"Introduction to Constitutional Law".

In Section 1 of this course you will cover these topics:
General Introduction To The Legal System

Topic : General Introduction To The Legal System

Topic Objective:

At the end of this topic student would be able to:

- Understand The Sources Of American Law
- Learn About The Concept Of Substance V. Equity
- Learn About The Concept Of Substance V. Procedure

Definition/Overview:

Overview: Civil law is the most widespread system of law in the world. It is also sometimes known as Continental European law. The central source of law that is recognised as authoritative are codifications in a constitution or statute passed by legislature, to amend a code. Civil law systems mainly derive from the Roman Empire, and more particularly, the Corpus Juris Civilis issued by the Emperor Justinian ca. AD. This was an extensive reform of the law in the Byzantine Empire, bringing it together into codified documents. Civil law was also partly influenced by religious laws such as Canon law and Islamic law. Civil law today, in theory, is interpreted rather than developed or made by judges. Only legislative enactments (rather than judicial precedents, as in common law) are considered legally binding.

Legal System: The three major legal systems of the world today consist of civil law, common law and religious law. However, each country often develops variations on each system or incorporates many other features into the system.

Common law:

Common law and equity are systems of law whose sources are the decisions in cases by judges. Alongside, every system will have a legislature that passes new laws and statutes, however these do not amend a collected and codified body of law.

Religious law: Religious law refers to the notion of a religious systemor document being used as a legal source, though the methodology used varies. For example, the use of Jewish Halakha for public law has a static and unalterable quality, precluding amendment through legislative acts of government or development through judicial precedent; Christian Canon law is more similar to civil law in its use of civil codes; and Islamic Sharia law (and Fiqhjurisprudence) is based on legal precedent and reasoning by analogy (Qiyas), and is thus considered similar to common law.

Key Points:

1. Common Law

Common law developed in England, influenced by the Norman conquest of England which introduced legal concepts from Norman law. Common law was later inherited by the Commonwealth of Nations, and almost every former colony of the British Empire has adopted it (Malta being an exception). The doctrine of stare decisis or precedent by courts is the major difference to codified civil law systems. Common law is currently in practice in Ireland, most of the United Kingdom (Englandand Wales and Northern Ireland), Australia,India (excluding Goa), South Africa, Canada(excluding Quebec), Hong Kong and the United States (excluding Louisiana) and many more places. In addition to these countries, several others have adapted the common law system into a mixed system. For example, Pakistanand Nigeriaoperate largely on a common law system, but incorporate religious law.

2. The Main Kinds of Religious Law

The main kinds of religious law are Shariain Islam, Halakha in Judaism, and Canon law in some Christian groups. In some cases these are intended purely as individual moral guidance, whereas in other cases they are intended and may be used as the basis for a country's legal system. The latter was particularly common during the Middle Ages.

The Islamic legal system of Sharia(Islamic law) and Fiqh (Islamic jurisprudence) is the most widely used religious law, and one of the three most common legal systems in the world alongside common law and civil law. It is not a divine law, however, as only a fraction of Sharia law is based on the Qur'an and Sunnah, while the majority of its rulings are based on the Ulema (jurists) who used the methods of Ijma (consensus), Qiyas (analogical deduction), Ijtihad(reason) and Urf (common practice) to derive Fatwā (legal opinions). An Ulemawas required to qualify for an Ijazah (legal doctorate) at a Madrasah (law school) before they could isse Fatwā. During the Islamic Golden Age, classical Islamic law may have had an

influence on the development of common law and several civil law institutions. Sharia law governs a number of Islamic countries, including Saudi Arabia and Iran, though most countries use Sharia law only as a supplement to national law. It can relate to all aspects of civil law, including property rights, contracts or public law.

3. Sources of American Law

Contemporary American law goes back to the primitive way of resolving disputes in the small towns and villages in England. The decisions made by judges became part of the old tradition known as the common law. Common law evolved into principles of stare decisisor precedent, fostered by the belief that people needed to know what the rules were so they could conduct themselves accordingly. Today, US courts are guided by decisions of other courts when faced with the same or similar issues. The common law rules as well as legislative enactments are rules of substantive law. Rules of procedure establish the step-by-step mechanics that litigants must follow to gain access to the courts and conduct themselves thereafter.Disputes are either civil or criminal.

In a criminal case the government brings the action. In a civil case a person, the plaintiff, seeks redress for an injury suffered. If the plaintiff prevails, the defendant must pay damages to the plaintiff. The courts function is to resolve disputes in an orderly manner. The judicial branch is one of three branches of the USgovernment: the other two are the legislative and executive. The courts have the authority to check the power of the other branches. The federal and state courts function independently. Some cases may be tried either in federal or state court; others may be tried only in state courts or only in federal court. Federal court judges are appointed, enabling them to protect the rights of minorities. Courts are passive arbiters in that they take action only after a party has come to it for redress. It cannot propose or enact laws of its choice, but it can reconfirm and strengthen existing laws. The judges role is to determine the facts, unless there is a jury, and apply the law to the facts to determine who should prevail and enter a judgment.

4. Substance v. Equity

"Equity" may generally be defined as the correction of a defect or error in the law. This idea is apparently of ancient origin, tracing back at least as far as Aristotle, who defined equity as an exception to the rule where the lawgiver's pronouncement is defective and erroneous.

There are a number of reasons why a law may be deemed "defective" or "erroneous." Substance on the other hand is what is essential; it is used in opposition to form. It is a general rule, that on any issue it is sufficient to prove the substance of the issue. For example, in a case where the defendant pleaded payment of the principal sum and all interest due, and it appeared in evidence that a gross sum was paid, not amounting to the full interest, but accepted by the plaintiff as full payment, the proof was held to be sufficient. The first reason for making an equitable exception to a law was when the law suffered from "universality," that is, the law was stated too broadly by the legislators. Supposedly the legislators, had they given thought to the matter, would have created an exception to the general rule in certain cases. The defect is really one of inaccurate word-crafting on the part of the legislative drafters. Thus, in theory, the statute does not accurately reflect the true law.

Equity has also been justified in cases where common law judges refused, for whatever reason, to grant relief to a complainant. In such cases, the complainant would seek relief in another place (historically, in the Court of Chancery or a separate Court of Equity). In such cases, the law was viewed as not providing for a remedy that it ought to have. A third justification for equity relates to so-called "hard cases," that is, where a strict application of the rule of law was clear and possible, but would have resulted in a hardship. In such cases, the harshness of the law was essentially viewed as contrary to justice.

5. Substance v. Procedure

Although different legal processes aim to resolve many kinds of legal disputes, the legal procedures share some common features. All legal procedure, for example, is concerned with due process. Absent very special conditions, a court can not impose a penalty - civil or criminal - against an individual who has not received notice of a lawsuit being brought against them, or who has not received a fair opportunity to present evidence for themselves. The standardization for the means by which cases are brought, parties are informed, evidence is presented, and facts are determined is intended to maximize the fairness of any proceeding. Nevertheless, Substance is definite within a certain situation For example, a party who is unfamiliar with procedural rules may run afoul of guidelines that have nothing to do with the merits of the case, and yet the failure to follow these guidelines may severely damage the party's chances. Procedural systems are constantly torn between arguments that judges should have greater discretion in order to avoid the rigidity of the rules, and arguments that judges should have less discretion in order to avoid an outcome based more on the personal

preferences of the judge than on the law or the facts. Legal procedure, in a larger sense, is also designed to effect the best distribution of judicial resources. For example, in most courts of general jurisdiction in the United States, criminal cases are given priority over civil cases, because criminal defendants stand to lose their freedom, and should therefore be accorded the first opportunity to have their case heard.

6. The Substance of "Procedural law"/"Substantive law" in Europe

In the European legal systems the Roman law had been of great influence. In ancient times the Roman civil procedure applied to many countries. One of the main issues of the procedure has been the actio (similar to the English word "act"). In the procedure of the legis actiones the actio included both procedural and substantive elements. Because during this procedure the Praetor had granted, or denied, litigation by granting or denying, respectively, an actio. By granting the actio the praetor in the end has created claims. i.e. a procedural act caused substantive claims to exist. Such priority (procedure over substance) is contrary to what we think of the relationship nowadays. But it has not only been an issue of priority and whether the one serves the other. Since the actio had been composed of elements of procedure and substance it was difficult to separate both parts again.

Even the scientific handling of law, which has grown up during medieval times in the new universities in Italy (in particular in Bologna, Mantua) did not come to a full and clear separation. (The English system of "writs" in the middle age had a similar problem like the Roman tradition with the actio.) In Germany the unity of procedure and substance in the actiodefinitely has been brought to an end at the codification of the Brgerliches Gesetzbuch (BGB) which came into force on January , . The expression Anspruch(of BGB) - meaning "claim" - has been "cleared" from procedural elements. And this was the time for "founding" the terms formelles / materiellesRecht. However, after World War II the expression formelles Recht obviously has been found "contaminated" and to a broad extent has been replaced by Prozerecht meaning narrowing the idea behind it to "law of litigation" (thereby excluding f.i. the law of other procedures and the law on competences).

