Isn't it burdening the society? How are those without

207 Totalitarianism Government. The Editors of Encyclopedia Britannica. Available at https://www.britanica.com.

208 Daily Monitor. I regret removal of term limits fro president-Chief Justice. Wednesday Oct 14, 2020. Anthony Wesaka.

209 Article 102b of The 1995 Constitution Of The Republic of Uganda.

210 Margherta Rendel. Law as an instrument of oppression or Reform. SAGE Journals. Published May 1, 1975. Available at https://doi.org/10.1111/j.1467-954x.1975.tb0036.x

money able to access justice? Isn't it left in the hands of the few? Lawrence Friedman says, the law reflects biases and prejudices or reflects the interests of powerful economic interests. Justice is bought by those that are wealthy leaving out the humble.

That aside, the legal system is watered with conservatism in its approach. The bar and bench are generally conservative in their approach to the dispensation of justice. The result is that very often the law is static. This is not conducive to a progressive society. Conservatism is unwillingness to accept changes and new ideas. In most times, the legal system is conservative basically it relies on the ancient doctrines and principles of law. The best example to this is the doctrine of precedents embedded in stare decisis. The doctrine is central to the English legal system and to the legal systems that derived it such as those of Australia, Canada and New Zealand.

A precedent is a statement made of the law by a judge in deciding a case. The doctrine states that within hierarchy of the English Courts, a decision by a higher court will be binding on lower courts. This means that when judges try cases, they will check to see if similar cases have come before a court then the judge should follow that precedent.[211] A court of law is bound to adhere to its previous decisions save in exceptional circumstances where the previous decision is distinguishable or was overruled by a higher court of appeal or was arrived at per incurium without taking into account a law in force or a binding precedent. In absence of such circumstances, a panel of an appellate court is bound by previous decisions of other panels of the same court.[212] This leaves the judges hands fixed on established principles of law that doesn't give room to innovation of new ideas by judges to fit in the new environment since law is not static. In other words such old laws are applied to people in the present day which perhaps leads to discontent with the law and injustice.

In most times, the law is found to be rigid. An ideal legal system keeps on changing according to changing needs of the people. But because of the rigidity of law, it is unable to keep pace with the fast changing society. There is always a gap between the advancement of society and the legal system prevailing on it. The lack of flexibility in law results in hardship and injustice to people for instance, the fixed rules and laws of marriage that have failed to transform and consider cohabitation as a form of marriage . Cohabitation means couple that are living together but are not married or in civil partnership. These people do pass off as husband and wife at times live for long without separation, have children acquire property together.

But surprisingly, in case of dissolution of their relationship courts do not accord them equal legal rights as those married. Besides this, though courts have tried to accord them, they

211 H.E.Morris and James S. Read: Uganda. The Development of its Laws and Constitution The British Common Wealth: (the development of its laws and Constitutions, Vol 13.) xvi,448pp. London: Stevens and Sons, 1966, 90s.

212 Justice Mulenga JSC in Attorney General v Uganda Law Society [2011] 1EA 1 SCU.

mainly base on the duration of the cohabitation which has continued to affect those unable to marry or perhaps meet the marriage costs.[213]

The legal system does not work or more accurately, it doesn't work for anyone except those with the most resources. Not because the system is corrupt, I don't think the legal system is all corrupt, I mean simply because the costs of our legal system are so astonishingly high that justice can practically never be done.[214] Ache Guevara noted that; Justice remains the tool of a few powerful interests; legal interpretations will continue to be made to suit the convenience of the oppressor powers.[215]

Law as a clog can only and only be maintained against customary law, beliefs and practices of given communities and how law frustrates them. From time immemorial law found itself evolving from the beliefs and practices of people of a given community, its not a finding of current day and age but medieval times and probably later than that. The clog of the law manifests in different works of early writers and works. The unpopularity of lawyers goes back a long way. Shakespeare contributes to it when, in Henry VI part 2, he portrays the short-lived rebellion in the 15th century against the rule of King Henry by the poor people of Kent. Corruption is rife and taxes are continually raised to fund the Hundred Years War in France. An army of 5,000 gathers at Blackheath, prepared to march on London. Their leader is Jack Cade, a clothes-seller and war veteran. He rallies his supporters with promises of an egalitarian paradise (but with him as king):

"All the realm will be in common there shall be no money all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers, and worship me their lord."

Dick the Butcher speaks up at this point:

"The first thing we do, let's kill all the lawyers."

Cade promptly agrees:
"Nay, that I mean to do."

Then we hear Cades personal grievance against the legal profession. Is it not lamentable, he asks, "that parchment, being scribbled over, should undo a man?" And the same for beeswax, used to seal documents: "For I did but seal once to a thing, and I was never mine own man since." A clerk enters, who "can write and read and cast a compt". Cade regards him with deep suspicion when he admits he can write his name. "Away with him," says Cade.

213 Baryamureeba James v Kabakonjo and 6 Others HCCS No 20 of 2013.
214 Free Culture (2004).
215 A speech delivered at the plenary session of the United Nations Conference on Trade and Development in Geneva. Switzerland (25 March 1964)

I say hang him with his pen and inkhorn about his neck."

Then the lawyers are numbered among the enemies of the people in the class war. A messenger reports to King Henry:

The rebels are in Southwark; my Jack Cade… calls your grace usurper openly and vows to crown himself in Westminster All scholars, lawyers, courtiers, gentlemen, they call false caterpillars, and intend their death."

Lawyers in Cades eyes are proxies for the landowners, employed to confuse the unpropertied with legalistic mumbo-jumbo they can neither read nor understand. Without prejudice We must not suppose that the dramatist is expressing a prejudice of his own against lawyers or the law through the voices of Cade and Dick the Butcher, any more than he can fairly be identified with the demand by Shylock in the Merchant of Venice for the pound of flesh stipulated in that other infamous bond. Shakespeare's plays are full of legal references, so it has been claimed that he must have had a legal training. His knowledge of the law has fed the controversy about the true identity of the author of the plays. How could the grammar school boy from Stratford have known so much? Our greatest author surely needed at least the aristocratic birth of an Earl of Oxford or the erudition of a Francis Bacon.

Assiduous scholars have detected more than 300 legal terms and phrases in the plays. Yet the prevailing view of legal historians, including GW Keeton, author of Shakespeare's legal and political background, is that his legal attainments were not so extensive as to cast doubt on the traditional Stratfordian attribution. And, of course, much of the factual basis for Shakespeare's plays comes from known sources. Most of the historical plays, including the story of the Jack Cade rebellion which was, incidentally, quickly put down are traceable to sources well known at the time, such as the popular chronicles of Ralph Holinshed. It would be wrong to suppose that he shared the hostility to lawyers (and the ruling classes) depicted in Cade and his followers. That would be to trivialize the subtlety of his social and political understanding. The full original title of the play in which Cade appears was the second part of Henry the Sixth with the death of the good Duke Humphrey. Humphrey, Duke of Gloucester, was uncle and guardian of the young King Henry during his minority and as Lord Protector.

The hostility towards lawyers goes back a long way we can't blame Shakespeare. Geoffrey Bindman QC reports effective ruler of the country. A "virtuous prince", Shakespeare presents him as the impeccably honorable and fair upholder of the rule of law. Nor does Humphrey respect the law only when it is in his favour: he submits to it even when it turns against him. When his enemies make false allegations against him he answers: "Prove them, and I lie open to the law." When his wife is banished for witchcraft, his faith in the law makes him seem callous. He tells her: "The law, thou seest, hath judged thee. I cannot justify whom the law condemns." Humphrey is murdered by his enemies. His death is mourned by the common people including Cade and his supporters. Clearly they approved his respect for legality.

Paradoxical puzzle Historians question Shakespeare's account in points of detail but the paradox of popular attitudes to lawyers and the law emerges as clearly from his play as if he were describing it today. Most people want the law to be upheld by those we entrust with its administration. There is widespread confidence in the basic integrity of the legal system though its failures are not overlooked. The judges are regarded as honest and competent though they are drawn from the profession. Lawyers are generally approved by their clients. Dick the Butchers outburst is grotesque. Yet over the centuries the public has never lost its scepticism about the conduct of lawyers in general, especially those who, under the umbrella of professional duty, exploit the economic power of their paying clients to the disadvantage of the poor. How well Shakespeare understood the ambiguities of our profession.[216]

Now unlike the western world and Europe, the sources of law in most African countries are customary law, the common law and legislation both colonial and post-independence. In a typical African country, the great majority of the people conduct their personal activities in accordance with and subject to customary law. Customary law has great impact in the area of personal law in regard to matters such as marriage, inheritance and traditional authority, and because it developed in an era dominated by patriarchy some of its norms conflict with human rights norms guaranteeing equality between men and women, the clog of the law has a very huge role to play here specifically, in eroding the character of African legal stature. While recognizing the role of legislation in reform, it is argued that the courts have an important role to play in ensuring that customary law is reformed and developed to ensure that it conforms to human rights norms and contributes to the promotion of equality between men and women. The guiding principle should be that customary law is living law and cannot therefore be static. It must be interpreted to take account of the lived experiences of the people it serves.

> What law is, it is that which must be obeyed and followed by citizens, subject to sanctions or legal consequences.[217]

If the law supposes that", said Mr. Bumble, squeezing his hat emphatically in both hands, *the law is an Ass- a idiot" if that's the eye of the law, the laws a bachelor, and the worst I wish the Law is, his eye may be opened by experience".*[218] Charles Dickens, an author expressed his understanding and stand with the law, with the use of his characters, he was able to share his thoughts about what he thought the law is.

216 Let's kill all the lawyers- Sir Geoffrey Bindman QC, consultant, Bindmans LLP
217 Garner, B. A.(2004).'Black's law dictionary.' Pg.1028
218 Dickens, C.(1868). The Adventures of Oliver Twist. Ticknor and fields.

The law being the only first and last resort by man in establishing a harmonious living, it is only mandatory that it is upheld to its standard of justice and equality as so it should. This paper shall illustrate the efficaciousness of this statement as regards the modern events.

> Plans are afoot to drop some of the more asinine and outdated laws from the statute books. Its true sometimes the law is indeed an ass, but laws are made and administered by human beings and people will always try to find a way around the ones they don't like[219]

Anyone having had the misfortune to seek recourse to justice through the legal system cannot be impervious to the fact that, while the court aspires to arrive at a rational decision, the sought after justice maybe a purely coincidental consequence.[220] This serves to explain the point that the makers of the law and the administrators of that same law usually enforce it with a one sided view of justice. In that the beneficiaries to the law find it quite absurd that the law which seeks to protect and which they, should hold dear, is against them in all particular ways.

The question posed today is, is the law rational? is the system to which the law belongs rational, or is it a barking dog? The outlook of this paper shall delve more into explaining this concept while triggering the reader into understanding whether the law is enacted for the betterment of the majority, or as Charles Dickens says, is it an ass?

Firstly is the jurisprudence of positivism. This was first expounded on by Hans Kelsen who was concerned to explain what the law is, not what it ought to be, he further goes on to state under his pure theory of law that every activity of a legal nature maybe traced back to an authoritative standard which is known as a norm[221]. In Ugandan context, the norm is the Constitution and he was on the view that the norm is the head and everything else exists stemming from that order.

219 https://www.stacklaw.com.au/news/criminal-law/yes-sometimes-the-law-is-an-ass/ accessed on 16/07/2021

220 Saltman,M. (1985). The law is an ass" an anthropological appraisal. *Reason and morality,*24,223

221 Austin, C. (2000). Essential Jurisprudence" Cavendish Publishing Limited.United Kingdom.

> Lawyers of positivist persuasion perceive the formal system within which they operate as a rational system. For them, rationality means that a valid or correct judicial decision is logically deduced from predetermined rules that constitute the components of the closed logical system. By the same token, the arrival at judicial decision by means not conforming to such logical derivations must be non-rational.[222]Justice should not only be done but it must see to be done.

The moral and code of conduct has trodden downhill in as far as advocates are concerned, in Uganda, the enactment of the Advocates(professional conduct)regulations and the Advocates Act Cap 267 which set out boundaries and yard stick for professionalism in lawyers has not been followed to the letter. The establishment of the law council which handle matters of professional misconduct often slugs with its decisions, in the end, the victims of the fraud get delayed justice. It is the mandate of this council to address the complaint made by aggrieved persons with immediate effect do that a decision is reached, however this is not usually the case as opposed to what is written down in the law.

The law should exist to serve best the interests of others, and that it should not be static or rigid, but rather flexible according to the circumstances. The Covid 19 pandemic that caused the world to stand still affected Uganda as well. Among the measures to curb the wide spread virus was an enforcement of total lockdown which saw businesses closing and others running bankrupt. With the backlash in the economy, the tax man, that is to say Uganda Revenue Authority is still inclined to collect taxes as earlier on. The law on mandatory pay of taxes should have been amended in light of the hit economy as a result of the claws of lockdown. There, is the evidence that the law is here to serve the interests of people. But the constant move of the authority to enforce the law on tax payment amidst the economy hit by the pandemic, shows how much of an ass the law is.

One of the most important functions full filled by lawyers is the giving of the legal advice. This is nothing more than the expression of the lawyers opinion in relation to the facts of a

222 id

particular matter related to him by his client, such opinion being based on his knowledge of the law and his experiences of the foibles and weaknesses of mankind and the courts.[223] When it comes to deciding on whether the lawyers should litigate, most focus is given to the evidence in question and the legal issues involved and forget the fact that the presence of judges is a determinant for whether indeed, one ought to litigate or not. The reality checks in where the client, knowing that they will handle this case once and for all, have to face off again in the next appellant courts.[224] Here it is not guaranteed if indeed the decision will stay the same of change in favor of one's opponent. The growing trend is that of clashing judicial precedent. Due to the divisions of units of law such as the family division, land divisions at different districts. Judges make decisions that clash, therefore attorney's base on those different judgments while making appeals especially in cases where facts are as the same but the decisions made are different. It leaves an unanswered question that in the event that courts of the same hierarchy give different decisions on the same facts at hand, which decision shall be given more weight and what is left of the decision that has not been considered? It is with no doubt that it is such scenarios that make the law an ass.

