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

CHAPTER ONE

THE THEORY OF LAW

Law might be understood as *a* set of rules which are generally obeyed and enforced within a politically organised 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.

[1] Introducing the Law- Glanville Williams 3rd Edition

- 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.

ORIGIN OF LAW

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[2].

Obligatory sources of law

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

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

[2] Introducing the Law- Glanville Williams 3rd Edition

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)[3].

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

[3] Principles Of Equity and Trusts 2nd edition- Samantha Hepburn

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.[4]

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

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

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 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 family

A second family is that of the common law, including the law of England and those laws modelled 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.

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[5].

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

Relations between Romano Germanic family and Common law family[6]

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[7]

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

[7] Dickson, B, *Introduction to French Law*, London, Pitman Publishing, 1994.

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 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.

Other systems[8]

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.

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

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.

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 community's 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.[9]

[9] 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)[10]. 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 King's 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 commissioners (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[11].

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

[10] The History of Law, Compendium of traditional legal history- William McBorough Phd and Dr. Sonia Thatcher Msc University of Yale.
[11] http://www.kent.ac.uk/lawlinks

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. 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[12]

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

[12] http://www.kent.ac.uk/lawlinks

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 settlor (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 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.[13] (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.

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.

[13] "Delays of Chancery" Bleak House by Charles Dickens

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.[14]

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;*

[14] Shisholm R and Nettheim G- Province Of The Law 3rd Edition

- *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 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.

[15]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.

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:

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[15] Harold J G *Introduction to law and the legal system*, (London: Houghton Mifflin company, 1975)

. . . 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)[16] 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 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.

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[16] H L Packer Kluckhohn's *The Limits of the Law,* Stanford University Press, Stanford California 1968

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.[17]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

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

ground on which he could be handed over to the United States.[18] 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 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.[19] 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.[20]

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 afresh : 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.

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

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

[20] 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.

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 no remedy except to charge the police officer with an offence.[21] 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

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

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

'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[22]. 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 '[23]. 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

[22] ' Legal and Social Aspects of Arrest' by Jerome Hall, 49 H.L.R. $66.

[23] Lee, History of Police in England, 184-j. 10 Lee, p. 2ji. Freedom Under the Law- Sir Alfred Denning

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.[24] 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 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,

[24] i Hale, P.C. 91-2. 11 See per Lord du Parcq in Christie v. Leachimij [1947] A.C. at PP- J96-7.

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.[25] 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.[26] 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 misdemeanours 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 the judges to determine it.[27] The working of the law was well shown a few years ago when some customs

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[25] Freedom Under The Law- Sir Alfred Denning

[26] 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.

[27] 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

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 neighbour : 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.[28]

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

[28] Freedom under the Law- Sir Alfred Denning

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 freedom of speech is well shown by the case of Richard Chambers.[29] 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 honourable 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.[30]

[29]State Trials (j Charles I, 1629) p. 374
[30] 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. 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 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[31]

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

[31] *Lawyers, clients and covenant* A Religious Perspective on Legal Practice and Ethics 1998 by Joseph Allegretti

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 resources 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.[32] 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 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.[33] 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[34], published in 1976-are steeped in the Enlightenment tradition that characterizes most scholarly writing about bioethics.

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[32]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).

[33] Mary C. Daly et al., Contextualizing Professional Responsibility: A New Curriculum for a New Century, 58 Law & Contemp. 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).

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

Wasserstrom, for example, criticizes lawyer paternalism as violative of client autonomy,'[35] 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.[36]

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.[37]

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"[38] and even to lay down their lives for each other.[39] 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.[40] 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

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[35] Wasserstrom, supra note 14.
[36] 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,
[37] Callahan
[38] Matthew 5:38-40 (New Revised Standard 1989). All Biblical citations and quo- tations in this article are from the New Revised Standard Version.
[39] 1 John 3:16.
[40] Harold J. Berman, Faith and Order: The Reconciliation of Law and Religion (1993); Harold J. Berman, The Interaction of Law and Religion (1974);

upon his. Christians are to love one another as Jesus has loved us.25 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 ex- cluded 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[41]-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, the Ethical

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

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.[42] 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.[43]

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

[42] See James Elkins, Moral Discourse and Legalism in Legal Education, 32 J. Legal Educ. 11, 19-20 (1982).
[43] 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).

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.

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.[44] 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."[45] 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.

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

[45] 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.

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 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).[46] 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,

[46]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.

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.[47] 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 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.

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

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,"[48] 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.[49] 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 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.

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[48] 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).

[49] 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

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.[50] 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.[51]

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.[52] This sharing of power assumes a sharing of relevant information so that each side can make the decisions 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

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

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

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

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.[53] First, humans are sacred. This is because we are created in the image and likeness of God. Despite our fallibility and sinfulness, human beings are subjects of reverence. Each of us is of unconditional value.[54] 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

[53] Joseph Cardinal Bernardin, Consistent Ethic of Life 60 (1988).
[54] 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.").

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 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.[55] 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, irreplaceably, 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.

[55]Amos 3 and Hosea 1-3

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." '[56] 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 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.133 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).

[56] Bouma

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 uncertainties 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. Perhaps 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 explains, "[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.[57] 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 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.

[57] Model Rules, supra note 34, Rule 2.1

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 offences. 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 Article 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 WEAKNESSESS

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;

General principles of law[58]

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.

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[58] 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[59].

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.