7. Civil v. Criminal

Most countries make a rather clear distinction between civil and criminal procedures. For example, an English criminal court may force a defendant to pay a fine as punishment for his

crime, and he may sometimes have to pay the legal costs of the prosecution. But the victim of the crime pursues his claim for compensation in a civil, not a criminal, action. In France, Italy, and many countries besides, the victim of a crime (known as the "injured party") may be awarded damages by a criminal court judge.

The standards of proof are higher in a criminal action than in a civil one since the loser risks not only financial penalties but also being sent to prison (or, in some countries, executed). In English law the prosecution must prove the guilt of a criminal beyond reasonable doubt; but the plaintiff in a civil action is required to prove his case on the balance of probabilities. Thus, in a criminal case a crime cannot be proven if the person or persons judging it doubt the guilt of the suspect and have a reason (not just a feeling or intuition) for this doubt. But in a civil case, the court will weigh all the evidence and decide what is most probable.
Criminal and civil procedure are different. Although some systems, including the English, allow a private citizen to bring a criminal prosecution against another citizen, criminal actions are nearly always started by the state. Civil actions, on the other hand, are usually started by individuals. In Anglo-American law, the party bringing a criminal action (that is, in most cases, the state) is called the prosecution, but the party bringing a civil action is the plaintiff. In both kinds of action the other party is known as the defendant. A criminal case against a person called Ms. Sanchez would be described as The People vs. (=versus, or against) Sanchez in the United States and R. (Regina, that is, the Queen) vs. Sanchez in England. But a civil action between Ms. Sanchez and a Mr. Smith would be Sanchez vs. Smith if it was started by Sanchez, and Smith vs. Sanchez if it was started by Mr. Smith. Evidence from a criminal trial is not necessarily admissible as evidence in a civil action about the same matter. For example, the victim of a road accident does not directly benefit if the driver who injured him is found guilty of the crime of careless driving. He still has to prove his case in a civil action. In fact he may be able to prove his civil case even when the driver is found not guilty in the criminal trial. Once the plaintiff has shown that the defendant is liable, the main argument in a civil court is about the amount of money, or damages, which the defendant should pay to the plaintiff

8. The Court

A court is a body, often a governmental institution, with the authority to adjudicate legal disputes and dispense civil, criminal, or administrative justice in accordance with rules of law. In common law and civil law states, courts are the central means for dispute resolution,

and it is generally understood that all persons have an ability to bring their claims before a court. Similarly, those accused of a crime have the right to present their defense before a court. Court facilities range from a simple farmhouse for a village court in a rural community to huge buildings housing dozens of courtrooms in large cities.

A court is a kind of deliberative assembly with special powers, called its jurisdiction, or jus dicere, to decide certain kinds of questions or petitions put to it. According to William Blackstone's Commentaries on the Laws of England, a court is constituted by a minimum of three parties, namely, the actor, reus, and judex though, often, courts consist of additional attorneys, bailiffs, reporters, and perhaps a jury. The term "court" is often used to refer to the president of the court, also known as the "judge" or the "bench", or the panel of such officials. For example, in the United States, and other common law jurisdictions, the term "court" (in the case of U.S. federal courts) by law is used to describe the judge himself or herself.
In the United States, the legal authority of a court to take action is based on three pillars of power over the parties to the litigation: Personal jurisdiction; Subject matter jurisdiction; and Venue.

8.1 Jurisdiction

Jurisdiction, meaning "to speak the law," is the power of a court over a person or a claim. In the United States, a court must have both personal jurisdiction and subject matter jurisdiction. Each state establishes a court system for the territory under its control. This system allocates work to courts or authorized individuals by granting both civil and criminal jurisdiction (in the United States, this is termed subject-matter jurisdiction). The grant of power to each category of court or individual may stem from a provision of a written constitution or from an enabling statute. In English law, jurisdiction may be inherent, deriving from the common law origin of the particular court.

8.2 Trial and appellate courts

Courts may be classified as trial courts (sometimes termed "courts of first instance") and appellate courts. Some trial courts may function with a judge and a jury: juries make findings of fact under the direction of the judge who reaches conclusions of law

(called a jury trial) and, in combination, this represents the judgment of the court. In other trial courts, decisions of both fact and law are made by judges (called a bench trial). Juries are less common in court systems outside the Anglo-American common law tradition.

8.3 Civil law courts and common law courts

The two major models for courts are the civil law courts and the common law courts. Civil law courts are based upon the judicial system in France, while the common law courts are based on the judicial system in Britain. In most civil law jurisdictions, courts function under an inquisitorial system. In the common law system, most courts follow the adversarial system. Procedural law governs the rules by which courts operate: civil procedure for private disputes (for example); and criminal procedure for violation of the criminal law.

9. The Judiciary and the Separation of Powers

The judiciary (known as the judicial system or judicature) is the system of courts which administer justice in the name of the sovereign or state, a mechanism for the resolution of disputes. It usually consists of a court of a final appeal (called the 'supreme court' or 'constitutional court') and other lower courts. The term is also used to refer collectively to the judges, magistrates and other adjudicators who form the core of a judiciary (sometimes referred to as a "bench"), as well as the support personnel who keeps the system running smoothly. Under the doctrine of the separation of powers, 'the judiciary is the branch of government primarily responsible for interpreting the law'. It construes the laws enacted by the legislature.

- In common law jurisdictions or provinces, courts interpret law, including constitutions, statutes, and regulations. They also make law based upon prior case law in areas where the legislature has not made law. For instance, the tort of negligence is not derived from statute law in most common law jurisdictions. The term common law refers to this kind of law.
- In civil law jurisdictions, courts interpret the law, but are, at least in theory, prohibited from creating law, and thus, still in theory, do not issue rulings more general than the actual case to be judged. In practice, jurisprudence plays the same role as case law.
- In socialist law, the primary responsibility for interpreting the law belongs to the legislature.

This difference can be seen by comparing United States, France and the People's Republic of China:

- in the United States government, the Supreme Court is the final authority on the interpretation of the federal Constitution and all statutes and regulations created pursuant to it;
- in France, the final authority on the interpretation of the law is the Council of State for administrative cases, and the Supreme Court for civil and criminal cases;
- and in the PRC, the final authority on the interpretation of the law is the National People's Congress.
- Other countries such as Argentina have mixed systems that include lower courts, appeals courts, a cassation court (for criminal law) and a Supreme Court. In this system the Supreme Court is always the final authority but criminal cases have four stages, one more than civil law.

It is said that the famed Byzantine Emperor Justinian had the Corpus Juris Civilis compiled and all other decisions by jurists burned to create certainty in the law. Again in the th century, French legal scholars at the time of the development of the Code Napolon advocated the same kind of approach it was believed that since the law was being written down precisely, it should not need interpretation; and if it did need interpretation, it could be referred to those who wrote the code. Napoleon, who was an advocate of this approach, felt that the task of interpreting the law should be left with the elected legislature, not with unelected judges. This contrasted with the pre-revolutionary situation in France, where unelected 'parliaments' defending the interests of the nobility would often slow the enforcement of royal decisions, including much needed reforms.

However, this idea was found difficult to implement in practice. In France, along with other countries that Napoleon had conquered, or where there was a reception of the Civil Code approach, judges once again assumed an important role, like their English counterparts. In civil law jurisdictions at present, judges interpret the law to about the same extent as in common law jurisdictions though it may be acknowledged in theory in a different manner than in the common law tradition which directly recognizes the limited power of judges to make law. For instance, in France, the jurisprudence constante of the Supreme Court or the Council of State is equivalent in practice with case law.

In theory, in the French civil law tradition, a judge does not make new law; he or she merely interprets the intents of "the Legislator." The role of interpretation is traditionally approached more conservatively in civil law jurisdictions than in common law jurisdictions. When the law fails to deal with a situation, doctrinal writers and not judges call for legislative reform, though these legal scholars sometimes influence judicial decisionmaking.

10. The Judiciary and Federalism

In law, the judiciary (known as the judicial system or judicature) is the system of courts which administer justice in the name of the sovereign or state, a mechanism for the resolution of disputes. It usually consists of a court of a final appeal (called the 'supreme court' or 'constitutional court') and other lower courts.
The term is also used to refer collectively to the judges, magistrates and other adjudicators who form the core of a judiciary (sometimes referred to as a "bench"), as well as the support personnel who keep the system running smoothly. Under the doctrine of the separation of powers, 'the judiciary is the branch of government primarily responsible for interpreting the law'. It construes the laws enacted by the legislature. A federation (Latin: foedus, 'covenant') is a union comprising a number of partially self-governing states or regions united by a central ("federal") government. In a federation, the self-governing status of the component states is typically constitutionally entrenched and may not be altered by a unilateral decision of the central government.