In assertion of the same views, one is inclined to focus on the political question doctrine. The political question doctrine obliges courts to set aside certain government actions and decisions from judicial review. The doctrine emerged in the United States in the early 19th Century. It first appeared in Ugandan jurisprudence in Ex parte Matovu (1966). After Matovu, it kept a relatively low profile. However, the doctrine reemerged dramatically in the case of **Centre of Health Human Rights & Development (CEHURD) and Three Others v. Attorney General**[225]. In CEHURD, the Constitutional Court of Uganda held that the political question doctrine prevented the court from reviewing government policy

223 https://www.stacklaw.com.au/news/criminal-law/yes-sometimes-the-law-is-an-ass/ accessed on 16/07/2021
Saltman, M. (1985). The law is an ass" an anthropological appraisal. Reason and morality,24,223

224 Austin, C. (2000). Essential Jurisprudence" Cavendish Publishing Limited. United Kingdom.

225 Constitution petition No. 16/2011

concerning the provision of maternal health care[226], this is a clear detachment from the provision of the law on the right to health under the constitution. The doctrine springs from a necessary limitation on judicial power and the need to honor purposeful allocations of power among the other branches over government[227]. Thus it has a fundamental role to play in achieving separation of powers and allocating of government responsibilities.

Despite its utility, the political question doctrine should not be used an excuse for the judiciary to abscond from core responsibilities or to avoid controversy. If the strength of the constitution as the supreme law is under looked by the judicial officers using the political doctrine as an excuse to abscond from the duties of interpreting that law and calling for its adequate enforcement, it is a clear that probably it is not strong enough to carry on its purpose and the tides are sweeping it away.

From a historical perspective, Uganda became a British protectorate in 1884, its rich traditional culture and massive methods of dispute resolution was taken up and over by the British way of solving issues, this led to development of courts of law and adoption of some of their English law, among which was the **Penal Code Act Cap 120**. This instructed many other measures especially under **Section 6** which is to the effect that ignorance of the law is no defence, that failure to know the law shall not be used as an excuse once one is brought before a court of law. In the particular context of human rights, knowledge of the law is not only important for protection and enforcement of rights, but also for people to have some knowledge of the human rights obligations imposed on them by law.

Consequently, there is no doubt that in order to enjoy these rights one has to have knowledge of them. One cannot enjoy or enforce rights that of which one is not aware.[228] People have tried as much as they can to make themselves aware of the laws in motion and act accordingly. But this is not usually enough, being a country whose norms and

226 https://www.researchgate.net/publication/317450046_The_political_question_doctrine_in_Uganda_A_reassessment_in_the_wake_of_CEHURD/citation/download accessed 17/07/2021.

227 Id

228 M Ssenyonjo, 'The domestic protection and promotion of human rights under the 1995 Ugandan Constitution' (2002) 20 (4) Netherlands Quarterly of Human Rights 445, 448.

traditionally rooted with a high rate of rural growth, it is usually hard and utmost impossible for the population to know about the recent updated laws and as thus prone to doing acts innocently that they may be punished for in the end.

The mandate for the government to make public aware is not fully carried out. Ignorance of the law will not excuse the offender. It is the duty of the subject to know it, and knowing, to obey it. The existence of the implication and duty, demands the correlative obligation of government, to publish its requirements. Men cannot be required to know that which is unrevealed, or to obey that which is unannounced. They cannot be punished but for sinning with knowledge, or with the means of knowledge. History has immortalized the shame of the ancient lawgiver, whose edicts were only published upon the city walls, high above the observation of the people. If ever a citizen shall be condemned under an unknown law, history will be true to her trust, and perpetuate the memory and condemnation of the prodigious wrong.[229] It is an absurdity that failure for government to carry on its obligation has not been fully addressed to best collate the provision of the law and gradually enforce it.

On the sector of legal professionalism, it has raised concerns amongst the population as to whether lawyers and the law are genuine persons. The belief by people that once one is representing a client should be able to share information only and only with him and that relating to a lawyer of the opponent is looked at as a conspiracy is the one of the common issues in the legal profession. The Advocates (Professional Conduct) Regulations[230] do not contain a specific provision as regards that. But in the profession, there are duties lawyers owe to each other amongst which is the duty of discovery.

Discovery is an area where advocates must work together and resolve disputes outside of the courtroom. Discovery matters also focus on sensitive information and often place advocates in positions where they are asked to produce documents or information that

229 William A Beach, 'Quoted in Manual of Forensic Quotations', by Leon Mead, P. 125
230 The Advocates (Professional Conduct) Regulations, 2018

their clients do not want to share.[231]This particular method has led to loss of trust in clients who usually believe that the lawyers are conspiring against them. It should be an eye opener that a law which indeed compels the advocates to share certain documents with their opposite counsel for purposes of the case is clearly expressed, that way a proper explanation is given to clients in these circumstances, in that way, trust is built and justice is given without second guesses by clients that perhaps the lawyers connived.

The concept of judicial activism has been the support system of the growing phrase that justice should not only be done bust also be seen to be done. Judicial activism, an approach to the exercise of judicial review, or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions.[232] Here judges are mandated to give judgments not necessarily by following the law to the book but rather considering other aspects.

To describe judges as activist in this sense is to argue that they decide cases on the basis of their own policy preferences rather than a faithful interpretation of the law, thus abandoning the impartial judicial role and legislating from the bench.[233]An example was in the case of **Behangana Domaro and anor Vs. Attorney General**[234]where Behangana, an Mbarara-based businessman, was beaten and detained by two police officers for over a month in 2010.Court ruled that detaining someone without charge for over 48 hours was unconstitutional. It also ordered that individual police officers who violate the Police Act ought to be prosecuted in their individual capacity. Court ordered legal practitioners to sue such police officers and their supervisors in their individual capacities because when the Attorney General is ordered to pay, it is taxpayers' money that is wasted. It is no longer about declarations and winning cases, but rather, is it indeed decided and

231 D. Brian Dennison,PamelaTibihikirra-Kalyegira (eds.),Legal Ethics and Professionalism. A Handbook for Uganda
Geneva: Globethics.net, 2014

232 Roosevelt, K. (2019, October 16). Judicial activism. Encyclopedia Britannica. https://www.britannica.com/topic/judicial-activism

233 id

234 Constitutional petition No.53 0f 2010

witnessed that justice has been granted reasonably and fair? Has justice been served regardless of one's capacity? That and many others is an example of how the law may, as said not be an idiot after all.

Principle of justifiability

In order to assess the success of the legislative and legal frameworks that have been adopted, it is crucial to ascertain the justiciability of the right to health in Uganda which is the starting point in analyzing any health issue.

The 1995 Constitution does not expressly provide for the right to health, however, the National Objectives and Directive Principles of State Policy (NODPSP)[235] acknowledge the right, although it is still uncertain whether the principles are justiciable. Egonda Ntende J in *Tinyefuza v Attorney General*,[236] held that NODPSP are important aids in interpreting the Constitution, however, he did not expressly state whether they are binding. Discordant views were expressed in *Zachary Olum & Another v Attorney General,* where the court agreed that NODPSP are part of the Constitution, however, the learned justices were quick to add that they are not justiciable. It is therefore uncertain whether the NODPSP are justiciable. However, with the introduction of Article 8A (1) in the 2005 constitutional amendment which provides that Uganda shall be governed based on principles of national interest, it can be argued that the NODPSP are now justiciable.[237]However, some commentators such as Twinomugisha,[238] have argued that this provision is not absolute because clause 2 requires Parliament to 'make laws for purposes of giving full effect to clause (1) of this Article.'[239] Unfortunately, Parliament has not yet invoked this clause.

Although there have been very few cases dealing with HIV/AIDS specifically because

235 Objective XX (on medical services)
236 Constitutional Petition 1/1999.
237 C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' HURIPEC Working Paper (2008)
238 Ben Kiromba Twinomugisha, 'Fundamentals of Health Law in Uganda,' at p.29.
239 Art 8A(2)

of stigma associated with the disease, the courts have gone ahead to rely on civil and political rights to advance the broader right to health in numerous cases, an example of such a case is *CEHURD and 2 Ors v The Executive Directive Director Mulago Referral Hospital and the Attorney,*[240]where Justice Lydia Mugambe held that denying the parents of the child the opportunity to bury their baby, was a violation of their right to health in contravention of objectives XX and XIV (b) of the Constitution, in addition to Article 12 and Article 16 of the ISECR and the African Charter respectively which guarantee the right to health. This judgement is important because it demonstrates judicial activism where judges have relied on civil and political rights which are well defined in the Constitution to protect the right to health. Specifically, the court observed that the hospital's actions amounted to psychological torture which violated Articles 24 and 44 of the Constitution.

The phrase justice should not only be done but also been seen to be done is a repeated statement, which only serves to fulfill this purpose of establishing whether indeed the law is good enough or not. The lot falls on the notion of enforcement of judicial decisions. Once a decision has been made by courts of law, it should be enforced or acted upon immediately as a revere for justice, which is not usually the case. A decision is made by courts of law but enforceability delays and thus defeats the purpose of the decision in the first place. For emphais in the case of **Cehurd, Mubangizi and Musimenta vs. Executive Director Mulago Hospital and Attorney General,**[241] court ordered that he couple who lost one of their twins and were given a wrong dead baby be given psycho-socio care and counseling services as part of their healing process at Mulago's expense, no effort had been made in that regard. Mulago was also ordered to write reports every four months indicating steps taken to ensure the safety of babies, dead or alive, within its facilities. Cehurd was to be granted unlimited access to oversee implementation of the above. However when asked whether it was done, CERHUD officials indicated that no follow ups had been made. This is a clear indication of non-implementation of the orders. What is

240 (CIVIL SUIT NO. 212 of 2013) [2017] UGHCCD 10
241 Constitution petition No. 16/2011

the whole point of granting justice if the justice is not effected at all. These are some of the situations that weaken the status quo as regards the strength and weight of the law.

For decades now, the legal system has been awash with the idea that each country should observe the rule of law, this means that the functions and powers are all subject to the law and will be exercised in accordance with the law. This was emphasized by professor Dicey who stated that the rule of law had three meanings that is to say; absolute supremacy of the law as opposed to arbitrary exercise of powers, equality before the law, supremacy of the constitution. What is most striking is equality before the law. The constitution stipulates it under *Article 21(1)*.[242] However there have been certain instances where administrative officers have carried on nepotism in hiring and appointing people to work in such offices. If everyone was to be hired on merit as the law suggests, then why are there tendencies of nepotism. There has been instances where persons in higher offices have asserted to be above the law and nothing has been done to that regard. If indeed the law is weak against them, is it strong enough to withstand the pressures upon it?

Still on the rule of law, the independence of the judiciary is a widely discussed part of the rule of law. Uganda consistently ranks low in terms of the rule of law and judicial integrity. The World Justice Projects (2018) Rule of Law Index rates Uganda 104th out of 113 countries globally, and Freedom House (2018) gives Uganda a 4 out of 16 for rule of law. While the Constitution calls for judicial independence and a clear separation of powers between the executive, legislature, and judiciary, the president and military are frequently accused of undermining the judiciary and rule of law.[243] The makers of the law are often criticized for not following it.

If the judiciary was independent, the decisions would be enforced with immediate effect, bringing justice where it is due. *Article 128* of the same constitution provides that no person shall interfere with the courts or judicial officers in exercise of their judicial functions and *Article 128(3)* of the same states that all organs and agencies of state shall accord to the

242 Constitution of Republic of Uganda,1995

243 Austin, C. (2000). Essential Jurisprudence" Cavendish Publishing Limited. United Kingdom.

courts such assistance as may be required to ensure effectiveness of the courts. This has not been the case as we constantly see the judiciary falling prey to and receiving wide criticism from the executive.

Firstly, *Article 142(1)*[244] is to the effect that *the chief justice, the deputy chief justice, the principle judge, a justice of the Supreme Court, a justice of the court of appeal and a judge of the High Court shall be appointed by the president acting on the advice of the judicial service commission and with the approval of parliament."*The move by the president to appoint the members of the judiciary in a way makes them prone to criticisms and interference with the granting of justice. The vivid incident is when a group of armed men known as the black mamba raided court at the time when the judge was pronouncing on whether bail was to be given to the suspects at that time. When the presiding judge announced that according to the Constitution the 14 suspects were free to apply for bail, all hell broke loose. Suddenly, the men in black T-shirts and combat fatigue trousers emerged from the vehicles. Some were hooded. They were all armed with guns, but not the common ones usually seen being carried by the police or military. The men took different positions around the court building with their fingers on the trigger.[245] Such a sight must be one of the things the presiding judge least expected in their court room. But such actions really get one wondering whether the people should trust that they are safe in courts of law and these action undermine the independence of the judiciary. If there is no law that protects its watchmen, what then is the essence of its existence.

The constitution of the Republic of Uganda consists of Chapter four, also known as the bill of rights. It expresses all the rights accruing to persons and citizens of Uganda. The most controversial right is enshrined under Article 26 which is the right to property. Article 26(2)(b) of the same constitution expressly states that "*no person shall be compulsorily deprived of property or any interest in or right over property of any description except where; the*

244 Constitution of Republic of Uganda, 1995
245 https://www.monitor.co.ug/uganda/magazines/people-power/black-mamba-s-raid-on-kampala-high-court-how-it-happened-1678378 accessed 17/07/2021

compulsory taking of possession or acquisition of property is made under law which makes for a provision for prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property and a right to access to a court of law by any person who has an interest or right over the property", this is the notion of compulsory land acquisition. It refers to the power of the government to acquire private rights in land for a public purpose, without the willing consent of its owner or occupant.[246] The rationale for acquiring land for a public purpose or in the public interest may be also clear where the land will be held by a private entity but used for a public purpose.[247] It is mostly done to bring services closer to the people as a mechanism for development Uganda. Thus the label compulsory acquisition is a critical development tool for governments ensuring that land is available when needed for essential infrastructure, a contingency that land markets are not always able to meet.

That notwithstanding, the compulsory acquisition comes with prompt payment, which has been diligently done, however there has been a sided story as regards prompt payment, where the payment goes to men, leaving aside women in most cases, this is against their right to property as well. They are sadly not included in the compensation process. An example is the acquisition of land to construct a kaweeri coffee plantation, a number of women were not evicted and not granted compensation, these women bore the burden of not only putting food on the table but also of shouldering the repercussions of social dislocation within the context of almost complete absence of government functionality. In very specific ways, lack of access to land for cultivation, water and firewood all created a burden for the women.[248] It is almost as if this law was create in exclusion of women. The bitterness faced by such people is enough to indicate that clarification needs to be done

246 J. Bruce et. al. Land law reform: achieving development policy objectives. (World Bank Law, Justice and Development S. Keith, P. McAuslan, R. Knight, J. Lindsay, P. Munro-Faure and D. Palmer. Compulsory acquisition of land and compensation. (FAO Land Tenure Series, 2008)

247 Jonathan milslandsay; compulsory Acquisition of land and compensation in infrastructure projects, an explanatory note on issues relevant to public-private partnerships. Accessed at www.worldbank.org/ppp. On 24/05/2021.