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[59] Harris P *An introduction to law* 4th ed. London: Weidenfeld, 1993

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.[60]

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

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

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[61]

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.

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

- 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.

Jeremy Bentham

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 mischiefs 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.[62]

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

[62] (The idea of law: 1973).

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 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.

The principle of legality[63]

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).

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

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

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[64]

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 some what 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

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

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.

CHAPTER FOUR

THE LAW AS A CLOG[65]

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."

[65] Let's kill all the lawyers- Henry IV (William Shakespeare)

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

Then we hear Cade's 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 acompt". Cade regards him with deep suspicion when he admits he can write his name. "Away with him," says Cade.

"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 Cade's 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 Butcher's 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.[66]

[66]Let's kill all the lawyers- Sir Geoffrey Bindman QC, consultant, Bindmans LLP

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.[67]

> *"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 law's a bachelor, and the worst I wish the Law is, his eye may be opened by experience"*.[68] 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.

> 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.

[67]Garner, B. A.(2004).'Black's law dictionary.' Pg.1028
[68]Dickens, C.(1868). The Adventures of Oliver Twist. Ticknor and fields.

Plans are afoot to drop some of the more asinine and outdated laws from the statute books. It's 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[69]

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.[70] 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[71]. 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.

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

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

[71] 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.[72]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 recent 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

[72] id

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 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.[73] 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.[74] 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.

[73] 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

[74]Austin, C. (2000). Essential Jurisprudence" Cavendish Publishing Limited. United Kingdom.

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**[75]. In CEHURD, the Constitutional Court of Uganda held that the political question doctrine prevented the court from reviewing government policy concerning the provision of maternal health care[76], 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[77]. 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.

[75]Constitution petition No. 16/2011

[76]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.

[77] Id

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.[78] 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 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

[78]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.

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.[79] It is an absurdity that failure for government to carry on its obligation has not been fully addressed to best colerate 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[80] 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 their clients do not want to share.[81]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

[79] William A Beach, 'Quoted in Manual of Forensic Quotations', by Leon Mead, P. 125
[80]The Advocates (Professional Conduct) Regulations, 2018
[81] D. Brian Dennison,PamelaTibihikirra-Kalyegira (eds.),Legal Ethics and Professionalism. A Handbook for Uganda Geneva: Globethics.net, 2014

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.[82] 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.[83]An example was in the case of **Behangana Domaro and anor Vs. Attorney General**[84]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 witnessed that justice has been granted reasonably and fair? Has justice been served regardless of one's

[82]Roosevelt, K. (2019, October 16). Judicial activism. Encyclopedia Britannica. https://www.britannica.com/topic/judicial-activism
[83] id
[84]Constitutional petition No.53 0f 2010

capacity? That and many others is an example of how the law may, as said not be an idiot after all.

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 instance in the case of **Cehurd, Mubangizi and Musimenta vs. executive director Mulago hospital and Attorney General,**[85] 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 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

[85] Constitution petition No. 16/2011

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).*[86] 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 Project's (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.[87] 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

[86] Constitution of Republic of Uganda,1995
[87] 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)*[88] 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.[89] 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.

[88] Constitution of Republic of Uganda, 1995

[89] 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

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 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.[90] 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.[91] 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

[90]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)

[91]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.

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.[92] 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 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 [93]

The precolonial 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

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

[93] African Customary Law, Customs, and Women's Rights by Muna Ndulo

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.[94] 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 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.[95] 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

[94] 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).
[95] High Court Act of 1960, Cap. 27, 3 LAWS OF REP. OF ZAMBIA (1997)

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 departments of the substantive law to achieve certainty and predictability and promote the course of justice.[96] 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,[97] 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

[96] 1. OLUWOLE AGBEDE, LEGAL PLURALISM 71 (1991)
[97] 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).

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- (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.[98] 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."

[98] African Customary Law, Customs, and Women's Rights

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

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 bridewealth 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 price21 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.

[99]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.

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 'people's 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 courtsí 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

[99] African customary law and the protection of folklore- Paul Kuruk

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[100]

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

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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 artefacts 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 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.’58 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.

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 sociolegal research might be set with the formation of the Law and Society Association in 1965.[101] Although there is, and was, more to sociolegal 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

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

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 even be read as inscribed in the legal tradition itself.[102] 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

[102] Trubek and Esser 1987, 23

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). 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.

In postdemocratization 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.41 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 . . . ."42 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."45 The new approach as reflected in the

postdemocratization 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.46

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 subregional 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 postdemocratization 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[103]

For decades, decisions by African courts took a static view of customary law and did little to mitigate its discriminatory operation against women.[104] 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.[105] The court considered the 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

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[103] African customary laws, customs and women's rights
[104] 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).
[105] Muojekwu v. Ejikeme [2000] 5 NWLR 402 (Nigeria).

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,[106] 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[107], 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.

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

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

CHAPTER SIX

NEW DISPENSATION OF A NEW LAW RECOMMENDATIONS AND SOLUTIONS[108]

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

[108] Legal Ethics and Professionalism. A Handbook for Uganda

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.[109] 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

[109]Dan Ngabirano, A Baseline Survey of Uganda's Legal Aid Providers

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[110] 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 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 Government's 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

[110] Article 28(3) (e) of the 1995 Constitution of the Republic of Uganda.

representation. Another prominent government-funded measure addressing access to justice is the Justice Centres Uganda initiative. Per its own materials "Justice Centres 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 Centres 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 Government's 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 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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