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The form of government or constitutional structure found in a federation is known as federalism . It can be considered the opposite of another system, the unitary state. The government of Germany with sixteen federated Lnder is an example of a federation, whereas neighboring Austria and its Bundeslnderwas a unitary state with administrative divisions that became federated, and neighboring France by contrast has always been unitary. Federations may be multi-ethnic, or cover a large area of territory, although neither is necessarily the case. Federations are most often founded on an original agreement between a number of sovereign states based on mutual concerns or interests. The initial agreements create a stability that encourages other common interests and each brings the disparate territories closer and gives them all even more common ground. At some time this is recognized and a movement is organized to merge more closely. Other times, especially when common

cultural factors are at play such as ethnicity and language, some of these steps in this pattern are exp ed and compressed.

11. Courts as Protectors of the Individual and the Oppressed

The main role of a court is to provide justice to all. Justice concerns the proper ordering of things and persons within a society. As a concept it has been subject to philosophical, legal, and theological reflection and debate throughout history. A number of important questions surrounding justice have been fiercely debated over the course of western history: What is justice? What does it demand of individuals and societies? What is the proper distribution of wealth and resources in society: equal, meritocratic, according to status, or some other arrangement? There is a myriad of possible answers to these questions from divergent perspectives on the political and philosophical spectrum. According to most theories of justice, it is overwhelmingly important: John Rawls, for instance, claims that "Justice is the first virtue of social institutions, as truth is of systems of thought.": Justice can be thought of as distinct from and more fundamental than benevolence, charity, mercy, generosity or compassion. Studies at UCLA in have indicated that reactions to fairness are "wired" into the brain and that, "Fairness is activating the same part of the brain that responds to food in rats... This is consistent with the notion that being treated fairly satisfies a basic need. Research conducted in at Emory University, Georgia, involving Capuchin Monkeys demonstrated that other cooperative animals also possess such a sense and that "inequality aversion may not be uniquely human." indicating that ideas of fairness and justice may be instinctual in nature.

11.1 Variations of justice

Utilitarianism is a form of consequentialism, where punishment is forward-looking. Justified by the ability to achieve future social benefits resulting in crime reduction, the moral worth of an action is determined by its outcome. Retributive justice regulates proportionate response to crime proven by lawful evidence, so that punishment is justly imposed and considered as morally-correct and fully deserved. The law of retaliation (lex battalions) is a military theory of retributive justice, which says that reciprocity should be equal to the wrong suffered; "life for life, wound for wound, stripe for stripe."

Restorative justice is concerned not so much with retribution and punishment as with (a) making the victim whole and (b) reintegrating the offender into society. This

approach frequently brings an offender and a victim together, so that the offender can better understand the effect his/her offense had on the victim.
Distributive justice is directed at the proper allocation of things - wealth, power, reward, respect - between different people. Oppressive Law exercises an authoritarian approach to legislation which is "totally unrelated to justice", a tyrannical interpretation of law is one in which the population lives under restriction from unlawful legislation. Some theorists, such as the classical Greeks, conceive of justice as a virtuea property of people, and only derivatively of their actions and the institutions they create. Others emphasize actions or institutions, and only derivatively the people who bring them about. The source of justice has variously been attributed to harmony, divine command, natural law, or human creation.

11.2 Justice AsHarmony

In his dialogue Republic, Plato uses Socrates to argue for justice which covers both the just person and the just City State. Justice is a proper, harmonious relationship between the warring parts of the person or city. Hence Plato's definition of justice is that justice is the having and doing of what is one's own. A just man is a man in just the right place, doing his best and giving the precise equivalent of what he has received. This applies both at the individual level and at the universal level. A persons soul has three parts reason, spirit and desire. Similarly, a city has three parts Socrates uses the parable of the chariot to illustrate his point: a chariot works as a whole because the two horses power is directed by the charioteer. Lovers of wisdom philosophers, in one sense of the term should rule because only they understand what is good. If one is ill, one goes to a doctor rather than a quack, because the doctor is expert in the subject of health. Similarly, one should trust ones city to an expert in the subject of the good, not to a mere politician who tries to gain power by giving people what they want, rather than whats good for them. Socrates uses the parable of the ship to illustrate this point: the unjust city is like a ship in open ocean, crewed by a powerful but drunken captain (the common people), a group of untrustworthy advisors who try to manipulate the captain into giving them power over the ships course (the politicians), and a navigator (the philosopher) who is the only one who knows how to get the ship to port. For Socrates, the only way the ship will reach its destination the good is if the navigator takes charge

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11.3 Justice as divine command

Justice as a divine law is commanding , and indeed the whole of morality, is the authoritative command. Killing is wrong and therefore must be punished and if not punished what should be done? There is a famous paradox called the Euthyphro dilemma which essentially asks: is something right because God commands it, or does God command it because it's right? If the former, then justice is arbitrary; if the latter, then morality exists on a higher order than God, who becomes little more than a passer-on of moral knowledge. Some Divine command advocates respond by pointing out that the dilemma is false: goodness is the very nature of God and is necessarily expressed in His commands.

11.4 Justice as natural law

In contrast to the understandings canvassed so far, justice may be understood as a human creation, rather than a discovery of harmony, divine command, or natural law. This claim can be understood in a number of ways, with the fundamental division being between those who argue that justice is the creation of some humans, and those who argue that it is the creation of all humans.

11.5 Justice as authoritative command

According to thinkers including Thomas Hobbes, justice is created by public, enforceable, authoritative rules, and injustice is whatever those rules forbid, regardless of their relation to morality. Justice is created, not merely described or approximated, by the command of an absolute sovereign power. This position has some similarities with divine command theory (see above), with the difference that the state (or other authority) replaces God.

11.6 Justice as trickery

In Republic, the character Thrasymachusargues that justice is the interest of the strongmerely a name for what the powerful or cunning ruler has imposed on the people. Nietzsche, in contrast, argues that justice is part of the slave-morality of the

weak many, rooted in their resentment of the strong few, and intended to keep the noble man down. In Human, All Too Human he states that, "there is no eternal justice."

11.7 Justice as mutual agreement

According to thinkers in the social contract tradition, justice is derived from the mutual agreement of everyone concerned; or, in many versions, from what they would agree to under hypothetical conditions including equality and absence of bias. This account is considered further below, under Justice as fairness.

11.8 Justice as a subordinate value

According to utilitarian thinkers including John Stuart Mill, justice is not as fundamental as we often think. Rather, it is derived from the more basic standard of rightness, consequentialism: what is right is what has the best consequences (usually measured by the total or average welfare caused). So, the proper principles of justice are those which tend to have the best consequences. These rules may turn out to be familiar ones such as keeping contracts; but equally, they may not, depending on the facts about real consequences. Either way, what is important is those consequences, and justice is important, if at all, only as derived from that fundamental standard. Mill tries to explain our mistaken belief that justice is overwhelmingly important by arguing that it derives from two natural human tendencies: our desire to retaliate against those who hurt us, and our ability to put ourselves imaginatively in anothers place. So, when we see someone harmed, we project ourselves into her situation and feel a desire to retaliate on her behalf. If this process is the source of our feelings about justice, that ought to undermine our confidence in them. Utilitarianism.

11.9 Theories of distributive justice

Theories of distributive justice need to answer three questions:

- What goods are to be distributed? Is it to be wealth, power, respect, some combination of these things?
- Between what entities are they to be distributed? Humans (dead, living, future), sentient beings, the members of a single society, nations?

- What is the proper distribution? Equal, meritocratic, according to social status, according to need, based on property rights and non-aggression?
- Distributive justice theorists generally do not answer questions of who has the right to enforce a particular favored distribution. On the other hand, property rights theorists argue that there is no "favored distribution." Rather, distribution should be based simply on whatever distribution results from non-coerced interactions or transactions (that is, transactions not based upon force or fraud).
- This section describes some widely-held theories of distributive justice, and their attempts to answer these questions.

12. Egalitarianism

According to the egalitarian, goods should be distributed equally. This basic view can be elaborated in many different ways, according to what goods are to be distributedwealth, respect, opportunityand what they are to be distributed equally betweenindividuals, families, nations, races, species. Commonly-held egalitarian positions include demands for equality of opportunity and for equality of outcome.

13. Giving people what they deserve

In one sense, all theories of distributive justice claim that everyone should get what they deserve. Theories disagree on the basis for deserts. The main distinction is between theories that argue the basis of just deserts is held equally by everyone, and therefore derive egalitarian accounts of distributive justiceand theories that argue the basis of just deserts is unequally distributed on the basis of, for instance, hard work, and therefore derive accounts of distributive justice by which some should have more than others. This section deals with some popular theories of the second type.

According to meritocratictheories, goods, especially wealth and social status, should be distributed to match individual merit, which is usually understood as some combination of talent and hard work. According to needs-based theories, goods, especially such basic goods as food, shelter and medical care, should be distributed to meet individuals' basic needs for them. Marxism can be regarded as a needs-based theory on some readings of Marx's slogan "from each according to his ability, to each according to his need." According to contribution-based theories, goods should be distributed to match an individual's contribution to the overall social good.