248 Chu, Jessica (2011) 'Gender and Land Grabbing in Sub-Saharan Africa: Women's Land Rights and Customary Land Tenure, Development 54 (1), 35-39.

on this law so as to make it strong enough to protect the weaker party against the strong party, which should be its essence in the first place.

In conclusion, Charles Dickens opinion of the law as being an ass has been realized in so many ways, in so many jurisprudences country wide. However when it comes to Uganda, it is observed that the law is okay, the law to a larger extent is no ass, it evolves and changes with time. However the problem lies with the administration of the legal process and the courts in the comparison. If there would be a reform and better presentation of both. Then indeed the law would be like a new born baby, with no flaws and living to make all those around it feel completer and whole.

THE COLONIAL PERIOD:
THE CLOG OF THE LAW AND THE APPLICATION OF CUSTOMARY LAW [249]

The pre colonial law in most African states was essentially customary law in character, having its source in the practices, traditions, and customs of the people. The normative force and legitimacy of customary law is derived from the idea that it is ancient, unchanging and passed on from generation to generation, and that it is part and parcel of people's identity and culture. The colonial administrations recognized customary law and its institutions, although its application was generally restricted to Africans. From its inception the system of administration of justice introduced by the British differentiated between the Europeans and Africans. For example in Zambia section 14 of the Royal Charter of Incorporation on October 29, 1889, authorized this differentiation as it entrusted the administration of Rhodesia to the British South African Company.[250] It stated, "In the administration of justice to the said peoples or inhabitants, careful regard shall always be had to the customs and laws of the class or tribe or nation . . . ." Native Courts administered customary law. Typically the governor of a territory had exclusive right to establish native courts. He also had exclusive right to determine who sat in the native courts and to suspend or terminate the appointment of justices.

The courts had jurisdiction over trials and determinations of any civil cause or matter in which both the parties were Africans. The practice and procedure was regulated in accordance with customary law. The native courts were subject to review by District Officers. This led to what is

249 African Customary Law, Customs, and Women's Rights by Muna Ndulo

250 Charter of the British South Africa Company (Oct. 29, 1889), in SELECT CONSTITUTIONAL DOCUMENTS ILLUSTRATING SOUTH AFRICAN HISTORY, 1795-1910, at 559 (George von Welfing Eybers ed., 1918).

termed the "bastardization" of African customary law. Human rights protections did not arise in the colonial period, as colonialism itself was premised on the violation of human rights. The common law and legislation was and still is administered by an English style judicial system. Practice and procedure in these courts has always been in substantial conformity with the law and practice observed in English courts.[251] This meant distinct judicial systems with no connecting link at any level of the judicial hierarchy. At independence many African countries instituted judicial reforms which attempted to deal with two things:
(1) integration of the court system and
(2) the removal of racial bias in the administration of justice.

In most African countries, English or French systems of courts served as models for a full range of African courts: e.g., supreme courts, high courts, and subordinate courts. These courts have the same jurisdiction as similar common law courts elsewhere. At the bottom of these courts, African countries created a fourth tier. The names vary from country to country, but they include primary courts, community courts, and local courts. The local courts serve as the courts of first instance in matters involving customary law. Appeals from these courts go to the subordinate courts, then to a high court, and finally to a supreme court.

From the inception of colonial rule, customary law was applicable on two conditions:
(1) That it was not repugnant to justice, equity, or good morality and
(2) That it was neither in its terms nor by necessary implication in conflict with any written law.

The application of the repugnancy clause has always been a source of controversy. It was observed that subjecting African customary law to a repugnancy clause and the clause being applied to African customary law by English colonial judges meant two things:
(1) that customary law was inferior to the common law and
(2) that the standard by which the validity of African customary law was to be determined was inevitably to be that set up by English ideas of legal norms, justice, and morality.
And yet the values of Western society are embedded in the common law, even as values of traditional African society are embedded in African customary law.
These are two different systems of law developed in two different situations under different cultures and in response to different conditions. In addition to the conflict of cultural values, apparent inconsistency in the application of the repugnancy clauses created problems. As can be seen from the examples of the cases Agbede gives in his book Legal Pluralism, the inconsistency created by an ad hoc approach to repugnancy clauses does not promote justice and reveals the need for sound principles as rules of guidance for the judges in the various

251 High Court Act of 1960, Cap. 27, 3 LAWS OF REP. OF ZAMBIA (1997)

departments of the substantive law to achieve certainty and predictability and promote the course of justice.[252] There are a number of cases that declared aspects of customary law repugnant to justice and morality that illustrate the inconsistency. Examples of customs that were declared repugnant include woman-to- woman marriage,[253] liability of the family for wrongs committed by one of its members, and paternity rules. Ironically it would seem that courts struck down provisions that empowered women and were contrary to the Victorian views as to the role of women in society. Many of today's contentious issues such as polygamy and discriminatory inheritance practices were left untouched. As in other, dual systems of law, there are many problems associated with duality. The coexistence of common law and customary law in the same country raises the problem of when the laws apply and to whom.

As Opoku has observed,

"As can be imagined, such a division of areas of competence, in the colonial context, was more than a simple mechanical or technical division of labour. It involved all kinds of assumptions and value judgments."

In discussing law under the colonial regime, it is usual to contrast the French policy of 'direct rule' with the British policy of 'indirect rule. In fact, the two approaches were not different in effect as both relegated customary law to an "inferior position." Because the different laws were administered by different courts, the resulting problem is not limited to conflict of jurisdiction rules, but also includes the divergence in the quality of justice attainable in the various systems of courts. This is because of the different rules of procedure and the marked differences in the quality of judicial personnel. In addition, in most cases men often staff the local courts, and the men are chosen for their familiarities with customary norms. Such men are more inclined to defend what they see as traditional norms than the living law of communities. In post independence constitutions elaborated before the era of democratizations in the 1980s, the independent African states continued to recognize customary law together with the common law and legislation as a source law. The court system was integrated. This was done by putting the local courts (the courts that dealt with customary law) at the bottom of the judicial structure. Unfortunately, the postcolonial constitutions in this period left much to be desired on the issue of women's rights. The independence and new constitutions of the 1960s contained bills of rights that guaranteed human rights to all on the basis of equality between men and women and, at the same time, immunized customary law against human rights scrutiny. For example, the Zimbabwe Constitution provides that "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority" and that "no law shall make any provision that is discriminatory either of itself or in its effect." It then states that nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters-

252 1. OLUWOLE AGBEDE, LEGAL PLURALISM 71 (1991)

253 C.O. Akpamgbo, A 'Woman to Woman" Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles, 14 AFR. L. STUD. 87, 87-92 (1977).

(a) matters of personal law;
(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law ...

The national legal system of a typical African state is pluralistic and composed of the following sources African customary law: religious laws (especially where there is a significant Muslim population); received law (common law or civil law depending on the colonial history)'; and legislation, both colonial (adopted from the colonial state) and post- independence legislation enacted by Parliament.[254] Customary law is the indigenous law of the various ethnic groups of Africa. The pre-colonial law in most African states was essentially customary in character, having its sources in the practices and customs of the people. In a typical African country, the great majority of people conduct their personal activities in accordance with and subject to customary law. It should be appreciated that the use of the term "African customary law" does not indicate that there is a single uniform set of customs prevailing in any given country. Rather, it is used as a blanket description covering many different legal systems.

These systems are largely ethnic in origin, and they usually operate only within the area occupied by the ethnic group and cover disputes in which at least one of the parties to the dispute is a member of the ethnic group. There are local variations within such areas, but, by and large, the broad principles in all the various systems are the same. There is broad agreement that in its present form customary law is distorted. The sources of customary law that are historically and presently accepted as authoritative are a product of social conditions and political motivations. It is influenced by the recent interaction between African custom and colonial rule. In Alexkor Limited v. Richtersveld Community, the Constitutional Court of South Africa observed that "although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied." Customary law has a great impact on the lives of the majority of Africans in the area of personal law in regard to matters such as marriage, inheritance, and traditional authority. In its application, customary law is often discriminatory in such areas as bride price, guardianship, inheritance, appointment to traditional offices, exercise of traditional authority, and age of majority. It tends to see women as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals. There is a major debate between human rights activists and traditionalists centered on whether customary norms are compatible with human rights norms contained in international conventions and national bills of rights in national constitutions.4

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While traditionalists argue that, by promoting traditional values, customary law makes a positive contribution to the promotion of human rights, activists argue that certain customary law norms undermine the dignity of women and are used to justify treating women as second class citizens. Many African constitutions contain provisions guaranteeing equality, human dignity, and prohibiting discrimination based on gender. However, the same constitutions recognize the application of customary law and they do this without resolving the conflict between customary law norms and human rights provisions. Using Zambia's Constitution as an example, a typical constitution provision limits the application of provisions outlawing discrimination by providing that such provisions
shall not apply to any law so far as that law makes provision:
(a) for the appropriation of the general revenues of the Republic;
(b) with respect to persons who are not citizens of Zambia;
(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
(d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons ... .

This article examines the place of African customary law in an African legal system, and tensions that exist between African customary law and both domestic and international human rights norms. It is important to evaluate customary norms in the context of human rights because legal norms capture and reinforce deep cultural norms and community practices. Customary norms entrench ideas and help give them the sense of being natural and part of the way things are or should be. While African customary law emphasizes rights in the context of the community and kinship rights and duties of individuals to their communities, human rights norms typically enjoin state parties to treaties to respect human rights and take all appropriate measures to eliminate discrimination against women. Human rights norms proceed on the basis that women's rights under international conventions are universal norms to which all countries must adhere,7 women are entitled to the exercise of their human rights, and fundamental rights and fundamental freedoms within the family and society.

Human rights norms also proceed on the basis that the protection of the family as a social unit should not be used to justify restrictions on the individual rights of family members. The difference in approach has resulted in clashes between customary law norms on one side, and internationally protected human rights norms and national bills of rights inspired by international norms on the other. As B. A. Rwezaura has observed, the opposition to change is based on an ideology that characterizes attempts at reforming customary law as contrary to

African traditions and culture and an attempt to westernize African society. Such opposition is often a political reaction to the colonial imposition of the common law on African states and an effort to assert African dignity. In such a context, efforts to reform customary law can easily be interpreted as an effort to impose Western values on African societies. In defense of customary law, Cobbah exemplifies this reaction. He states that

"It is my contention that to correct injustices within different cultural systems of the world it is not necessary to turn all people into Westerners".

Western liberalism with its prescription of human rights has had a worthwhile effect not only on Westerners but on many peoples of this world. It is, however, by no means the only rational way of living human life. . . . Instead of imposing the Western philosophy of human rights on all cultures one's effort should be directed to searching out homeomorphic equivalents in different cultures. In other words, we should understand that homeomorphism is not the same as equivalence and strive to discover peculiar functional equivalence in different cultures.9
This reaction to efforts at reforming African customary law is often accompanied by an almost religious exhalation of the virtues of the traditional system of law.

While it is imperative that we draw attention to the fact that most Western understandings of African customary law are influenced by their negative attitudes towards all things African, it is important to realize that African theory and practice have been influenced and have become part of the global movement for the globalization of human rights. By enthusiastically joining international human rights instruments and adopting their own African instruments such as the African Human and People Rights Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa," African states are embracing the international human rights movement and its universality. The context and the implications for vulnerable groups are always going to be important in the interpretation of rights. As Eze has observed, "[tihe categories of rights protected as well as their scope, and ultimately who enjoys any of these rights, are in the end determined by the nature and character of society that is being examined."

Much has changed in African societies since the advent of colonialism. The process of industrialization is widely associated with movements from rural areas to urban centers. The fact that African customary law is changing in response to urbanization, interethnic marriages, and education is not a phenomenon peculiar to Africa. For example, it is well known that the impact of industrialization in Europe changed the nature of the family as a social institution beyond all recognition. The earlier forms of the family exhibited quite complicated kinship patterns similar to those of African families. A fundamental question arises as to whether the continued application of customary norms that discriminate against women can be justified with reference to any set of prevailing social norms or traditions or cultural standards. The place of African customary law in African legal systems can be divided into three approaches. The first approach can be termed the historical approach. This was the

approach adopted during colonial rule. The second approach is that adopted by new constitutions in the post independence era, and the third is the approach in the post democratization era. This article will describe these three approaches in relation to the status of customary law and their impact on women's rights. In any effort to advance human rights, the courts play a crucial role. Therefore, this article will examine the role of the courts in the implementation of African customary law and the reaction of courts to African customary law norms that discriminate against women. While recognizing the important role legislation can play in law reform, this article argues that the fight for gender equality needs to move to the courts and mass movements. The challenge is how to ensure that courts interpret the law in such a way that gender equality is advanced. This will require social movements to put pressure on the courts and society to act in the interests of gender equality. This suggests that we need to improve access to courts so that women can bring claims based on discrimination, thereby giving opportunities to the courts to reform the law.

One way of encouraging the courts to interpret customary law in accordance with human rights norms is to show that the traditional social and economic relations on which the customary norms that discriminate against women are founded, and on which traditionalists rely to oppose reform, have in reality been radically transformed. This will enable us to show that the values used by traditionalists to support customary legal norms that discriminate against women are no longer practiced in their existing form by communities.
For example, Rwezaura has made a strong criticism of the institution of bride wealth based on the changed social and economic relations prevailing today.' He has observed that "payment of bride wealth was not an individualized affair. It was a matter for the concern of a wider family." He adds that the system of mutual assistance in bride wealth transfers was part of a wider economic interdependence and kinship solidarity which obtained in many African societies during the pre-capitalist era. But this economic interdependence and kinship solidarity was based upon a number of other relationships. Agriculture was undertaken by mutual aid teams, and so was livestock husbandry. Children, being so dependent on the elders for their marriage cattle, worked very hard for their fathers and were obedient to them. In return the fathers assisted their sons to establish their own families. They also paid fines and damages in respect of their sons' wrongs.

The practice is now characterized by high demands of money as bride wealth. The rapid rise of the quantity of bride wealth can only be explained by the distortion of the custom. It has become what Westerners alleged was a bride price and has ceased to be a source of African pride, as it has become an institution that is characterized by the domination and exploitation of women.

[255]From time immemorial customary law was the principal system of law in African communities. However, this exclusivity was broken in the nineteenth century when European colonialists introduced their own metropolitan law and system of courts into their colonies, but retained so much of customary law and the African judicial process that they did not deem contrary to basic justice or morality.

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The result of the imposition of colonial rule, therefore, was to produce a dual or parallel system of courts and laws in African countries. In the colonies, dualism was reflected on the one hand, by the establishment of Western type courts presided over by expatriate magistrates and judges whose jurisdiction extended over all persons in criminal and civil matters. These courts, hereinafter referred to as 'general courts', applied European law and local statutes based on European statutes. A second group of courts was established composed of either traditional chiefs or local elders. Depending on the colony the latter courts were referred to as 'African courts,' 'native courts,' 'native authority courts,' 'primary courts,' 'local courts' or peoples courts.These courts had jurisdiction only over Africans and for the most part, applied the customary law prevailing in the area of the jurisdiction of the court.

They were supervised by administrative officers, who also had control over the appointment and dismissal of the court members. Attorneys were not allowed to appear before these courts or tribunals. In this article, this second group of courts will be referred to as statutory customary courts to denote that they were created by statute. However, it must be pointed out that their creation did not mean the abolition of the traditional adjudication systems in place before the advent of colonialism. The statutory customary courts only formalized selected aspects of the traditional systems that suited the practical purposes of the colonial administration. While not recognized at an official level, the traditional adjudication systems left intact by the colonial administration continued to be used by the parties as they wished. These traditional adjudication systems, which are described later, will be referred to as non-statutory adjudication systems' to distinguish them from the statutory customary courts. It should also be noted while the statutory customary courts were created mainly to apply customary law, their jurisdiction in this area, even at a formal level, was not exclusive. Provision was also made for the general courts to determine and apply customary law when it was raised in legal proceedings.

At first, customary law and the general courts developed separately with no connection between them. However, towards the end of the colonial period, an integration of the dual courts system was initiated by conferring supervisory jurisdiction on the general courts over statutory customary court proceedings. There was also a gradual change of personnel of the statutory customary courts from the traditional chiefs and elders to young lay magistrates who were given some basic training in law. Some of the procedures at the general courts were also slowly introduced into the statutory customary courts. These broad features in the development of the dual legal system can be illustrated with reference to the evolution of the legal system in Ghana. Pre- colonial law in Ghana was essentially customary in character, having its source in the practices and customs of the people.

During the colonial era, the colonial administration continued to recognize customary law, but also passed local laws in addition to the existing English law it incorporated into the colony. Reflecting this dichotomy in the types of law, the colonial administration in Ghana divided formal judicial power between two systems of courts, one administering the customary law of the bulk of the African population and the other applying received English law and the recently developed national law adopted by the local legislature. English law was administered by the subordinate courts, the High Court and the Court of Appeal, all of which are referred to in this article as general courts. The practice and procedure followed by these courts was in substantial conformity with the law and practice observed in English courts. Customary law was administered in Ghana mainly through the native courts, which the colonial governor was empowered to create. Appointment to membership of a native court was not based on a person's position or status in the community, though the governor for the most part selected chiefs and elders. Special training of the appointees was not required, but it was generally assumed that they were conversant with the customary law practices of their respective areas. Personal jurisdiction of the native courts was based on ethnicity while subject-matter jurisdiction was limited to civil claims under native customary law and certain customary offences.

The system of native courts was retained after Ghana's independence in 1957. However, under the Local Courts Act of 1958, the native courts were renamed 'local courts', a nationally uniform system of local courts was established without the hierarchy of grades formerly used, and an effort was made to eliminate the racial criterion for jurisdiction over persons which had applied in native courts. The new Act also reflected an effort to maintain a higher quality of operation in the local courts through standards of efficiency for appointment as a court officer and the periodic inspection of court records. Ghana's experience with local courts is not unique. Similar institutions are found in other parts of Africa.

For instance, throughout Malawi's colonial history, jurisdiction over Africans in cases involving issues of customary law and in simple criminal cases was left to be determined by the traditional courts. Unlike Ghana, Malawi maintains a clear hierarchy of traditional courts consisting of different grades of traditional courts at the lowest level, then district traditional courts, district traditional appeal courts, regional traditional courts and the National Traditional Appeal Court. All these traditional courts exercise both civil and criminal jurisdiction except the regional traditional courts, which have original criminal jurisdiction only. Generally, the jurisdiction of traditional courts is exercised in cases where the parties are Africans, but the minister in charge of traditional courts may extend the jurisdiction of any traditional court to include non-Africans.

The hearing of a civil case is conducted in accordance with the customary law prevailing in the area of the court's jurisdiction. In the case of Zambia, the Native Courts Ordinance of 1939 initially governed its native court system. The governor during the colonial period had the exclusive authority to establish native courts upon which were conferred jurisdiction in civil matters involving Africans. The courts also exercised criminal jurisdiction where the accused was an African, except in cases where a non- African could be called as a witness and or where the governor had directed that any party not be subject to the jurisdiction of native courts. The practice and procedure of the courts were determined by customary law and their records subject to review by the Commissioner of Native Courts. In 1966, Zambia's native courts were reorganized and renamed 'local courts with limited civil and criminal jurisdiction. The Judicial Service Commission now appoints members of the local courts whose decisions can be appealed to the subordinate courts and then to the High Court and finally to the Supreme Court. Supervision of the work of the court is ensured through advisers and officers appointed for this purpose.

Three basic approaches can be identified regarding the place of customary law in the legal systems of post-independence Africa. The English-speaking countries have retained much of the dual legal structures created during colonial rule while attempting to reform and adapt customary law to notions of English law. On their part, the French- and Portuguese-speaking countries have pursued an integrationist course by trying to absorb customary law into the general law. Only in Ethiopia and Tunisia have some radical measures been adopted to abolish legislatively carefully selected aspects of customary law.

However, regardless of the approach adopted, in no African country is customary law totally disregarded, or proscribed. It continues to be recognized and enforced, albeit to a different degree depending on the jurisdiction. National constitutions and statutes authorize it as a major source of law to be determined and applied in legal proceedings when it is raised by the parties. For instance, the Constitution of the Fourth Republic of Ghana describes the laws of Ghana to include the 'common law' which in turn comprises the rules of customary law. Under the same constitution, customary law refers to rules of law that by custom are applicable to particular communities in Ghana.52 Since it is part of the national law, customary law will be enforced in judicial proceedings. This status of customary law is especially useful to folklore, which essentially is a body of rights derived from customs and practices of members of a given community. The enforcement mechanisms available under customary law and which are relevant to the protection of folklore are elaborated upon in the next section.

The Case for Protection[256]

In pre-colonial times, works of folklore were produced and used within the local community. Large-scale production of folklore was not required and the limited production was generally enough to satisfy the needs of the community. For the most part, there was little if any commercial exploitation of folklore. However, that is no longer the case today where advanced technological processes and increased interest in traditional culture by foreigners have led to exploitation of folklore at a level never before seen. Arts and crafts are now sold openly in retail markets while indigenous dance and music are copied by record companies and performing groups, and presented as original compositions or choreography. Some individuals and companies also formerly register folklore themes under trademark law as a way of preventing others from using them. Ethnobotanists backed by pharmaceutical companies and governments have invaded tropical areas to tap into the local knowledge of the medicinal value of plants which in turn could be used to develop drugs for sale.

On their part, research scientists collaborate with indigenous farmers to obtain local crop varieties to improve seeds under so-called biodiversity programmes. Associated with these forms of commercialization of folklore is a serious concern that traditional societies may be short-changed or even harmed during the process. Such harm is reflected in issues regarding compensation, expropriation, degradation, misrepresentation and general control over the use of folklore. With respect to compensation, it has been determined that in many cases where traditional art or knowledge is exploited, the communities derive hardly any economic benefits. Where the communities are compensated, the benefits often pale in comparison with the huge profits made by the exploiters. Regarding expropriation, traditional communities may be harmed by forms of exploitation that lead to the permanent loss of irreplaceable property to museums and art galleries. There is expropriation when valuable pieces of folklore are removed from the traditional communities and sent overseas. It is hardly surprising that there is more African art in major Western cities such as New York, London and Paris than in African cities. While some of these items may have been sold or given away by traditional elders, in other cases, the items were probably forcibly removed, particularly during the colonial era. As to the degradation of cultural items, such harm may occur where the items are displayed outside their traditional setting and for purposes different from those for which they were originally created or where religious art facts are sold as mere decorative art. Limitations on the use of the works of folklore to special occasions and rituals are not likely to be respected when such works are commercialized.

Thus, a sacred object of an indigenous group would be used openly and irreverently in the West. Even where African dances are copied and performed abroad, there is a denigration of African culture to the extent that the 'non-African actors cannot lend the gestures that communicate warmth specific to Africa.' As one writer laments: 'It is possible to encounter groups and soloists who unscrupulously modernize works of folklore by arranging them in a new manner, by giving folk songs added rhythm and volume at the expense of their melodic character. . . . Performances of folk songs often take the

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form of . . . banal impersonal shows devoid of the characteristics peculiar to . . . folk dances. . . . As for the garishly-coloured costumes worn by the dancers, they are a travesty of the originals.' Related to issues of degradation is the harm caused by misrepresenting works of folklore as regards to quality and the values they depict. Mass-produced items sold as traditional crafts can raise authentication problems to the extent they do not have the same attributes as the traditional items. Moreover, folklore expresses important values in traditional societies, which the mass-produced items cannot possibly have since they did not originate in those societies.

Thus, the large scale production of traditional items has come to be viewed as 'a cultural and psychological threat to the authentic practitioners of traditional arts and to the traditional groups whose values those arts express.' Finally, control issues are implicated where consent of the elders in the community is not sought prior to the exploitation of a work of folklore. It is critical to protect folklore from these harmful consequences, particularly in light of the obvious significance of folklore to life in traditional societies. Folk songs and tales are used to build African character because of their frequent references to morality and integrity. As one writer put it, folktales developed in part from the 'need to impress on men the moral truth that wickedness and cruelty would in the long run meet their due reward.' from its entertainment value, music serves as a means of recording history by preserving information about important past events. It is used in rituals and festivities and plays various roles including as a palliative in healing, as part of war preparation, and as a means criticizing or checking governmental abuses. Dance and drama are also linked to rituals and religious festivities, while designs on African fabrics and art may depict religious, social or cultural concepts.

There are many aspects of customary law that are good and need to be preserved. For example, it has no institutionalized or complicated procedures, and the objective of dispute settlement is reconciliation. This underpins many of its procedures. In terms of the future, there is need to create one legal system which takes into account both the received law and the customary law. In a unified system the good values of customary law, such as the simplicity of procedures and the preference for reconciliation rather than litigation, should be reflected in the integrated legal system. Unless customary law is integrated it is bound to die or be relegated to the law of the poor. We must always remember that the function of law is to meet the needs of the society it serves.

TO BE OR NOT TO BE A LAWYER

Lawyers, also better known as attorneys or advocates, by definition are is defined as those who offer themselves to practice the vocation of representing the people in their legal battles; A professional who is paid for a deserved fee or for his skilled labour offers himself as an advocate to intercede for his clients in legal crossfire of litigation or prosecution. He or she must do so in understanding the professional creed and doctrine of ethics.

Inspite of this they are usually loathed no wonder it has been often said the first thing we do, kill all lawyers.(William Shakespeare). This a line from William Shakespeare's book titled ***Henry VI, under Part II, Act IV, Scene II*** on the basis of Dick the Butchers character , the line reveals his resentment of lawyers and to some it is interpreted as; Lawyers maintenance of a privilege of the wealthy and powerful. Others understand it as praise as to how lawyers stand in the way of violent mobs, the other criticism is that of bureaucracy and perversion of the rule of law.

However Shakespeare's meaning behind the context is not that of indictment of the impunity of the law profession, it is rather praise towards it though taken to be otherwise for those aggrieved by injustices with lawyers being maliciously or irresponsibly pinned as those responsible. A case in point, the reported cases of lawyers being killed in the Philippines simply because they advocate for human rights portrays that, the assured way to sabotage and cause tyranny at the time is to remove people of independent minds or independent thinking.[257]

Therefore, the fact that the line is uttered by one of the oppositions in the play, at the presumption that by killing all the lawyers they can obtain power with no one is stopping them. Through the overthrow threat, Shakespeare reminds us that lawyers are protectors of the system of ordered liberty, as much as an obstacle to the rebellion that would curtail liberty to establish a dictatorial government.[258]

Lawyers explain to the society that even the tyrants or the most prejudiced also have rights. No doubt, these prejudices should be put aside to bring about justice. For example in the ***Kill the Mockingbird*** [259]Atticus comes to the defense of a Black man named Tom Robinson accused of rape towards a white woman, by which he is subject to ridicule. It upon lawyers to tell villains that they cannot do whatsoever they feel like doing because that is against the laws.[260]

Article 28 of the constitution[261] provides that capital offenders are to be availed proper representation. Accordingly, were such cannot be afforded by the individual, then it is upon the government to do so. This shows the important role of lawyers in society because in absence of such representation, the alleged capital offender is most likely to face a life sentence or even death which a disruption of justice thus contributing to a fair process which is essential in a civilized society.

257 https://www.aljazera.com/amp/news/2021/4/1/record-number-of-filipino-lawyers-killed-under-dutertes-reign
258 John J.Curti, Jr, Esq, President, American Bar Association, published in the ABA. Journal, September,1990.
259 To kill a mochkingbiird by harper lee J.B. Lippincott & Co 1960
260 https://youtube/1i0MN0wNNsM
261 The Constitution of the Republic of Uganda, 1995 as amended.

The argument that lawyers contribute inadequately to society or cause blunt abuse of the legal system simply because they know enough about the law to know how to break it with impunity is baseless or a bit exaggerated. A remarkable number of lawyers do provide vital services. Correspondingly, through provision of prono bono services to keep a portion of the society from being locked out of the courts due to high cost of legal services.

An advocate is an officer of court. According to Brain Dennison[262] "clients needs and desires do not trump all other allegiances.

It is worth to note that an advocate's duty to court is supreme to that of the client that is they owe ultimate allegiance to the court in the court setting. Thus an advocate is advised to inform their clients prior for better understanding, because an advocate is an officer of court. In other words, advocate has an overriding duty to court than to a client. It is worth to note that an advocate's duty to court is supreme to that of the client. As a rule, they owe ultimate allegiance to the court in the court setting. Thus an advocate is advised to inform their clients prior for better understanding, since an advocate is an officer of court. In other words, advocate has an overriding duty to court than to a client.

Following this, when representing a client two maxims apply that is;

Lord Denning in ***Rondley Worsley***[263]**said**;

A barrister or advocate must defend his client to the end but his duty is not only to the client. He has duty to court which is paramount. It is a mistake to suppose that he is a mouth piece of his client to say what he wants or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth of justice. He must not cautiously mistake the facts. He must not knowingly conceal the truth. He must not unjustly make change of fraud that is with no evidence to support. He must produce all relevant authorities even those that are against him. He must see that his client discloses, if ordered, the relevant document even those that are fatal to his case. He must disregard the most specific instructions of his client if they conflict with his duty to the court."