14. Fairness

In his A Theory of Justice, John Rawls used a social contract argument to show that justice, and especially distributive justice, is a form of fairness: an impartial distribution of goods. Rawls asks us to imagine ourselves behind a veil of ignorance which denies us all knowledge of our personalities, social statuses, moral characters, wealth, talents and life plans, and then asks what theory of justice we would choose to govern our society when the veil is lifted, if we wanted to do the best that we could for ourselves. We dont know who in particular we are, and therefore cant bias the decision in our own favour. So, the decision-in-ignorance models fairness, because it excludes selfish bias. Rawls argues that each of us would reject the utilitarian theory of justice that we should maximize welfare (see below) because of the risk that we might turn out to be someone whose own good is sacrificed for greater benefits for others. Instead, we would endorse Rawlss two principles of justice:

- Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
- Social and economic inequalities are to be arranged so that they are both
  - to the greatest benefit of the least advantaged, consistent with the just savings principle, and
  - attached to offices and positions open to all under conditions of fair equality of opportunity.

This imagined choice justifies these principles as the principles of justice for us, because we would agree to them in a fair decision procedure. Rawlss theory distinguishes two kinds of goods liberties and social and economic goods, i.e. wealth, income and power and applies different distributions to them equality between citizens for, equality unless inequality improves the position of the worst off for.

15. Property Rights (non-coercion)/Having the right history

Robert Nozicksinfluential critique of Rawls argues that distributive justice is not a matter of the whole distribution matching an ideal pattern, but of each individual entitlement having the right kind of history. It is just that a person has some good (especially, some property right) if and only if they came to have it by a history made up entirely of events of two kinds:

> Just acquisition, especially by working on unowned things; and Just transfer, that is free gift, sale or other agreement, but not theft (i.e. by force or fraud).

If the chain of events leading up to the person having something meets this criterion, they are entitled to it: that they possess it is just, and what anyone else does or doesn't have or need is

irrelevant. On the basis of this theory of distributive justice, Nozick argues that all attempts to redistribute goods according to an ideal pattern, without the consent of their owners, are theft. In particular, redistributive taxation is theft.

Some property rights theorists also take a consequential view of distributive justice and argue that property rights based justice also has the effect of maximizing the overall wealth of an economic system. They explain that voluntary (non-coerced) transactions always have a property called paretoefficiency. A paretoefficient transaction is one in which at least one party ends up better off and neither party ends up worse off. The result is that the world is better off in an absolute sense and no one is worse off. Such consequential property rights theorists argue that respecting property rights maximizes the number of pareto efficient transactions in the world and minimized the number of non-paretoefficient transactions in the world (i.e. transactions where someone is made worse off). The result is that the world will have generated the greatest total benefit from the limited, scarce resources available in the world. Further, this will have been accomplished without taking anything away from anyone by coercion.

16. Welfare-maximization

According to the utilitarian, justice requires the maximization of the total or average welfare across all relevant individuals. This may require sacrifice of some for the good of others, so long as everyones good is taken impartially into account. Utilitarianism, in general, argues that the standard of justification for actions, institutions, or the whole world, is impartial welfare consequential, and only indirectly, if at all, to do with rights, property, need, or any other non-utilitarian criterion. These other criteria might be indirectly important, to the extent that human welfare involves them. But even then, such demands as human rights would only be elements in the calculation of overall welfare, not uncrossable barriers to action.

17. Courts as Passive Arbiters

Courts also act as passive arbitrators. The following theories of retributive justice are concerned with punishment for wrongdoing, and need to answer three questions:

why punish?

who should be punished?

what punishment should they receive?

This section considers the two major accounts of retributive justice, and their answers to these questions. Utilitarian theories look forward to the future consequences of punishment, while retributive theories look back to particular acts of wrongdoing, and attempt to balance them with deserved punishment.

18. Utilitarianism

According to the utilitarian, as already noted, justice requires the maximization of the total or average welfare across all relevant individuals. Punishment is bad treatment of someone, and therefore cant be good in itself, for the utilitarian. But punishment might be a necessary sacrifice which maximizes the overall good in the long term, in one or more of three ways:

- Deterrence. The credible threat of punishment might lead people to make different choices; well-designed threats might lead people to make choices which maximize welfare.
- Rehabilitation. Punishment might make bad people into better ones. For the utilitarian, all that bad person can mean is person whos likely to cause bad things (like suffering) . So, utilitarianism could recommend punishment that changes someone such that they are less likely to cause bad things.
- Security/Incapacitation. Perhaps there are people who are irredeemable causers of bad things. If so, imprisoning them might maximize welfare by limiting their opportunities to cause harm.

So, the reason for punishment is the maximization of welfare, and punishment should be of whomever, and of whatever form and severity, are needed to meet that goal. Worryingly, this may sometimes justify punishing the innocent, or inflicting disproportionately severe punishments, when that will have the best consequences overall (perhaps executing a few suspected shoplifters live on television would be an effective deterrent to shoplifting, for instance). It also suggests that punishment might turn out never to be right, depending on the facts about what actual consequences it has.

18.1Retributivism

The retributivist will think the utilitarian's argument disastrously mistaken. If someone does something wrong, we must respond to it, and to him or her, as an individual, not as a part of a calculation of overall welfare. To do otherwise is to disrespect him or her as an individual human being. If the crime had victims, it is to disrespect them, too. Wrongdoing must be balanced or made good in some way, and

so the criminal deserves to be punished. Retributivismemphasizes retribution payback rather than maximization of welfare. Like the theory of distributive justice as giving everyone what they deserve (see above), it links justice with desert. It says that all guilty people, and only guilty people, deserve appropriate punishment. This matches some strong intuitions about just punishment: that it should be proportional to the crime, and that it should be of only and all of the guilty. However, it is sometimes argued that retributivism is merely revenge in disguise. Despite this criticism, there are numerous differences between retribution and revenge: the former is impartial, has a scale of appropriateness and corrects a moral wrong, whereas the latter is personal, unlimited in scale, and often corrects a slight.

18.2 Institutions

In an imperfect world, institutions are required to instantiate ideals of justice, however imperfectly. These institutions may be justified by their approximate instantiation of justice, or they may be deeply unjust when compared with ideal standards consider the institution of slavery. Justice is an ideal which the world fails to live up to, sometimes despite good intentions, sometimes disastrously. The question of institutive justice raises issues of legitimacy, procedure, codification and interpretation, which are considered by legal theorists and by philosophers of law. Another definition of justice is an independent investigation of truth. In a court room, lawyers, the judge and the jury are supposed to be independently investigating the truth of an alleged crime. In physics, a group of physicists examine data and theoretical concepts to consult on what might be the truth or reality of a phenomenon.

18.3 The Judge

A judge, or arbiter of justice, is a lead official who presides over a court of law, which is operated by the local, state, and/or federal government(s). The powers, functions, method of appointment, discipline, and training of judges vary widely across different jurisdictions. The judge is like an umpire in a game and conducts the trial impartially and in an open court. The judge hears all the witnesses and any other evidence presented by the prosecution and the defence. If the accused is convicted, then the judge pronounces the sentence.

18.4Judicial powers

In common law countries, such as the United Kingdom and United States, and those with roots in the Commonwealth of Nations, judges have a number of powers which are not known to exist, or are not acknowledged to exist in civil law legal systems, which collectively make the judiciary a more powerful political force than in civil law countries. One of these powers is the "contempt of court" power. In a noncommonlaw system, a judge typically has the power to summarily punish with a fine or imprisonment any misconduct which takes place in the courtroom, and to similarly punish violations of the court's orders, after a hearing, when they take place outside the courtroom. This power, in turn, may be used by common law judges to enforce orders for injunctive relief, which is a court order to take or refrain from taking some particular act, directed at the individual who must do so. This power is a vestige of authority that members of the nobility had when they personally presided over disputes between their subjects. It has the effect of giving common law country judges great power to fashion remedies, such as school desegregation orders and restraining orders directed at individuals. Civil law judges, in contrast, outside of specialized courts with narrowly delineated powers, generally lack contempt power or the power to impose injunctive relief.he judgespeople that are innocent or guilty

Another power of every judge in the United States, generally right down to the level of the magistrate, is the power to declare a law unconstitutional and invalid, at least as applied in a particular case. In contrast, most civil law countries limit this power to a special constitutional court, and all other judges are required to follow the enacted laws, even if the judge personally believes those laws to be unconstitutional, in the absence of an order from the constitutional court. However, if a person believes that a law applied against them in court is unconstitutional, they can apply for consideration in the constitutional court and, if the law is indeed declared unconstitutional, file an appeal against the ruling based on the now-invalidated law.

Similarly, in the common law system, cases in which the government administration is at issue, known as public law cases, for example, suits claiming violations of civil rights by government officials, are often heard by the same judges who handle criminal cases and disputes between private individuals. In contrast, in civil law countries, only designated judges or quasi-judges (such as the Conseil d'tatin France) can hear public law cases, and ordinary judges can hear only criminal cases and cases

involving private parties. Judges in a common law system are also empowered, and for the most part required, to make law guided by past precedent, or to choose to ignore past precedent as no longer applicable, based on a concept known as "stare decisis" ("to stand by what has been decided"), in cases where no statute or prior case clearly mandates a particular result, and in cases where past precedents, for some reason, no longer appear to provide firm guidance as to the current state of the law. For example, in a case of "first impression" which has never arisen in a publicly reported case in a state, a judge must choose which rule will apply, usually informed by decisions which have been made in similar cases in other jurisdictions and based on the public policies involved. Judges in civil law systems, in contrast, are strictly forbidden from "making law" and, as a general rule, are not bound by or even encouraged to refer to precedents established in prior similar cases.

Civil law judges, likewise, have some powers not usually held by common law judges. Most importantly, a common law judge is usually required to base a decision almost exclusively on the evidence provided by the parties to a case during the course of a trial, or a hearing, or in documents filed with the court. In contrast, a civil law judge frequently has the authority to investigate the facts of a case independently of evidence provided by the parties to that case, in what is known as an "inquisitorial" role. All judges must sign a judicial oath which is a fiduciary undertaking or a promise of duty of care. Yet the moment it is signed, the judge is protected with judicial immunity which prevents anyone from testing the obligation the judge undertook in the oath. Arguments against the judicial immunity say this law is allowing judges a special method of escape for claims for breach of fiduciary duty which is something no other fiduciary apart from politicians can obtain.

18.5Symbols of office

Being a judge is usually a prestigious and solemn position in society. A variety of traditions have become associated with the occupation. In many parts of the world, judges wear long robes (usually in black or red) and sit on an elevated platform during trials (known as the bench). In some countries, especially in the Commonwealth of Nations, judges sometimes wear wigs. The long wig often associated with judges is now reserved for ceremonial occasions, although it was part of the standard attire in previous centuries. A short wig resembling but not identical to a barrister's wig would

be worn in court. This tradition, however, is being phased out in Britain in non-criminal courts. American judges frequently wear black robes. American judges have ceremonial gavels, although American judges have court deputies or bailiffs and "contempt of court" power as their main devices to maintain decorum in the courtroom. However, in some Western states, like California, judges did not always wear robes and instead wore everyday clothing. Today, some members of state supreme courts, such as the Maryland Court of Appeals wear distinct dress.

In Section 2 of this course you will cover these topics:

- The Criminal Justice System

Topic : The Criminal Justice System

Topic Objective:

At the end of this topic student would be able to:

- Understand the concept of Policing
- Learn About The Concept of courts
- Learn About The Concept of corrections

Definition/Overview:

Criminal Justice System: A crime is defined in Blacks Law Dictionary as an act done in violation of those duties that an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public. A crime is defined by statute. The criminal justice system is a network of courts and tribunals that enforce criminal laws. Both federal and state laws divide criminal conduct into two categories. Misdemeanors range from traffic violations to small thefts. Felonies are major crimes, such as homicide and rape, with penalties ranging from fine to imprisonment or both. Federal courts consist of three levels: District, Appeals and Supreme. A suspect is formally charged in an indictment, or an information or complaint. During an arraignment the accused enters a plea. Motions may be filed before trial, such as Motion for Discovery and Inspection, Motion for Bill of Particulars, Motion for Change of Venue, Motion to Sever, Motions to Suppress Evidence or to Dismiss the Indictment. A jury panel is questioned in voir dire examination. The parties have a right to challenge a certain number of jurors from the jury panel. These are called preemptory challenges. Evidence is presented through direct

examination and cross-examination. After closing arguments, a jury charge is presented to the jury, which then deliberates and presents a verdict. Sentences can be either probation or imprisonment, or a combination, called a split sentence. Criminal cases are appealed to the U.S. Court of Appeals.

Key Points:

1. Policing

The first contact an offender has with the criminal justice system is usually with the police (or law enforcement) who investigate and make the arrest. Police or law enforcement agencies and officers are empowered to use force and other forms of legal coercion and legal means to effect public and social order. The term is most commonly associated with police departments of a state that are authorized to exercise the police power of that state within a defined legal or territorial area of responsibility. The word comes from the Latin politia("civil administration"), which itself derives from the Ancient Greekπόλις, for polis ("city"). The first police force comparable to the present-day police was established in 1667 under King Louis XIV in France, although modern police usually trace their origins to the 1800 establishment of the Marine Police in London, the Glasgow Police, and the Napoleonic police of Paris. The notion that police are primarily concerned with enforcing criminal law was popularized in the 1930s with the rise of the Federal Bureau of Investigation as the pre-eminent "law enforcement agency" in the United States; this, however, has constituted only a small portion of policing activity. Policing has included an array of activities in different contexts, but the predominant ones are concerned with order maintenance and the provision of services.

2. Courts

The courts serve as the venue where disputes are then settled and justice is administered. With regard to criminal justice, there are a number of critical people in any court setting. These critical people are referred to as the courtroom work group and include both professional and nonprofessional individuals. These include the judge, prosecutor, and the defense attorney. The judge, or magistrate, is a person, elected or appointed, who is knowledgeable in the law, and whose function is to objectively administer the legal proceedings and offer a final decision to dispose of a case.

In the U.S. and in a growing number of nations, guilt or innocence is decided through the adversarial system. In this system, two parties will both offer their version of events and

argue their case before the court (sometimes before a judge or panel of judges, sometimes before a jury). The case should be decided in favor of the party who offers the most sound and compelling arguments based on the law as applied to the facts of the case.

The prosecutor, or district attorney, is a lawyer who brings charges against a person, persons or corporate entity. It is the prosecutor's duty to explain to the court what crime was committed and to detail what evidence has been found which incriminates the accused. The prosecutor should not be confused with a plaintiff or plaintiff's counsel. Although both serve the function of bringing a complaint before the court, the prosecutor is a servant of the state who makes accusations on behalf of the state in criminal proceedings, while the plaintiff is the complaining party in civil proceedings.

A defense attorney counsels the accused on the legal process, likely outcomes for the accused and suggests strategies. The accused, not the lawyer, has the right to make final decisions regarding a number of fundamental points, including whether to testify, and to accept a plea offer or demand a jury trial in appropriate cases. It is the defense attorney's duty to represent the interests of the client, raise procedural and evidentiary issues, and hold the prosecution to its burden of proving guilt beyond a reasonable doubt. Defense counsel may challenge evidence presented by the prosecution or present exculpatory evidence and argue on behalf of their client. At trial, the defense attorney may attempt to offer a rebuttal to the prosecutor's accusations.

In the U.S., an accused person is entitled to a government-paid defense attorney if he or she is in jeopardy of losing their life and/or liberty. Those who cannot afford a private attorney may be provided one by the state. Historically, however, the right to a defense attorney has not always been universal. For example, in Tudor England criminals accused of treason were not permitted to offer arguments in their defense. In many jurisdictions, there is no right to an appointed attorney, if the accused is not in jeopardy of losing his or her liberty. The final determination of guilt or innocence is typically made by a third party, who is supposed to be disinterested. This function may be performed by a judge, a panel of judges, or a jury panel composed of unbiased citizens. This process varies depending on the laws of the specific jurisdiction. In some places the panel (be it judges or a jury) is required to issue a unanimous decision, while in others only a majority vote is required. In America, this process depends on the state, level of court, and even agreements between the prosecuting and defending parties. Other nations do not use juries at all, or rely on theological or military authorities to issue verdicts.

Some cases can be disposed of without the need for a trial. In fact, the vast majority are. If the accused confesses their guilt, a shorter process may be employed and a judgementmay be rendered more quickly. Some nations, such as America, allow plea bargaining in which the accused pleads guilty, nolo contendre or not guilty, and may accept a diversion program or reduced punishment, where the prosecution's case is weak or in exchange for the cooperation of the accused against other people. This reduced sentence is sometimes a reward for sparing the state the expense of a formal trial. Many nations do not permit the use of plea bargaining, believing that it coerces innocent people to plead guilty in an attempt to avoid a harsh punishment. The entire trial process, whatever the country, is fraught with problems and subject to criticism. Bias and discrimination form an ever-present threat to an objective decision. Any prejudice on the part of the lawyers, the judge, or jury members threatens to destroy the court's credibility. Some people argue that the often Byzantine rules governing courtroom conduct and processes restrict a layman's ability to participate, essentially reducing the legal process to a battle between the lawyers. In this case, the criticism is that the decision is based less on sound justice and more on the lawyer's eloquence and charisma. This is a particular problem when the lawyer performs in a substandard manner. The jury process is another area of frequent criticism, as there are few mechanisms to guard against poor judgement or incompetence on the part of the layman jurors.

3. Corrections

Offenders are then turned over to the correctional authorities, from the court system after the accused has been found guilty. Like all other aspects of criminal justice, the administration of punishment has taken many different forms throughout history. Early on, when civilizations lacked the resources necessary to construct and maintain prisons, exile and execution were the primary forms of punishment. Historically shame punishments and dismemberment have also been used as forms of censure.

The most publicly visible form of punishment in the modern era is the prison. Prisons may serve as detention centers for prisoners after trial. For containment of the accused, jails are used. Early prisons were used primarily to sequester criminals and little thought was given to living conditions within their walls. In America, the Quaker movement is commonly credited with establishing the idea that prisons should be used to reform criminals. This can also be seen as a critical moment in the debate regarding the purpose of punishment.