Lord Peed in the same case put it this way;

"……."*he has an overwhelming duty to the court to the standards of his profession and to the public which may often and does lead to a conflict with his clients wishes or with what the client thinks are his personal interests".*"

An advocate has a duty of confidentiality that is the requirement of silence .They live by a code of silence and discretion. This prohibits disclosure of information concerning their client's affairs and this can only be overlooked where the veil of confidentiality is lifted. In ***R v. Cox and Railton (1884) 14 QBD 153***, Stephen J cautions that attorney and client privilege cannot be used to protect criminal

262 Legal Ethics and Professionalism in Uganda
263 (1966) 3 ALL ER 651 at 665

communications. These are some of the limitations which some may misconceive, particularly, those victimized by the corrupt legal system.

Lawyers today are trained to be more cordial, with political and ethical instincts. There are laws governing them as to the appropriate conduct. In ***Alcon International Ltd V. The New Vision Printing & Publishing Co Ltd & Anor Supreme Court Civil Application No.040 Of 2010***, court granted an interim injunction stopping the respondents from publishing any matter prejudicial to the applicants case. As a result some lawyers may not conform to heinous ways thus referring to those lawyers as incompetent.

Under ***Regulation 26***[264], an advocate is barred from sharing of proceeds from a judgment. Therefore an advocate cannot enter any form of agreement such as champerty agreements in relation to such. In the case of ***Elizabeth Kobusingye v. Anne tZimbiha***[265] ***as was cited in Mugisa M Abraham and 4 others v. Rwambuka and Co Advocates***[266]**,** champerty was defined as a bargain between a stranger and a party to a suit by which the stranger pursues a party's claim in consideration of receiving part of the judgment proceeds. This was contrasted with the definition of Thomas Sweet and Maxwell to mean a contract by which one person agrees to finance another's litigation in return for a share in precede, the former having no genuine or substantial interest in the outcome.

As you can see, people need to clearly understand that sometimes the law is for you and sometimes it is not. This does not change the fact that lawyers matter. They bring forth issues of law for social justice, help us understand ourselves. Hence the heart of the matter is that, if lawyers are done away with, there is likely disruption of the judiciary, dismantle to the tort system of which laws contribute through negotiation of settlements of civil disputes, abrogation of the common law system.[267]

Additionally, lawyers provide competent representation hence acquire redress for harm. They represent either party in criminal and civil trials by presenting evidence and arguing in court to support their clients.[268]

The conversation between Jack Cade and Dick the Butcher in King Henry VI, Part II, IV (*from the Yale Shakespeare series, Yale University Press, 1923*).

Cade. Be brave, then, for your captain is brave, and vows reformation. There shall be in England and half penny loaves sold for a penny, the three hooped pot shall have ten hoops; and I will make it felony to drink small beer. All the realm shall be in common, and in Cheapside shall my palfrey go to grass. And, when I am king-as king I will be-

264 the Advocates Act (Professional Conduct) Regulations SI 267-2
265 HCCS No. 395 of 2014
266 Miscellaneous Application No. 733 of 2018.
267 https://www.scribd.com/document/234427867/First-Thing-We-Do-Lets-Kill-All-the -Lawyers
268 https://www.thesun.co.uk/fabulous/4620930/true-story-of-a-man-falsely-accused-of-a-brutal-gangland-murder-in-docmentary-long-shot-is-about-to-become-your-new-netflix-obsession/

All God save your majesty!

Cade. I thank you, good people;- there shall be no money; all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers, and worship me their lord.

Butch. The first thing we do, let's kill all the lawyers.

Cade. Nay that I mean to do Is not this a lamentable thing that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled over, should undo a man? Some say the bee stings; but say, 'this the bees wax, for I did seal once a thing, and I was never my own man since.

Therefore Cades lamentation of never being his own man since signing the contract by lawyers designs as an answer to Butchers proclamation. As you can see, portrays lawyers to be a cancerous blight in society.[269]In this situation, it is vivid that their lamentation in context, are based on a grudge towards the law profession.

The author of ***Njals Saga*** writes that continuous human problems such as laws inability to curb human passions from negative consequences is a violent wave which is out of control. Consequently, it is vividly illustrated that terrible things happen when revenge becomes an overwhelming social force rather than the rule of law being dominant. Thus lawyers play a tremendous role in having rights observed and where abused that justice is served. This is done through upholding constitutional rights contrary to ***Article 137*** of the constitution of the Republic of Uganda, as amended. An advocate can file a suit to court for proper interpretation of the constitution in case there is any form or imminent violation.

Lawyers stand in the perversion of the rule of law when they act precisely in accordance with their duty. They advocate against disproportionate force used by security agencies on behalf of governments. At times, they translate the core competencies of the legal profession into political projects by helping establish democratic states a case in point South Africa where Nelson Mandela was first a lawyer then a politician that through his craft and legal ideas helped deliberate South Africa from the Apartheid government.[270]

Lawyers are not in the palm of any ruling regime and where there is suppression of their duties for instance intimidation, obstruction or improper interference which violates the basic principles of lawyers role and as such, they determine ramification for cases. As an example, where there is closure of democratic space such as declaration of virtual state of emergency.

269 https://blogs.harvard.edu/ethicalesq/shakespeare-and-lawyers/
270 Mandela autobiography "A Long Walk to Freedom."

It is also worth to note, that access to justice is a basic principle of the rule of law which is said to go hand in hand with legal and human rights, legal services, legal capacity development. Access to justice enables people to voice their ideas and needs of which lawyers are at the forefront. This enables people to exercise their rights, challenge discrimination or hold policy makers accountable through checks and balances by bringing about fair hearing and not justice for only the rich[271].

Lawyers are the conscious of the both legal system and client that is, advocate on behalf of the client, assert all proper procedural and substantive rights through legitimate exercise of their profession thus should not be prosecuted for it. When they adhere to strict code of ethics as Gandhi truly put it in his autobiography 'facts mean truth and once we adhere to truth, the law comes to our aid'

In the book, ***The Law And The Lawyers*** by M.K. Gandhi, it is written that Gandhi's fight for political, economic and social justice for his fellow countrymen or the under privileged is attributed to his quick, lawyer-trained mind and apt-reasoning which shows that Shakespeare's line in the play was meant not to criticize but recognize lawyers stand in society and as such criticism should be directed towards law enforcement agencies, poor investigation, justice system and the suppression of exculpatory evidence that undermine the state of judicial as well as prosecutorial independence over the primacy of truth.

It is only appropriate to concur with Gandhi at his conclusion that the whole duty of an advocate is not to exploit legal and adversary advantages but to promote, compromise and reconciliation.[272]According to him, the worst a lawyer as a party can do, is commit miscarriage of justice in the process of law.

The misinterpretation of the line in context is as a result of people's failure to understand the laws and processes making them disconnected from the legal profession. For instance a client seeks a lawyer desperate for a solution but does not get exactly that which they perceived he or she would get, this at times, causes them to be disgruntled misunderstanding the fact that this might be the due process.

Bharara in his book ***Doing Justice*** he notes that "people will regard a result as just if they regard the process leading to it as fair and if they believe the people responsible for it are fair-minded." Thus when he quotes Judge Learned Hands warning borrowed from Oliver Cromwell, 'I beseech ye in the bowels of Christ, think that ye may be mistaken.'

Bharara argues that justice is never assured, but if each person in the process remembers to be vigilant, rigorous, and open-minded to changing a view, justice is at least more likely.

271 https://www.un.org/rule of law/thematic-areas/access-to-justice-&-rule-o-law-institutions;access-to-justice/

272 Dada Abdulla case

Thus the justice process not only involves lawyers but all individuals are responsible hence the Shakespeare is only applauding one of the group involved in the deliverance of justice.

Additionally, lawyers' matter to whom the law is real, they interpret laws and regulations for individuals and businesses. For instance where a business is overtaxed, at times it takes a lawyer to bring this to a lime light and as such an individual is not taken advantage of or made to sign away their rights through uncouth means under contracts.

Lawyers help individuals to understand themselves through interpretation of the law to an individual identified need such as under the process of land acquisition they designing contract and cause adherence to the terms and conditions of sale.

Where there is evolution of the law, lawyers play a vital role by keeping up to date and at times cause adjustment of the law in order to strike a balance as was in the case of ***Human Rights Network Uganda and 4 others v Attorney General Constitutional Petition No.56 of 2013*** where the constitutional court held the enactment and assent to section 8 of the public order Management Act to be inconsistent with the constitution as well as Articles 29 and 43. Thus reaffirming the ruling in ***Muwanga Kivumbi v. Attorney General***

Furthermore, the misinterpretation of the Shakespeare line let's kill all the lawyer" is based on several misconceptions that lawyers have god-like intelligence. People think that lawyers know everything yet these specialize in specific areas and where given opportunity on matters, they have no knowledge. Thus lawyers have their strengths and struggles.

In "***The Lost Lawyer***"[273] the author is quick to state that he and his Christian friends desired a deeper walk as Christians in the law and they wanted to know what it meant to serve God in the law, and perhaps even a prerequisite: whether it was a good thing to try to serve him as a lawyer in the first place. They desired to be Christian lawyers who integrated faith in their calling but found little guidance in the classroom, texts, practicing lawyers, professors, pastors and priests.

Although today's Christian law students hunger for an authentic integrated approach to their studies and ultimately their professional calling, yesterdays law students still march through their legal careers searching for integrity, looking for answers and disappointed in their own shallow approach to issues of faith and law practice wondering whether their life's work is pleasing to God. Therefore, Shakespeare in fact upholds these efforts in order to deliver a noble cause that contributes greatly to society were morals at times fail.

The advocate's duties to client not only extend towards one they have received instructions from as well as representing but also the prospective clients or those who may formally or informally seek counsel from the advocate.

273 Kronman, Anthony T. (1993), The Lost Lawyer: falling ideals of the legal profession. Cambridge, Mass: Belknap Press of Harvard University Press

Lawyers give individuals a sense of security to pursue their goals as well protect their interest such as securing loans for their businesses, registration of businesses for example act as agents, trustees, guardians or executors for businesses or individuals.

Probate wills, represent and advise executors as well as administrators of estates. They determine the validity of a will. Thus emphasise the principle established in ***Parker v. Felgate***[274], that greatest precaution should be applied and reserve where the testator does not himself give instructions to the solicitor who draws the will and the intermediary who repeats them to the solicitor. The court held that, before making any presumption in favor of validity of the will, it ought to be strictly proved that there is no ground of suspicion and that instructions given to the intermediary were unambiguous and clearly understood, faith, fully reported by him and rightly apprehended by the solicitor. Particularly, a lawyer preparing a will must not make a beneficiary a witness to the will.

Lawyers develop state programs, draft and establish enforcement procedures for example Mr. Bizos was one of the architects of South Africa's constitution[275]. To some this is misconceived to mean its only done for their selfish gain that is to keep them in business hence the misinterpretation of Shakespeare's line.

Lawyers bring about reformation in society by bringing wrong doers before court to be punished and have the aggrieved come to terms with their grievances. Through intuition of legal actions a number of those shunning the law become apprehensive when threatened to face lawyers by mere issuance of a letter from a law firm for example demand letter addressed to defaulting tenants.

Lawyers advise clients about their legal rights and obligations for instance in child custody battles, a lawyer is to advise their clients that welfare of the child is paramount. Thereupon lawyers help clients navigate and understand laws where necessary.

Justice Ogola underscores the importance of ethics, integrity and professionalism in legal practice.[276]This is highly the main cause of misconception Shakespeare's tribute. The lawyers duty is divided into different categories, all working in synchronization. These constitute: knowledge of the law, skills of the profession that is advocacy, how to apply accumulated legal knowledge effectively. Conduct and liturgy of the law practice which involves the ethics and etiquette of legal practice.

The duty of a lawyer is not limited to court or client but stretch to oneself but to the fraternity and to the opposite party, the public at large to keep chaste the nobility of the learned

274 (1883),L.R.8 P.D. 171
275 https://www.bbc.com.news/world-africa-54094248
276 Legal ethics and professionalism :Handbook for Uganda, Brain Dennison ,Pamela Tibihikirra

profession. The professional code of conduct stipulates that lawyers should not stoop below the bar of that code.

The disciplinary rules state the minimum level of conduct a lawyer contacts. Therefore, a lawyer is subject to disciplinary action, if they act below these standards.

The misconception of the line cause lawyer bashing because of ignorance of what makes the lawyers' duties in ensuring justice which through explaining the nature of their profession and services to their clients as was explained in ***Swinfan v. Lord Chelmsford***[277] that the duty undertaken by an advocate is one in which the client, the court and the public have an interest because the due and proper orderly administration of justice is a matter of vital public concern. Where public concern is utmost importance since lawyers operate in a profession they have extreme importance.

According to ***Regulation 2(1)*** of the Advocates (Professional Conduct Regulations)[278]advocates are prohibited from acting for any person unless they have been duly instructed either by the client or agent of the client. Lawyers should listen to their clients, give advice, take instructions about what should be done and carry out those instructions.

Regulation 2 (2) **of the Advocates (Professional Conduct) Regulations SI 267-2** advocates not delay to carry out instructions. An advocate owes a client a duty to be competent to perform any legal services undertakes on the clients behalf. Therefore, advocates should exercise competency, if not refer the prospective matter or client to another advocate.

As Daniel Kornstein explains in his book ***Kill All The Lawyers***[279]: Shakespeare's legal Appeal: ***Measure for Measure***[280] one of the characters in the play announces that "Good counselors lack no clients." Lawyers should serve the clients in a conscious diligent and efficient manner and should provide quality services at least equal to that which lawyers would generally expect of a competent lawyer or should avoid unsatisfactory professional practice.

In ***Barry v. Keharchand,***[281] liability for negligence, an advocate is liable if he or she institutes proceedings on the instructions of a client, without informing the client that those proceedings were bound to fail. Therefore an aggrieved person can make a complaint about lawyers misconduct if he or she has not been honest or puts their own interests before those of a client.

Many have exploited the line to express their frustration with lawyers. However some of their arguments are not totally unfounded for instance where lawyers provide inadequate

277 (1860) 5 H &N 890
278 SI 267-2
279 Page 35
280 1.2.198-99
281 (1918) 8 EALR 102

representation to their clients for example filing a suit out of time or not exercising due diligence and some instances failure to provide zealous presentation as stipulated under ***Regulation 2 (2) and 5*** respectively[282].