Punishment (in the form of prison time) may serve a variety of purposes. First, and most obviously, the incarceration of criminals removes them from the general population and inhibits their ability to perpetrate further crimes. Many societies also view prison terms as a

form of revenge or retribution, and any harm or discomfort the prisoner suffers is "payback" for the harm they caused their victims. A new goal of prison punishments is to offer criminals a chance to be rehabilitated. Many modern prisons offer schooling or job training to prisoners as a chance to learn a vocation and thereby earn a legitimate living when they are returned to society. Religious institutions also have a presence in many prisons, with the goal of teaching ethics and instilling a sense of morality in the prisoners. If a prisoner is released before his time is served, he is released as a parole. This means that they are released, but the restrictions are greater than that of someone on probation.

There are numerous other forms of punishment which are commonly used in conjunction with or in place of prison terms. Monetary fines are one of the oldest forms of punishment still used today. These fines may be paid to the state or to the victims as a form of reparation. Probation and house arrest are also sanctions which seek to limit a person's mobility and their opportunities to commit crimes without actually placing them in a prison setting. Many jurisdictions may require some form of public or community service as a form of reparations for lesser offenses.

Execution or capital punishment is still used around the world. Its use is one of the most heavily debated aspects of the criminal justice system. Some societies are willing to use executions as a form of political control, or for relatively minor misdeeds. Other societies reserve execution for only the most sinister and brutal offenses. Others still have outlawed the practice entirely, believing the use of execution to be excessively cruel or hypocritical.

4. Academic discipline

Criminal justice is distinct from the field of criminology, which involves the study of crime as a social phenomena, causes of crime, criminal behavior, and other aspects of crime. Criminal justice emerged as an academic discipline in the 1920s, beginning with Berkeley police chief August Vollmer who established a criminal justice program at the University of California, Berkeley in 1916. Vollmer's work was carried on by his student, O.W. Wilson, who led efforts to professionalize policing and reduce corruption. Other programs were established in the United States at Indiana University, Michigan State University, San Jose State University, and the University of Washington. As of 1950, criminal justice students were estimated to number less than 1,000. Until the 1960s, the primary focus of criminal justice in the United States was on policing and police science.

Throughout the 1960s and 1970s, crime rates soared and social issues took center stage in the public eye. A number of new laws and studies focused federal resources on researching new

approaches to crime control. The Warren Court (the Supreme Court under Chief Justice Earl Warren), issued a series of rulings which redefined citizen's rights and substantially altered the powers and responsibilities of police and the courts. The Civil Rights Era offered significant legal and ethical challenges to the status quo.

In the late 1960s, with the establishment of the Law Enforcement Assistance Administration (LEAA) and associated policy changes that resulted with the Omnibus Crime Control and Safe Streets Act of 1968. The LEAA provided grants for criminology research, focusing on social aspects of crime. By the 1970s, there were 729 academic programs in criminology and criminal justice in the United States. Largely thanks to the Law Enforcement Education Program, criminal justice students numbered over 100,000 by 1975. Over time, scholars of criminal justice began to include criminology, sociology, and psychology, among others, to provide a more comprehensive view of the criminal justice system and the root causes of crime. Criminal justice studies now combine the practical and technical policing skills with a study of social deviance as a whole.

5. History

The modern criminal justice system has evolved since ancient times, with new forms of punishment, added rights for offenders and victims, and policing reforms. These developments have reflected changing customs, political ideals, and economic conditions. In ancient times through the Middle Ages, exile was a common form of punishment. During the Middle Ages, payment to the victim (or their families), known as wergild, was another common punishment, including for violent crimes. For those who could not afford to buy their way out of punishment, harsh penalties included various forms of corporal punishment. These included mutilation, branding, and flogging, as well as execution.

Though a prison, Le Stinche, existed as early as the 14th century in Florence, Italy, incarceration was not widely used until the 19th century. Correctional reform in the United States was first initiated by William Penn, towards the end of the 17th century. For a time, Pennsylvania's criminal code was revised to forbid torture and other forms of cruel punishment, with jails and prisons replacing corporal punishment. These reforms were reverted, upon Penn's death in 1718. Under pressure from a group of Quakers, these reforms were revived in Pennsylvania toward the end of the 18th century, and led to a marked drop in Pennsylvania's crime rate. Patrick Colquhoun, Henry Fielding and others led significant reforms during the late eighteenth and early nineteenth centuries.

6. Modern police

The first modern police force is commonly said to be the London Metropolitan Police, established in 1829 by Sir Robert Peel, which promoted the preventive role of police as a deterrent to urban crime and disorder. In the United States, police departments were first established in Boston in 1838, and New York City in 1844. Early on, police were not respected by the community, as corruption was rampant. In the 1920s, led by Berkeley, California police chief, August Vollmer and O.W. Wilson, police began to professionalize, adopt new technologies, and place emphasis on training and professional qualifications of new hires. Despite such reforms, police agencies were led by highly autocratic leaders, and there remained a lack of respect between police and the community. Following urban unrest in the 1960s, police placed more emphasis on community relations, enacted reforms such as increased diversity in hiring, and many police agencies adopted community policing strategies. In the 1990s, CompStatwas developed by the New York Police Department as an information-based system for tracking and mapping crime patterns and trends, and holding police accountable for dealing with crime problems. CompStathas since been replicated in police departments across the United States and around the world, with problem-oriented policing, intelligence-led policing, and other information-led policing strategies also adopted.

In Section 3 of this course you will cover these topics:
Substantive Civil Law

Topic : Substantive Civil Law

Topic Objective:

At the end of this topic student would be able to:

Understand the concept of tort
Learn About The Concept of Contract Law
Lean about Real Property

Definition/Overview:

Substantive civil law: Substantive civil law is a major part of law that deals with torts, contracts Property law and Wills. Torts are broadly defined as acts or omissions to act that causelegal harm to someone, committed under circumstances where the law imposes a duty

to refrain from causing such harm. Some torts such as fraud arise out of a contractual relationship. Torts are divided into intentional torts and negligence torts. Intentional torts may be battery, assault, falseimprisonment, intentional infliction of emotional distress, trespass, and conversion. Negligence torts are the basis of the majority of modern lawsuit. Strict-liability torts apply especially to animals, or product liability. Nuisance, deceit or fraud are also classified as torts. Damages for torts are compensatory (actual) or punitive.

International law

In an era of political and economic globalization, international law is becoming increasingly important. Closest to home is probably immigration law as well as wage and hour rules promulgated by the Labor Department.

Key Points:

Contracts require an offer and an acceptance. They can be express or implied in fact or implied in law (quasi contractual). Consideration is something of value or an act that a party performs or promises to perform. Contracts of adhesion refer to standardized contracts, usually preprinted, to which the weaker party usually a buyer must agree if the weaker party wishes to do business with the stronger party. Real Property stems largely from the common law of England dating back to the Norman Conquest. Various types of ownership interests are known as estates in land. Fee simple is the most common. Easement is a right to make specified use of the land of another, for instance, a utility easement. Limited property interests would be mineral rights, water rights and air rights. Co-ownership can exist through tenancy in common, joint tenancy or tenancy by the entireties. Co-ownership is also created through mortgages (deeds of trust). Under a lease, the landlord provides possession of the premises with quiet enjoyment. A Will is a written declaration of a persons intent to distribute his or her property after death. Wills can be made three ways. A testator is the person who executes a will. If that person is a female, the title is testratrix. Intestate succession refers to property passing to descendants without a will. If no heir can be found, the property passes to the state. Independent administration can be conducted with or without court supervision. A federal estate tax is applied to the estate remaining after all debts have been paid And certain trusts have been funded. Some states also impose inheritance taxes. Statutory law is derived by the numerous agencies at federal and local levels and affects the law practice more directly than common law. Alternative dispute resolution, known as ADR,

is found in four methods: self-resolution; by expert intervention; decision by neutral third party; or finally by court authority.

1. Torts

Tort law is the name given to a body of law that addresses, and provides remedies for, civil wrongs not arising out of contractual obligations. A person who suffers legal damages may be able to use tort law to receive compensation from someone who is legally responsible, or "liable," for those injuries. Generally speaking, tort law defines what constitutes a legal injury and establishes the circumstances under which one person may be held liable for another's injury. Torts cover intentional acts and accidents. For instance, Alice throws a ball and accidentally hits Brenda in the eye. Brenda may sue Alice for losses occasioned by the accident (e.g., costs of medical treatment, lost income during time off work, pain and suffering, etc.). Whether or not Brenda wins her suit depends on if she can prove Alice engaged in tortiousconduct. Here, Brenda would attempt to prove Alice had a duty and failed to exercise the standard of care which a reasonable person would render in throwing the ball. One of the main topics of the substance of tort law is determining the "standard of care" - a legal phrase that means distinguishing between when conduct is or is not tortious. Put another way, the big issue is whether a person suffers the loss from his own injury, or whether it gets transferred to someone else. Going back to the example above, if Alice threw the ball at Brenda on purpose, Brenda could sue for the intentional tort of battery. If it was an accident, Brenda must prove negligence. To do this, Brenda must show that her injury was reasonably foreseeable, that Alice owed Brenda a duty of care not to hit her with the ball, and that Alice failed to meet the standard of care required. In much of the western world, the touchstone of tort liability is negligence. If the injured party cannot prove that the person believed to have caused the injury acted with negligence, at the very least, tort law will not compensate them. Tort law also recognizes intentional torts and strict liability, which apply to defendants who engage in certain actions.

In tort law, injury is defined broadly. Injury does not just mean a physical injury, such as where Brenda was struck by a ball. Injuries in tort law reflect any invasion of any number of individual "interests." This includes interests recognized in other areas of law, such as property rights. Actions for nuisance and trespass to land can arise from interfering with rights in real property. Conversion and trespass to chattels can protect interference with movable property. Interests in prospective economic advantages from contracts can also be

injured and become the subject of tort actions. A number of situations caused by parties in a contractual relationship may nevertheless be tort rather than contract claims, such as breach of fiduciary duty. Tort law may also be used to compensate for injuries to a number of other individual interests that are not recognized in property or contract law, and are intangible. This includes an interest in freedom from emotional distress, privacy interests, and reputation. These are protected by a number of torts such as infliction, privacy torts, and defamation. Defamation and privacy torts may, for example, allow a celebrity to sue a newspaper for publishing an untrue and harmful statement about him. Other protected interests include freedom of movement, protected by the intentional tort of false imprisonment.

The equivalent of tort in civil law jurisdictions is delict. The law of torts can be categorisedas part of the law of obligations, but unlike voluntarily assumed obligations (such as those of contract, or trust), the duties imposed by the law of torts apply to all those subject to the relevant jurisdiction. To behave in 'tortious' manner is to harm another's body, property, or legal rights, or possibly, to breach a duty owed under statute. One who commits a tortious act is called a "tortfeasor". Torts is one of the American Bar Association mandatory first year law school courses.

Etymology

Middle English, "injury", from Anglo-French, from Medieval Latin tortum, from Latin, neuter of tortus"twisted", from past participle of torquēre. It is in contrast to the word rectum which means 'straight'.

Categories of torts

- Torts may be categorised in a number of ways: one such is to divide them into Negligence Torts, and Intentional Torts.

- The dominant action in tort is negligence. The tort of negligence provides a cause of action leading to damages, or to injunctive relief, in each case designed to protect legal rights, including those of personal safety, property, and, in some cases, intangible economic interests. Negligence actions include claims arising primarily from automobile accidents and personal injury accidents of many kinds, including clinical negligence. Product liability cases may also be considered

negligence actions, but there is frequently a significant overlay of additional statutory content.

o Among intentional torts may be certain torts arising out of the occupation or use of land. One such is the tort of nuisance, which connotes strict liability for a neighbor who interferes with another's enjoyment of his real property. Trespass allows owners to sue for incursions by a person (or his structure, for example an overhanging building) on their land. There is a tort of false imprisonment, and a tort of defamation, where someone makes an unsupportable allegation represented to be factual which damages the reputation of another.

o Workers' compensation laws were a legislative response to the common law torts doctrine placing limits on the extent to which employees could sue their employers in respect of injuries sustained during employment.

Negligence

Negligence is a tort which depends on the existence of a breach of duty of care owed by one person to another. One well-known case is Donoghue v. Stevenson where Mrs. Donoghue consumed part of a drink containing a decomposed snail while in a public bar in Paisley, Scotland and claimed that it had made her ill. The snail was not visible, as the bottle of ginger beer in which it was contained was opaque. Neither her friend, who bought it for her, nor the shopkeeper who sold it were aware of its presence. The manufacturer was Mr. Stevenson, whom Mrs. Donoghue sued for damages for negligence. She could not sue Mr. Stevenson for damages for breach of contract because there was no contract between them. The majority of the members of the House of Lords agreed (3-2) that Mrs. Donoghue had a valid claim, but disagreed as to why such a claim should exist. Lord MacMillan thought this should be treated as a new product liability case. Lord Atkin argued that the law should recognisea unifying principle that we owe a duty of reasonable care to our neighbors. He quoted the Bible in support of his argument, specifically the general principle that "thou shalt love thy neighbor."
The elements of negligence are:

Duty of care

Breach of that duty
Breach being a proximate or not too remote a cause, in law
Breach causing harm in fact

Statutory torts

A statutory tort is like any other, in that it imposes duties on private or public parties, however they are created by the legislature, not the courts. One example is in consumer protection, with the Product Liability Directive in the European Union, where businesses making defective products that harm people must pay for any damage resulting. Liability for defective products is strict in most jurisdictions. The theory of risk spreading provides support for this approach. Since manufacturers are the 'cheapest cost avoiders', because they have a greater chance to seek out problems, it makes sense to give them the incentive to guard against product defects.
Another example is the Occupiers' Liability Acts in the UK whereby a person, such as a shopowner, who invites others onto land, or has trespassers, owes a minimum duty of care for people's safety. One early case was Cooke v Midland Great Western Railway of Ireland, where Lord MacNaughton felt that children who were hurt whilst looking for berries on a building site, should have some compensation for their unfortunate curiosity. Statutory torts also spread across workplace health and safety laws and health and safety in food produce.
The concept of statutory torts is not held throughout all common-law countries, however. Courts in both the United States and Canada have rejected the concept that a statutory duty can be the basis of a private cause of action, absent a specific provision in statute authorising such a cause of action.

Nuisance

Legally, the term nuisance is traditionally used in three ways: (1) to describe an activity or condition that is harmful or annoying to others (e.g., indecent conduct, a rubbish heap or a smoking chimney); (2) to describe the harm caused by the before-mentioned activity or condition (e.g., loud noises or objectionable odors); and (3) to describe a legal liability that arises from the combination of the two. The law of nuisance was created to stop such bothersome activities or conduct when they unreasonably interfered either with the rights of other private landowners (i.e.,

private nuisance) or with the rights of the general public (i.e., public nuisance).
The tort of nuisance allows a claimant (formerly plaintiff) to sue for most acts that interfere with their use and enjoyment of their land. A good example of this is in the case of Jones v Powell(1629). A brewery made stinking vapors which wafted onto neighbors' property, damaging his papers. As he was a landowner, the neighbor sued in nuisance for this damage. But Whitelocke J, speaking for the Court of the King's Bench, said that because the water supply was contaminated, it was better that the neighbor's documents were risked. He said "it is better that they should be spoiled than that the common wealth stand in need of good liquor." Nowadays, interfering with neighbors' property is not looked upon so kindly. Nuisance deals with all kinds of things that spoil a landowner's enjoyment of his property.
A subset of nuisance is known as the rule in Rylands v. Fletcher where a dam burst into a coal mine shaft. So a dangerous escape of some hazard, including water, fire, or animals means strict liability in nuisance. This is subject only to a remoteness cap, familiar from negligence when the event is unusual and unpredictable. This was the case where chemicals from a factory seeped through a floor into the water table, contaminating East Anglia's reservoirs.
Free market environmentalists would like to expand tort damage claims into pollution (i.e. toxic torts) and environmental protection.

Defamation

Defamation is tarnishing the reputation of someone; it is in two parts, slander and libel. Slander is spoken defamation and libel is printed and broadcast defamation, both share the same features. Defaming someone entails making a factual assertion for which evidence does not exist. Defamation does not affect or hinder the voicing of opinions, but does occupy the same fields as rights to free speech in the United States Constitution's First Amendment, or the European Convention's Article 10. Related to defamation in the U.S. are the actions for misappropriation of publicity, invasion of privacy, and disclosure. Abuse of process and malicious prosecution are often classified as dignitary torts as well.

Intentional torts

Intentional torts are any intentional acts that are reasonably foreseeable to cause harm

to an individual, and that do so. Intentional torts have several subcategories, including tort(s) against the person, including assault, battery, false imprisonment, intentional infliction of emotional distress, and fraud. Property torts involve any intentional interference with the property rights of the claimant. Those commonly recognized include trespass to land, trespass to chattels, and conversion.

Economic torts

Economic torts protect people from interference with their trade or business. The area includes the doctrine of restraint of trade and has largely been submerged in the twentieth century by statutory interventions on collective labour law and modern antitrust or competition law. The "absence of any unifying principle drawing together the different heads of economic tort liability has often been remarked upon."
Two cases demonstrated economic tort's affinity to competition and labor law. In Mogul Steamship Co. Ltd. the plaintiff argued he had been driven from the Chinese tea market by competitors at a 'shipping conference' that had acted together to under price his company. But this cartel was ruled lawful and "nothing more [than] a war of competition waged in the interest of their own trade." Nowadays, this would be considered a criminal cartel. In labor law the most notable case is Taff Vale Railway v. Amalgamated Society of Railway Servants. The House of Lords thought that unions should be liable in tort for helping workers to go on strike for better pay and conditions. But it riled workers so much that it led to the creation of the British Labour Party and the Trade Disputes Act 1906 Further torts used against unions include conspiracy, interference with a commercial contract or intimidation.
Through a recent development in common law, beginning with Hedley Byrne v Heller in 1964 a victim of the tort of negligent misstatement may recover damages for pure economic loss caused by detrimental reliance on the statement. Misrepresentation is a tort as confirmed by Bridge LJ in Howard Marine and Dredging Co. Ltd. v A Ogden & Sons.