Some lawyers may represent their clients by violating their ethical mandate in a pursuit to win cases through manufacturing evidence and coaching witnesses. Lawyers thereby undermine the overall scheme of justice per ***Regulation 18*** as well as intimidate and induce witnesses contrary to ***Regulation 19.***[283]

Some lawyer engagements or conduct, impact not only the justice system. Chiefly where some lawyers use their status to garner undue benefits. For instance, some use their profession to garner land thus the deeds of the few cause the lawyers image to be tarnished. Thus the misconception of Shakespeare's context is not totally unfounded.

The harbingers of the rule of law and attain their living as officers of court by understanding and enforcing the dictates of law, appear to disregard that very law. This at time manages to tarnish the rest of the law profession. These miscreants cannot be weeded and this taints the public image making it difficult to rebuild the public perception into a positive thus a stumbling block that seems to stay. ***The court in Nangumya v. Tumusime***[284] held that Nyagumya had failed to demonstrate to the law council and in their court in any way that he informed or remitted the said money to Tumwine. The High court upheld the decision of the Uganda of the law council when it suspended Nangumya from practice for a period of sixteen months and refund the clients' money had recovered and used for personnel interests and thus dismissed his appeal reasoning that the law council rightly fond his conduct unbecoming of an advocate and amounted to professional misconduct under Regulation 31 of the Advocates Professional conduct.

Thus there is no need to discredit the entire law fraternity for those few that disregard the profession through ethical misconduct yet they can be brought to justice. Hence lawyers are not exempted from the laws themselves.

The way forward is to create awareness to teach the public about the ethical code of conduct of lawyers.

Adopt international standards for example United Nations basic principles on the role of lawyers under ***Principle 26.***[285]

282 Advocates (Professional Conduct) Regulations SI 267-2
283 Supra
284 Civil Appeal No.93 of 2018
285 United Nations , Basic Principles on the Role of Lawyers,7 September 1990:https://www.refworld.org/docid/3ddbf034.html [accessed 18 July 2021]

Section 1 of the Advocates Act refers to an advocate as any person whose name is duly entered upon the roll and for the purposes of section 19 (2) and part 6 of the Act, includes any person mentioned in section 6

Pursuant to ***section 3*** **of the advocates Act cap 67,** one of the functions of the law council established under the Advocates Act is to exercise disciplinary measures.

Further, Section 18 of the Advocates Act Cap 67 provides for establishment of the disciplinary committee. The Law council through the disciplinary committee regulates the practice of lawyers.

The continuous lawyer bashing is not because of those few that paint the profession wrongly through unethical means. It's because of those that deliver and do their work right since they are a threat to not only to power angry individuals but also corrupt governments and officials since they bring them to justice by acting as the laws backbone in society. Thus Butch in the context is right, when planning to abuse the law the first thing is to kill the lawyers otherwise one would have to face a group highly cautious of the rule of law.

In conclusion, the misinterpretation or misquotation of the Shakespeare context can be attributed to poor public relations as a result of public dissatisfaction towards the legal profession which they consider an enemy where lawyers are often labeled as professional liars. Though the context is said by one of the villains in the play, who are keenly aware of the lawyers capability with the power to thwart their rebellious ambitions or an authoritarian power grab.

In summary, Lawrence Friedman tried to put in a short form the complexity of the law. He stated that, Legal actions may be used to harass individuals or to gain revenge rather than redress a legal wrong; the law may reflect biases and prejudices or reflect the interest of powerful economic interests; the law may be used by totalitarian regimes as an instrument of repression; the law can be too rigid because it is based on a clear set of rules that don't always fit neatly for example Friedman notes that the rules of self-defense do not apply in situations in which battered women use force to repel consistent abuse because of the law's requirement that the threat be immediate; the law may be slow to change because of its reliance on precedent(he also notes that judges are also concerned about maintaining respect for the law and hesitate to introduce change that society is not ready to accept.)

He further notes that the law derives equal access to justice because of inability to pay for legal services; that courts are reluctant to second- guess the decisions of political decisions-makers, pertaining interests of war and crisis; that reliance on law and courts can discourage democratic political activism because individuals and groups when they look courts to decide issues; divert energy from lobbying the legislature and from building political coalitions for elections; and finally that law may impede social change because it may limit the ability of individuals to use the law to vindicate their rights and liberties[286]

286 Lippman, M.R (2015). Law and Society (pp.25). Thousand Oaks, CA. SAGE Publications.

CHAPTER FIVE

Legal Realism Jurisprudence

The legacy of realism has been realized in the past three decades by the modern law and society movement. Indeed, the beginnings of the modern period of socio legal research might be set with the formation of the Law and Society Association in 1965.[287] Although there is, and was, more to socio legal research than can be encapsulated by the formation of that association, its creation marked an important step forward for empirical studies of law. The Law and Society Association self-consciously articulated the value of empirical research for informing policy (see Schwartz 1965).

The emergence of the modern law and society movement coincided with one of those episodes in American legal history in which law is regarded as a beneficial tool for social improvement, in which social problems appear susceptible to legal solutions, and in which there is, or appears to be, a rather unproblematic relationship between legal justice and social justice (Trubek and Galanter 1974). Moreover, the rule of law served to distinguish the West from its adversaries in the communist world, and hence the full and equal implementation of legal ideals was, to many reformers, essential. By the mid-1960s, liberal reformers seemed once again to be winning the battle to rebuild a troubled democracy; the political forces working, albeit modestly, to expand rights and redistribute wealth and power were in ascendancy.

The national government was devoting itself to using state power and legal reform for the purpose of building a Great Society. The courts, especially the Supreme Court, were out front in expanding the definition and reach of legal rights. Because law was seen as an important vehicle for social change, those legal scholars who were critical of existing social practices believed they had an ally in the legal order. Pragmatic social change was an explicit agenda of the state and an equally explicit part of the agenda of law and society research. Legality seemed a cure rather than a disease (Scheingold 1974); the aspirations and purposes of law seemed unquestionably correct. Thus, the modern law and society movement, like the realist movement before it, grew up in, and allied itself with, a period of optimism about law. The period was one in which liberal legal scholars and their social science allies could identify with national administrations which seemed to be carrying out progressive welfare regulatory programs, expanding protection for basic constitutional rights, and employing law for a wide range of goals that were widely shared in the liberal community and could

287 Lloyd D & Freeman M D A *Introduction to jurisprudence*, 5th ed. (London: Stevens 1985);

even be read as inscribed in the legal tradition itself.[288] This period was, of course, also a period of extraordinary optimism in the social sciences, a period of triumph for the behavioral revolution, a period of growing sophistication in the application of quantitative methods in social inquiry (see Eulau 1963).

Realists generally argue that the perception of phenomena is an experience of objective things which are independent of the private sense data that we may initially hold. A meaningful analysis of the nature of law must, therefore, concentrate on the objective experience of the actual practice of the courts, rather than on some 'rules' which are supposed to guide the attitudes of judicial officials. Legal realism has expressed itself in two main forms:

Scandinavian realism,

Espoused by Hagerstrom (1868–1939), Lundstedt (1882–1955), Olivecrona (1897–1980) and Ross (1899– 1979). This movement generally rejects metaphysical speculation on the nature of law, regards the ideas and principles of Natural Law as being unacceptable, and argues that the only meaningful propositions about law are those which can be verified through the experience of the senses.

American realism

Espoused by William James (1890–1922) and John Dewey (1859–1952). The realist version of legal positivism is the product of the American realist movement of the 1920s and 1930s. The movement was so named because most of its leading exponents were legal scholars and jurists based in North America, specifically in the United States This school of thought emphasizes the actual practice of the courts and the decisions of judges as comprising the essential elements of law. The law, this movement argues, is not to be found in some rules and concepts which may guide officials to reach decisions. It is rather to be found in the actual decisions of judges and predictions of these; until a judge pronounces what he is going to do about a particular case, we can never know what the law is going to be and how it is going to be applied. Such things as statutes, for example, are therefore merely sources of the law, rather than a part of the law itself.

The realists conceive the law as consisting in the predictions of the decisions (and sundry pronouncements) of law courts, in cases brought before them for adjudication. As Justice Holmes famously put it, "the prophecies of what the courts will do indeed, and nothing more pretentious, are what I mean by the law Individual members of the realist movement

288 Trubek and Esser 1987, 23

qualify this basic proposition in different ways. But these three features of the theory are fairly constant.

1. Law is a social fact; the law, as the realists are wont to say, is not a brooding omnipresent in the sky.

2. The source of the law is judicial decision. Law, in other words, is the end product of the process of adjudication.

In post democratization constitutions, the status of customary law in most African jurisdictions is constitutionally protected. It is part of the general law of the country. For example, Section 211 of the Constitution of South Africa provides that the institution, status, and role of traditional leadership are recognized subject to the constitution. It further states that a "traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, including amendments to, or repeal of, that legislation or those customs," and that "courts must apply customary law when that law is applicable, subject to the Constitution and [relevant] legislation . . . ." As Justice Langa noted in Bhe v. Magistrate, Khayelitsha, this means that customary law "is protected by and subject to the Constitution in its own right." 43 It is no longer dependent on rules of repugnancy for continued validity. Judge Van Der Westhuizen explained in Shilubana v. Nwamitwa that "customary law has a status that requires respect."44 As the South African Constitutional Court held in Alexkor v. Richtersveld Community, customary law must be recognized as an "integral part" of the law and "an independent source of norms within the legal system." The new approach as reflected in the post democratization constitutions does not immunize customary law from human rights norms. The new Kenyan Constitution provides that [tiraditional dispute resolution mechanisms shall not be used in a way that:

(a) contravenes the Bill of Rights;
(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
(c) is inconsistent with [the] Constitution or any written law.

It makes clear that the Bill of Rights clauses trump customary law norms that conflict with constitutional provisions by stating that "[a]ny law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid." The Kenyan Constitution goes further than any of the other African constitutions by providing for automatic application of international treaties to which Kenya has acceded. 48 Article 2 (6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution. It further provides for

the application of customary international law norms to Kenya. Clearly, international human rights norms prohibiting discrimination are applicable to Kenya. Similarly, the Constitution of the Republic of Malawi provides that "[any law that discriminates against women on the basis of gender or marital status shall be invalid . . . .a" I also obligates the government to take legislative measures that eliminate customs and practices that discriminate against women. In section 10(2), it further provides that "in the application and development of . .. customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution." Similarly, the Constitution of South Africa provides that "[tihe courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." A similar approach can be found in the 1995 Uganda Constitution, which in article 33 provides that
(1) Women shall be accorded full and equal dignity of the person to men[;]
(2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement[;]

The fundamental human rights provision of the Constitution of the Republic of Ghana guarantees the cultural rights and practices of the people, while still prohibiting "[a]ll customary practices that dehumanize or are injurious to the physical or mental well-being of a person." The modern approach is informed by the development of international human rights norms that outlaw discrimination. The Universal Declaration of Human Rights unequivocally prohibits discrimination. Similarly, several major international conventions prohibit discrimination on grounds of gender. These include: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination. Similar norms are expressed in regional treaties such as the Inter-American Convention on Human Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples' Rights. In the context of Africa, these have been followed by a regional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. In addition some of the sub regional organizations have adopted regional instruments.

For example, in 2008, the Southern African Development Community (SADC) adopted the Protocol on Gender and Development. The conventions, especially CEDAW, impose positive obligations on states to pursue policies of eliminating discrimination against women by

adopting legislative and other measures which prohibit discrimination against women. The fact that the post democratization constitutions do not immunize customary law against scrutiny based on human rights norms is very significant for women's rights because customary law embodies and underpins customs and traditions that discriminate against women. The discrimination of women is rooted in inequality, male domination, poverty, aggression, misogyny, and entrenched customs and myths. The real solution to the problem is eradication of customs that undermine the dignity of women. The Beijing Declaration called on state parties to ensure that "[a]ny harmful aspect of certain traditional, customary or modern practices that violates the rights of women . . . [is] prohibited and eliminated." That is why it is so important that both the post democratization national constitutions and the international conventions impose positive obligations on states to eradicate customs and traditions that undermine the dignity and rights of women. This can, however, only be achieved if judges take up the challenge and interpret both the constitutional provisions and the conventions in a manner that shows sensitivity to the objectives of the norms contained in those documents.

Judicial scrutiny, Human rights, and African customary law in light of Legal Realism[289]

For decades, decisions by African courts took a static view of customary law and did little to mitigate its discriminatory operation against women.[290] This was especially true in countries where constitutions recognized the application of customary law without resolving the conflict between it and human rights provisions. Judges interpreted this situation as permitting the application of provisions of customary law that discriminated against women. Courts failed to take into account the fact that customary law is dynamic and ignored the living law that was being practiced by the communities. Customary law is continually evolving in the light of social, economic, scientific, and technological developments and possibilities. The failure to take into account that customary law is dynamic has changed in the majority of jurisdictions. Judges are increasingly asserting the supremacy of human rights norms and declaring customary discriminatory norms unconstitutional or invalid and inapplicable in modern society. In several jurisdictions, courts are responding to the need for change and are showing an understanding of the existing social and economic conditions.

In the Nigerian case of Muojekwu v. Ejikeme, the Nigerian Court of Appeal examined a custom at issue in the context of several provisions of the constitution.[291] The court considered the

289 African customary laws, customs and women's rights

290 W. Van Doren, Death African Style: The Case of S.M. Otieno, 36 AM. J. COMP. L. 329 (1988); Muna Ndulo, Widows under Zambian Customary Law and the Response of the Courts, 18 COMP. & INT'L L.J. S. AFR. 90 (1985).

291 Muojekwu v. Ejikeme [2000] 5 NWLR 402 (Nigeria).

Nrachi custom of Nnewi that "enable[d] a man to keep one of his daughters unmarried perpetually under his roof to raise issues, more especially males, to succeed him. With the custom performed on a daughter, she takes the position of a man in the father's house." The court of appeal held that the custom was discriminatory and therefore inapplicable. It was held to be against the dictates of equity and good conscience, and it was also held to be a violation of CEDAW. It was further held to be inconsistent with public policy and as being repugnant to natural justice.74 Noting the failure of the legislature to outlaw the practice through legislation, the court expressed the view that in such situations it was up to courts to do something about it.

Justice Olagunju stated:

"...since the abrogation of such obnoxious practice rests absolutely with the legislature of the state that still clings to such absurdity and the burden of containing the incidence of its manifestations in judicial matters lies upon the apex court the best that can be done at this level of judicial hierarchy is to shun the practice as repugnant to natural justice, equity and good conscience and, therefore, unenforceable, hoping that sooner than later the authorities that are in a position to do so will hasten the interment of a custom that has outlived its usefulness and has become counter-productive...."

Quoting an earlier related case,[292] Justice Fabiyi added,

"All human beings-male and female-are born into a free world and are expected to participate freely without any discrimination on grounds of sex, and that is constitutional."

In Edet v. Essien[293], a Nigerian court considered a customary rule in which, if a woman's dowry was not refunded to her former husband, children born by a subsequent marriage belonged to the husband of the first marriage. The court held that the custom was contrary to natural justice, equity, and good conscience. The court ruled that a custom that denies the natural or biological father of his child is certainly repugnant to natural justice. In Bhe v. Magistrate, Khayelitsha, Shibi v. Sithole, and South African Human Rights Commission v. President of the Republic of South Africa, the South African Constitutional Court consolidated three cases, and took up the "constitutional validity of the principle of primogeniture in the context of the customary law of succession." Central to the customary law of succession is the principle of male primogeniture.

These were three cases brought to the Constitutional Court at the same time. In Bhe, two

292 Mojekwu v. Mojekwu, [1997] 7 NWLR 283
293 Edet v. Essien [1932] 11 NLR 47.

minor daughters were ineligible to inherit from their father's intestate estate. Under section 33 of the Black Administration Act 38 of 1927 and regulation 2(e) of the Administration and Distribution of the Estates of Deceased Blacks, minor children are not entitled to inherit intestate from their father's estate." The estate thus devolved to the deceased's father, who was named sole heir and successor. Among other sections, section 23(2) and regulation 2(e) were challenged in the high court, where both sections were ruled unconstitutional. In Shibi, Ms. Shibi, the applicant and deceased's sister, was ineligible to become heir of the deceased's intestate estate, notwithstanding the fact that the deceased had neither a civil nor customary law wife, was childless, and did not have surviving parents or grandparents. This was the result of the application of section 23 of the Black Administration Act, and regulation 2(e) in particular, requiring devolution of an African's estate to be made according to custom.
One of the deceased's male cousins was named the rightful representative of the estate, with a second male cousin designated as the sole heir of the deceased's intestate estate. In the high court, Ms. Shibi was granted a declaratory order pronouncing her as sole heir in her deceased brother's estate. The third case was an application by the South African Human Rights Commission and the Women's Legal Center Trust. These organizations had applied to the high court for the constitutional invalidation of section 23 of the Act, which allowed the application of the offending customary norm. Before the case was heard, the Bhe case was referred to the Constitutional Court. Rather than proceed in the high court, the South African Human Rights Commission and the Women's Legal Centre Trust sought direct access to the Constitutional Court to have section 23 of the Act-or in the alternative subsections (1), (2), and (6) of section 23-declared inconsistent with the Constitution of South Africa, in particular the equality provisions (section 9), the right to human dignity (section 10), and the rights of children (section 28). The application was granted.

Although progress is being made, there are still many jurisdictions where much work remains to be done. There are still countries where constitutional provisions immunize African customary norms, against human rights scrutiny. Judges in these jurisdictions interpret these constitutional derogation provisions as permitting the application of provisions of customary law that discriminate against women. This is clearly a retrogressive way of constitutional interpretation and one that fails to take into account the country's obligations under international conventions and regional human rights instruments. International jurisprudence that has developed in international human rights courts, such as the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Commission on Human and Peoples' Rights courts, interprets international conventions as imposing obligations on state parties to ensure that discrimination does not happen and that it is prohibited. In Velasquez Rodriguez, the Inter-American Court of Human Rights held that parties to the

American Convention on Human Rights shall undertake to respect the rights and freedoms recognized [in the Convention] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

The court held that three obligations arise from these undertakings: (1) respect the rights and freedoms recognized by the Convention,1 6 3 (2) ensure the free and full exercise of the rights recognized in the Convention to every person subject to its jurisdiction, and (3) investigate acts that violate an individual's rights. "An illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself," but because it failed to prevent the violations when it could have done so. The court stated that "what [was] decisive was whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State allowed the act to take place without taking measures to prevent it or to punish those responsible." In A. v. United Kingdom, the European Court of Human Rights explained that state parties must protect the human rights of their inhabitants from violation by others, including by private parties subject to the state's jurisdiction or authority.168

Similarly the African Commission on Human and Peoples' Rights has stated that internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate [a number] of duties for a State that undertakes to adhere to a rights regime .... [T]he State is obliged to protect right-holders against other subjects by legislation . . .. [The State must] move its machinery [to protect beneficiaries of the protected rights] towards actual realisation of the rights. African governments know the discriminatory nature of certain African customary law norms and are therefore complicit in the violation of women's rights. But as the South African Constitutional Court observed in the Bhe case with respect to the customary law of succession, we cannot leave the customary law of succession, or others areas of the law, to develop in a piecemeal and sometimes slow fashion, since this would provide inadequate protection to women and children. In this respect constitutional provisions should declare that women have equal rights with men in the enjoyment of all rights and freedoms and the derogations on account of customary law should be eliminated. In addition, in order to achieve equality between men and women, we will need to transform institutions that define poverty, vulnerability, and dependence.

The relationship among social science, social policy, and the law is nothing if it is not complex, contingent, and variable. As a result, the lessons that can be drawn from this collection of essays are, of course, multiple. Sometimes our work identifies where policy fails and helps us to understand why; sometimes it shows what works and points the way for a greater investment in those things. Yet always what social science offers to law is a broadening of perspective and a deepened awareness of the latent forces that constrain legal policy and the latent consequences that accompany any legal decision. This broadening of perspective comes at a cost to both law and social science. Law has to act in the world and act with whatever information it has, however, partial, incomplete, or biased. The cost to social science is that its power as critique may be diminished as it seeks influence and that it may lend an appearance of rationality and legitimacy to a process that is itself deeply political. And, as the essays suggest, social science information competes with anecdote, horror story, and myth for the attention of policymakers. What we offer is complexity and often increased uncertainty. This is hardly the stuff to win friends when decisions have to be made and sides have to be taken.

CONCLUSION (CRITISCM)

Law does not necessarily satisfy the conditions by which it is appropriately assessed (Lyons 1984, p. 63, Hart 1994, pp. 185-6). Law should be just, but it may not be; it should promote the common good, but sometimes it doesn't; it should protect moral rights, but it may fail miserably. This we may call the moral fallibility thesis. The thesis is correct, but it is not the exclusive property of positivism. Aquinas accepts it, Fuller accepts it, Finnis accepts it, and Dworkin accepts it. Only a crude misunderstanding of ideas like Aquinas's claim that "an unjust law seems to be no law at all" might suggest the contrary. Law may have an essentially moral character and yet be morally deficient. Even if every law always does one kind of justice (formal justice; justice according to law), this does not entail that it does every kind of justice. Even if every law has a prima facie claim to be applied or obeyed, it does not follow that it has such a claim all things considered. The gap between these partial and conclusive judgments is all a natural law theory needs to accommodate the fallibility thesis. It is sometimes said that positivism gives a more secure *grasp* on the fallibility of law, for once we see that it is a social construction we will be less likely to accord it inappropriate deference and better prepared to engage in a clear-headed moral appraisal of the law. This claim has appealed to several positivists, including Bentham and Hart. But while this might follow from the truth of positivism, it cannot provide an argument for it. If law has an essentially moral character then it is obfuscating, not clarifying, to describe it as a source-based structure of governance.

Law has also been thought of as political institutions and hardened customs that formulated rules of the dead over the living (Spencer, 1882). This observation of law presents law as being slow to change and unable to follow the pace of change in society. It denotes a static institution and therefore not fit for a dynamic society, which is what we live in today. This perception however limits law to its negative side and fails to consider the power of law to control deviant behavioral patterns of society. It neither gives room for laws' ability to provide a means for dispute settlement nor force to compel the compliance with orders and the fulfillment of contractual obligations. Another facet of the whole concept of law is that it is described as the witness and external deposit of moral life and shares the same history with moral development of society. The practice of law, in spite of its limits has the propensity of turning men into good citizens. Law is not morality but it's affected and limited by morality. Morality deals with the actual internal state of a person's mind, that is, what his intentions are, whilst the law deals with the external exhibition of signs. The court in determining the existence of a contract will not only look at the actual intentions of the parties but will be swayed by the reasonableness of the external signs or conduct exhibited by the parties. In fact, law is simply

"the prophecies of what the courts will do in fact, and nothing more pretentious (Holmes, 1997).

Law can also be described as a certain unknown or fully undisclosed rules of culture which are nevertheless accepted by society. These are usually deeply rooted cultural beliefs and values which are generally accepted and obeyed without their being declared as such. They include standardized and generally accepted rules developed through various gestures or sound and normally comprise of rules of knowledge, convenience, technology and common life. Law is further referred to as rules of conduct governing relations between individual members and amongst members of groups in society. Such rules may be developed to create orderliness in society by controlling certain behavioral patterns and elements of social deviance. It is said to constitute a specific mechanism created to deal with disputes or claims and composes of societal generally accepted rules as in the sense of establishing a retributive and restitutive social action (Malinowski, 1942). In contrast to various concept of law developed on propounded theories outside classes and socio-economic developments, the Marxist perception of law is based on concrete historical meanings of law derived from class societies and socio-economic formation. It is alleged to be an impossible task to undertake a search for a general meaning of law without first considering the law of socio-economic formation of society and it is only by so doing that one can identify characteristics which are general and typical (Pashukanis, 1932). Pashukanis (1932), thus, argued that a pure concept of law devoid of socio-economic formations through historical developments could only be a ploy used by the bourgeois jurists to hide the reality of the exploitative nature of society and law, as seen in the capitalist law of private property, leading to unemployment, misery and poverty of the proletariat (Pashukanis, 1932) The reliance therefore on the concept of socio-economic formation in the search for a definition of state and law is crucial in

Marxist theory as it provides a basis for a "precise and scientific delineation of the different types of state and the different systems of law" (Pashukanis, 1932:3).

Law is therefore a phenomenon of social relationships, as in relations of production and exchange, representing the interest of the ruling class under the protection of organized force. Accordingly, all other areas of law, apart from civil law which constitutes the basic law, are of a subordinate or derivative nature and it is only bourgeois law that creates a legal state and criminal law (Stuchka, 1927). Stuchka's (1927) definition of law is embedded with several errors and loopholes. In the first instance, he thinks of the basic law as civil law which in his view serves as an economic intermediary, relegating all other areas of law to a subordinate level. His definition presupposes the existence of a set of 'law' identified as a basic law and superior to all others also known as law but inferior in nature. This view of law fails to provide a definitive concept of law and his attempt at segregating law into superior and subordinates reduces law into a compartmentalized concept creating confusion both in theory and practice. Truly, economics is at the base of political, familial and other social relations, as the nature of a state and law are generally determined by economic relations. In the same vein civil law, being part and parcel of law in general, also has its base in economic relations and consist mainly of legislations detailing the confines of economic relations between individuals in a state (Engels, 1888). Law in general has different branches affecting the economy in different ways. Therefore, to equate the basic law to civil law and limit the scope of law to property relations and relations of production is wholly incorrect. The recognition of law as a historical phenomenon, involving class systems, and based on the system of exchange of commodities of equal value eliminates other important values of law, such as its use as a social control mechanism.

Further, Pashukanis thought of bourgeois law as one not limited to the facilitation of exchange or property relations between commodity owners but also seeks to entrench unequal distribution of property and supports the monopoly of the capitalist in production (Pashukanis, 1932). In sum, law is a means of composing and consolidating class society's relationships of production and the social relationships connected with them. These relations are formed with certain ideological views supported by the conscious will of the people expressed through the formulation of various relationships which are shown in the resulting customs and rules. The resulting customs and rules are consequently backed by the ruling class through an organized coercive apparatus such as the courts, police, army, prison guards, court bailiffs (Pashukanis, 1932). Simply put, law becomes meaningless without an apparatus of state coercion, and Lenin (1917) minced no words when he said, bourgeois law is nothing without an apparatus capable of enforcing observation of the norms of law. Accordingly, law in bourgeois society is seen as an instrument of domination and oppression by the ruling

class. The description of law in this sense however fails to bring out the true essence of law as the domination and oppression of one by another can exist without law (Fuller, 1949). In the State and law under socialism, Pashukanis (1936), observed that the practice of socialist law is an intensified struggle and an infliction of heavy blows on the remnants of class enemies. The courts he indicated is a tool of coercion and repression of the enemies of society and that soviet law is used to achieve correct relation between citizens and the socialist state. Pashukanis' commodity exchange theory identifies law as being independent of the state and exclusively as a thing for the ruling class (Melvin, 1951-1952).

Thus, the reduction of law to a state where it is seen as an instrument of class coercion by the ruling class destroys the whole concept of law, its importance and reduces it to a shameful weapon of war, struggle, antagonism and feuds. Further the emphasis on commodity exchange, property relations and individual ownership as core to the theory of law, as championed by Pashukanis, makes the market place the origin of law and ignores other aspects of law and therefore portrays law as a myopic market social being. It appears the Marxist perception of law lacks depth, substance and is very limited in nature. In as much as history is important in the search for an appropriate definition and components of law, historical developments alone cannot define law. The nature of the Marxist concept of law is myopic and fails to see law in its broadest sense well beyond class struggles and property relations. It also fails to consider or deal with what happens beyond exchange relationships and sees law as a system of coercion applied by state apparatus to oppress the masses. Following from all the propositions, theories and narrative postulations, there seems to be no safe, an all encompassing and exhaustive definition of law acceptable to all schools of thought and jurists. The development and definition of law has over the period been tied to historical development of a society, socio-cultural environment within which each theorist finds himself. One can therefore not disassociate himself from his environment in his attempt to find a perfect definition of law. How accurate therefore can one be in his search for a true and an all-encompassing definition of law? Law can therefore be defined as a system of relationships and behavioral patterns accepted and backed by the will of the people and in accordance of which human conduct is measured, and a deviation of which attracts a certain measure of sanction from society through an authoritative source whose actions are backed by the force and will of the people.

CHAPTER SIX

New Dispensation of a New Law Recommendations and Solutions[294]

"...In the Court of Justice, both the parties know the truth, it's the judge who's on trial..."

(Justice JR Midha of Delhi High Court on his farewell speech)

Obuntu – Bulamu and the Law Jurisprudence towards anew Constitutional dispensation

In my much coveted book Obuntu Bulamu and the law: an extra textual statutory aid interpretation tool (Lubogo 2020) I make the following observation, firstly this was the first comprehensive book to address the relationship of *Obuntu-bulamu* to law in Uganda. It also provides the most important critical information on the use of O*buntu-bulamu*, by the judiciary in Uganda. Although *Obuntu-bulamu* is an ideal or value rooted in Africa, its purchase as a performative ethic of the human goes beyond its roots in African languages. Indeed, this book helps break through some of the stale antinomies in the discussions of cultures and rights, since both the courts and the critical essays discuss Obuntu-bulamu as not simply an indigenous or even African ideal but one that is its own terms calls for universal justification. The efforts of Courts to take seriously competing ideals of law and justice has led to original constitutionalism and law more generally. *Obuntu-bulamu*, then, as it is addressed as an activist ethic of virtue and then translated into law, helps to expand the thinking of a modern legal system's commitment to universality by deepening discussions of what inclusion and equality actually mean in a postcolonial country. Since *Obuntu-bulamu* claims to have universal purchase, its importance as a way of thinking about law and justice should not be limited to a few which has greatly incorporated the same, it but becomes important in any human rights discourse that is not limitedly rooted in Western European ideals. Thus, this book will be a crucial resource for anyone who is seriously grappling with human rights, postcolonial constitutionalism, and competing visions of the relations between law and justice.

The book demonstrates the irony that the absence of the values of *Obuntu-bulamu* in society that people often lament about and attribute to the existence of the Constitution with its demands for respect for human rights when crime becomes rife, are the very same values that the Constitution in general and the Bill of Rights in particular aim to inculcate in our society. Furthermore, the new call for an African renaissance that has now become topical globally, I demonstrate the potential that traditional African values of *Obuntu-bulamu* have for influencing the development of a new Ugandan law and jurisprudence. I recommend it as a presentation to a contribution to the early debates on the revival of African jurisprudence as part of the total or broader process of the African renaissance and the freedom through law.

The process of globalization is intertwining the legal systems of all nations, making an understanding of our differences and similarities a useful, if not essential, tool for working in this new global environment. In terms of the post-conflict reconstruction and development

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projects, there are two predominant legal cultures involved in providing technical assistance: Common Law and Civil Law. Though these terms are frequently used as if they are self-defining, the contemporary reality is that it is increasingly difficult to identify countries with solely one legal tradition or the other. The cross-pollination between these legal cultures has enriched both traditions, creating a global legal mosaic. This trend has contributed to a renaissance in the study of comparative law. What was once considered an arcane field solely of academic interest is increasingly viewed as a practical asset. Legal professionals working across borders have found that the distinctions between, and within, the Common and Civil Law traditions have significance for their practice. Moreover, while differences are often presumed, a careful analysis sometimes reveals striking similarities that surprise members from both traditions.

The historical reality of colonialism is perhaps more evident in the study of 'Law and Legal Systems' than in any other legal subject. While the ex-colonies have attempted to fashion new identities since gaining independence, their legal expressions remains largely British, or, at least, neo-colonial. The law should be unique to each scenario. As Sharma JA from the Trinidad and Tobago Court of Appeal explained in Boodram v AG and Another:

. . . even after independence, our courts have continued to develop our law very much in accordance with English jurisprudence. The inherent danger and pitfall in this approach is that, since independence our society has developed differently from the English and now requires a robust examination in order to render our Constitution and common law more meaningful...

I will use Uganda as a case study. According to a report prepared by the Commission on the Legal Empowerment of the Poor titled Making the Law Work for Everyone, one of the four pillars of legal empowerment of the poor is the provision of "access to justice and the rule of law." Pro bono legal services address this key pillar by empowering the poor and enabling the indigent to access justice. In Uganda and Africa at large, the challenge of access to justice is quite formidable. This is largely due to the high levels of poverty, especially with respect to the practice of income generating activities. Only a small percentage of Ugandans can actually afford to pay for the services of an advocate. In fact, for many Ugandans the cost of court fees presents a serious financial challenge. In addition to resources, there are other challenges. Many Ugandans do not understand the justice system. It is difficult to access justice if you have a limited understanding. For other Ugandans, there is a
problem of distrust. Many Ugandans view the justice system as corrupt. Ugandans with such views will not seek to access justice through the judicial system.

Government Efforts to Increase Access to Justice Uganda is home to several government strategies and initiatives to improve access to justice. Efforts range from establishing

community sensitization programs to forcefully directing advocates to offer free legal services.[295] I begin with descriptions of some broad-based efforts that concern coordination and strategic development. Next, I will address more specific service-based efforts. I conclude this treatment with a description of government efforts to engage and enable non-governmental actors to improve access to justice. There are certain wide-ranging efforts that seek to improve access to justice in Uganda. From 2007 through 2011, the Ugandan Judiciary has implemented administrative, legal and judicial reforms under the Judiciary Strategic Investment Plan II, better known as JSIP II. JSIP II seeks to enhance access to justice, improve human rights observance and strengthen the rule of law in Uganda. JSIP II is the first Plan to specifically list speedy and affordable access to justice for the poor and marginalized as one of the Judiciary's four primary strategic outcomes. The Judiciary is cognizant of the need to minimize financial hurdles and other bottlenecks hampering access to justice for vulnerable persons as well as enable physical access to JLOS institutions and services, improve the quality of justice delivered and reduce the technicalities that hamper access to justice.

A second broad-based initiative was the establishment of the Legal Aid Service Providers Network (LASPNET) in 2004. This network has provided a platform for collaboration and solution-directed initiatives within the wide array of actors that seek to promote access to justice. This effort has been further bolstered and coordinated through the existence of the Legal Aid Basket Fund. A third broad-based approach concerns the efforts of the Justice, Law and Order Sector (JLOS) and Law Council. JLOS provides guidance and direction for non-governmental organisations seeking to increase access to justice for the poor and marginalized and to eliminate legal service gaps. JLOS's responsibility springs from a mandate issued by the Government of Uganda in 2000 for administration of justice and maintenance of law and order. JLOS is committed to supporting the development of a national legal aid and pro bono policy. The Law Council is charged with devising the Terms of Reference for this initiative and has made some progress in this regard. This includes setting up a pro bono scheme supported by a legal and regulatory framework to ensure that pro bono and legal aid service provision is done in a well-coordinated manner. One of the best-known government-based access to justice initiatives in Uganda is the State Brief System. Under State Briefs, the Ministry of Justice sends out invitations to practicing Advocates requiring them to represent indigent criminals at a modest fee provided by the State. This practice is in conformity with the Constitutional provision under Article 28[296] that requires that a person accused of a capital offence shall be entitled to legal representation at the expense of the State. Most persons charged with capital offences cannot afford legal representation and yet the gravity of the offence requires that they be represented. As such, the State is constitutionally mandated to

295 Dan Ngabirano, A Baseline Survey of Uganda's Legal Aid Providers
296 Article 28(3) (e) of the 1995 Constitution of the Republic of Uganda.

provide them with legal representation. The advocates who are engaged to work in the State Briefs System typically receive less pay than the fees that are paid in private practice.

Therefore, the State Brief System relies on the willingness of Ugandan advocates to deliver their services at lower than normal rates. The unfortunate consequence is that in some cases advocates compensate for their lower pay by providing services in a manner that could be described as less dedicated or less professional than the standard level of practice. Some attribute the lack of interest in State Briefs to the meager fees paid out to advocates who take up the briefs. Excuses aside, the practice of advocates accepting payment for a State Brief and then giving it lackluster attention raises concern about the integrity and professionalism within the legal fraternity.

There are many critics of the State Brief System. Some condemn the level of service provided in the system. Many complain that lawyers assigned to handle matters on State Brief fail to exercise adequate diligence in research and preparation. Some critique the low rate of pay provided to the advocates. Others assert that the State Brief System does not go far enough to meet the Ugandan Governments obligations under the Constitution and binding international human rights instruments such as the ICCPR due to the limited scope of criminal defendants who receive free representation. Another prominent government-funded measure addressing access to justice is the Justice Centers Uganda initiative. Per its own materials "Justice Centers are a one-stop-shop legal aid service delivery model that seeks to bridge the gap between the supply and demand sides of justice by providing legal aid services across civil and criminal areas of justice to indigent and vulnerable persons, while at the same time empowering individuals and communities to claim their rights and demand for policy and social change."Justice Centers offer a variety of core services to the "most indigent persons of Uganda" including:

1) Legal advice;
2) Legal representation;
3) Alternative dispute resolution;
4) Counseling;
5) Legal awareness;
6) Referrals; and
7) A toll-free help line.

In addition to these key government initiatives, the Government must seek to promote the provision of legal services to the poor and disenfranchised through private legal practitioners

and non- governmental organisations. The Government support for such efforts ranges from the establishment of regulations requiring all practicing advocates to perform pro bono services (or pay a fee in lieu of providing such services) to openness towards cooperation with non-governmental organisations (NGO's). I will address pro bono and pro bono policy issues subsequently in this chapter. Here I will conclude this section with a brief discussion of the Governments interaction with NGO's operating in the justice sector. The Government does not give NGOs carte blanche authority to do whatever the NGOs want to do. The activities of NGO legal service providers are vetted and supervised by the Legal Aid Sub-Committee of the Law Council under the Ministry of Justice and Constitutional Affairs. In addition, certain NGOs have incurred the displeasure and public criticism of the Government for falling short of fulfilling the Constitutional objectives of legal aid service provision. That said, the Government of Uganda is quite open to extensive partnerships and collaborations with NGOs in the context of justice delivery. Perhaps the best testimony to Uganda's openness toward NGOs in the justice sector is the large number of NGO actors involved in a wide range of activities and initiatives concerning access to justice. Short reports on many of these actors and their activities are included in an Appendix to this chapter.

The following is a list of fifteen recommendations for improving the management and delivery of legal services globally:

(1) Reforming the law on paper is not enough to change the reality on the ground. Poor people also need a legal and judicial system that they can access – one that ensures that their legal entitlements are practical, enforceable and meaningful. Therefore, efforts to legally empower the poor should focus on the underlying incentive structures as well as the capacity of the judiciary and state institutions necessary to make the law work for the poor.

(2) The current scheme on legal aid provision orchestrated by civil society often focuses on the resolution of discrete legal problems instead of equipping people to handle their own legal challenges. More emphasis should be placed on community outreach programs that build awareness on basic legal rights such

(3) More legal and human rights awareness programs should be introduced in schools especially in the rural areas. In the same vein, measures to improve access to justice should focus on developing low-cost justice delivery models, taking into account.

(4) The congestion in the court system;

(5) The incentives of the judiciary and law enforcement agencies; and
(6) The efficacy of informal and alternative dispute resolution mechanisms.

(7) When structuring a national pro bono scheme, considerations should be made with the existing Law Council pro bono scheme as a foundation. Other factors to consider include physical barriers to accessing justice, timing and capacity to improve access to justice as well as the existence of formal and informal institutions that poorer citizens approach for judicial and quasi- judicial intervention, and the weakness of existing institutional arrangements.

(8) The importance of access to justice, legal aid and pro bono services should be emphasized at the law school level. This exposure should include field activities in order to ground future advocates in the importance and rewards of public service.

(9) Consideration should be given to providing legal aid desks at Police Stations and police posts. These would be vital contact points for persons reporting cases on any form of human rights infringement, especially for victims that are unaware of how to proceed in following up their cases or seeing to it that justice is done.

(10) Legal aid service providers should rigorously undertake more training of paralegals at the sub-county and parish levels so as to make it easier for persons in far-to-reach areas to know how to

(11) It has also been suggested that lawyers with a reluctance towards pro bono practice should be encouraged to take on law school interns or Bar Course students to handle pro bono cases, and in return, the advocate supervising the student would be awarded professional contact hours for pro bono service provisions under the Pro Bono Scheme and the Advocates (Pro bono Services to Indigent Persons) regulations, 2009. In this way, the student benefits from professional exposure and training while the lawyer acquires the contact hours needed to satisfy pro bono service requirements without necessarily directly rendering such service.
(12) Colin Cohen, a partner in the law firm of Boase, Cohen & Collins (Hong Kong) is critical of making it mandatory for private attorneys to provide pro bono services. Cohen suggests that the law society and the Bar should set up a unit comprising a list of lawyers who are prepared to deal with pro bono cases, so that people who really need help can get it from such a unit. These units would also guarantee commitment and exercise of due diligence from the lawyers involved hence rendering effective

service. After all, as has already been emphasized, the most fundamental motivation for lawyers engaged in pro bono work should be the desire to see that justice is done.

(13) Some of the prevalent cases that keep recurring, especially upcountry, involve domestic disputes. The victims of domestic abuse are normally resigned to fate because of ignorance or poor access to justice. As such, more interventions should be designed

(14) Areas that are difficult to access such as the regions of West Nile, Karamoja, and the Islands of Lake Victoria should be the focus of special efforts in terms of capacity building and the provision of legal aid.

(15) CSO's require support in building their capacity to manage programs in both organisational and institutional development. Different regions in the country should develop systems and mechanisms for integrating programs into sub- county plans and budgets.

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FREEDOM THROUGH LAW

Isaac Christopher Lubogo

If the legal system or a particular law is wrong or not good enough, and should be changed: if that is against the law, then the law is an ass – an idiot. ... said of a law that one thinks is unnecessary or ridiculous. The phrase comes from Charles dickens Novel Oliver twist this opinion was expressed by Mr. Bumble, when he learned from Mr. Brownlow that, under Victorian law, he was responsible for actions carried out by his wife. His words and action vividly convey the extent of his indignation when he apprised of this legal fact, if that's the eye of the law, the law is a bachelor: and the worst I wish the law is that his eye may be opened by experience. **(Resonate with changing society)**

This is the **very purpose of this book the law should be seen to resonate with changing society not a dogma** for if we fail to do so then to use Shakespeare's exact line by the famous plotter of treach-ery " the first thing we do, let's kill all the lawyers" this was stated by dick the butcher in Henry VI part II, Act IV, Scene II, LINE 73 Dick the Butcher was a follower of the rebel Jack Cade, who thought that if he disturbed law order, he could become king. Shakespeare meant it as a compliment to attorneys and judges who instill justice in society. It is among Shakespeare's most famous lines, as well as one of his most controversial. Shakespeare may be making a joke when character "Dick the Butcher" suggests one of the ways the band of pretenders to the throne can improve the country is to kill all the lawyers. Dick is a rough character, a killer as evil as his name implies like the other henchmen, and this is his rough solution to his perceived societal problem. The line has been interpreted in different ways: criticism of how lawyers maintain the privilege of the wealthy and powerful; implicit praise of how lawyers(law) emphasis added stand in the way of violent mobs; and criticism of bureaucracy and perversions of the rule of law under **THE NAME OF DOGMA**

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