Competition law

Modern competition law is an important method for regulating the conduct of businesses in a market economy. A major subset of statutory torts, it is also called 'anti-trust' law, especially in the United States, articles 81 and 82 of the Treaty of the

European Union, as well as the Clayton and Sherman Acts in the U.S., which create duties for undertakings, corporations and businesses not to distort competition in the marketplace. Cartels are forbidden on both sides of the Atlantic. So is the abuse of market power by monopolists, or the substantial lessening of competition through a merger, acquisition, or concentration of enterprises. A huge issue in the EU is whether to follow the U.S. approach of private damages actions to prevent anti-competitive conduct.

Vicarious liability

The word 'vicarious' derives from the Latin for 'change' or 'alternation' or 'stead' and in tort law refers to the idea of one person being liable for the harm caused by another, because of some legally relevant relationship. An example might be a parent and a child, or an employer and an employee. You can sue an employer for the damage to you by their employee, which was caused 'in the course of employment.' For example, if a shop employee spilled cleaning liquid on the supermarket floor, one could sue the employee who actually spilled the liquid, or sue the employers. In the aforementioned case, the latter option is more practical as they are more likely to have more money. The law replies "since your employee harmed the claimant in the course of his employment, you bear responsibility for it, because you have the control to hire and fire him, and reduce the risk of it happening again." There is considerable academic debate about whether vicarious liability is justified on no better basis than the search for a solvent defendant, or whether it is well founded on the theory of efficient risk allocation.

Defenses

A successful defense absolves the defendant from full or partial liability for damages. Apart from proof that there was no breach of duty, there are three principal defences to tortious liability.

Consent

This is Latin for "to the willing, no injury is done". It operates when the claimant either expressly or implicitly consents to the risk of loss or damage. For example, if a

spectator at an ice hockey match is injured when a player strikes the puck in the ordinary course of play, causing it to fly out of the rink and hit him or her, this is a foreseeable event and spectators are assumed to accept that risk of injury when buying a ticket. A slightly more limited defense may arise where the defendant has been given a warning, whether expressly to the claimant or by a public notice, sign or otherwise, that there is a danger of injury. The extent to which defendants can rely on notices to exclude or limit liability varies from country to country. This is an issue of policy as to whether (prospective) defendants should not only warn of a known danger, but also take active steps to fence the site and take other reasonable precautions to prevent the known danger from befalling those foreseen to be at risk.

Contributory negligence

This is either a mitigatory defense or, in the United States, it may be an absolute defense. When used as a mitigatorydefense, it is often known in the U.S. as comparative negligence. Under comparative negligence a plaintiff/claimant's award is reduced by the percentage of contribution made by the plaintiff to the loss or damage suffered. Thus, in evaluating a collision between two vehicles, the court must not only make a finding that both drivers were negligent, but it must also apportion the contribution made by each driver as a percentage, e.g. that the blame between the drivers is 20% attributable to the plaintiff/claimant: 80% to the defendant. The court will then quantify the damages for the actual loss or damage sustained, and then reduce the amount paid to the plaintiff/claimant by 20%. While contributory negligence retains a significant role, an increasing number of jurisdictions, particularly within the United States, are evolving toward a regime of comparative negligence. All but four US states now follow a statutorily created regime of comparative negligence.

Contributory negligence has been widely criticized as being too draconian, in that a plaintiff whose fault was comparatively minor might recover nothing from a more egregiously irresponsible defendant.. Comparative negligence has also been criticized, since it would allow a plaintiff who is recklessly 95% negligent to recover 5% of the damages from the defendant, and often more when a jury is feeling sympathetic. Economists have further criticized comparative negligence, since under the Learned Hand Rule it will not yield optimal precaution levels.

Illegality

Ex turpi causa non oritur actio is the illegality defence, the Latin for "no right of action arises from a despicable cause". If the claimant is involved in wrongdoing at the time the alleged negligence occurred, this may extinguish or reduce the defendant's liability. Thus, if a burglar is verbally challenged by the property owner and sustains injury when jumping from a second story window to escape apprehension, there is no cause of action against the property owner even though that injury would not have been sustained "but for" the property owner's intervention.

Remedies

The main remedy against tortious loss is compensation in 'damages' or money. In a limited range of cases, tort law will tolerate self-help, such as reasonable force to expel a trespasser. This is a defence against the tort of battery. Further, in the case of a continuing tort, or even where harm is merely threatened, the courts will sometimes grant an injunction. This means a command, for something other than money by the court, such as restraining the continuance or threat of harm. Usually injunctions will not impose positive obligations on tortfeasors, but some Australian jurisdictions can make an order for specific performance to ensure that the defendant carries out their legal obligations, especially in relation to nuisance matters.

Theory and reform

Scholars and lawyers have identified conflicting aims for the law of tort, to some extent reflected in the different types of damages awarded by the courts: compensatory, aggravated and punitive. In The Aims of the Law of Tort (1951), Glanville Williams saw four possible bases on which different torts rested: appeasement, justice, deterrence and compensation. From the late 1950s a group of legally oriented economists and economically oriented lawyers emphasized incentives and deterrence, and identified the aim of tort as being the efficient distribution of risk. They are often described as the law and economics movement. Ronald Coase, one of the movement's principal proponents, submitted, in his article The Problem of Social Cost (1960), that the aim of tort should be to reflect as closely

as possible liability where transaction costs should be minimized.Calls for reform of tort law come from diverse standpoints reflecting diverse theories of the objectives of the law. Some calls for reform stress the difficulties encountered by potential claimants. Because of all people who have accidents, only some can find solvent defendants from which to recover damages in the courts, P. S. Atiyahhas called the situation a "damages lottery". Consequently, in New Zealand, the government in the 1960s established a "no-fault" system of state compensation for accidents. Similar proposals have been the subject of Command Papers in the UK and much academic debate.

However, in the U.S. calls for reform have tended to be for drastic limitation on the scope of tort law, a minimisation process on the lines of economic analysis. Anti-trust damages have come under special scrutiny, and many people believe the availability of punitive damages generally are a strain on the legal system. Theoretical and policy considerations are central to fixing liability for pure economic loss and of public bodies.

Overlap with criminal law

There is some overlap between criminal law and tort, since tort, a private action, used to be used more than criminal laws in the past. For example, in English law an assault is both a crime and a tort (a form of trespass to the person). A tort allows a person, usually the victim, to obtain a remedy that serves their own purposes (for example by the payment of damages to a person injured in a car accident, or the obtaining of injunctive relief to stop a person interfering with their business). Criminal actions on the other hand are pursued not to obtain remedies to assist a person although often criminal courts do have power to grant such remedies but to remove their liberty on the state's behalf. That explains why incarceration is usually available as a penalty for serious crimes, but not usually for torts.

The more severe penalties available in criminal law also means that it requires a higher burden of proof to be discharged than the related tort. For example, in the O. J. Simpson murder trial, the jury were not convinced "beyond reasonable doubt" that O. J. Simpson had committed the crime of murder, but a later civil trial, the jury in that case felt that he did satisfy the balance of probabilities threshold required to prove the tort of wrongful death. Many jurisdictions, especially the US, retain punitive

elements in tort damages, for example in anti-trust and consumer-related torts, making tort blur the line with criminal acts. Also there are situations where, particularly if the defendant ignores the orders of the court, a plaintiff can obtain a punitive remedy against the defendant, including imprisonment. Some torts may have a public element for example, public nuisance and sometimes actions in tort will be brought by a public body. Also, while criminal law is primarily punitive, many jurisdictions have developed forms of monetary compensation or restitution which criminal courts can directly order the defendant to pay to the victim.

Tort by legal jurisdiction

Legal jurisdictions whose legal system developed from the English common law have the concept of tortious liability. There are technical differences from one jurisdiction to the next in proving the various torts. For the issue of foreign elements in tort see Tort and Conflict of Laws.

o Australian tort law

o Canadian tort law

o English tort law

o Scots Law of Delict(equivalent)

o United States tort law

o Irish tort law

2. Contracts

A contract is an exchange of promises between two or more parties to do, or refrain from doing, an act which is enforceable in a court of law. It is a binding legal agreement. That is to say, a contract is an exchange of promises for the breach of which the law will provide a

remedy. Agreement is said to be reached when an offer capable of immediate acceptance is met with a "mirror image" acceptance (ie, an unqualified acceptance). The parties must have the necessary capacity to contract and the contract must not be either trifling, indeterminate, impossible or illegal. Contract law is based on the principle expressed in the Latin phrase pacta sunt servanda (usually translated "pacts must be kept", but more literally "agreements are to be kept"). Breach of contract is recognized by the law and remedies can be provided. Sometimes written contracts are required, such as when buying a house. However, most contracts can be and are made orally, such as purchasing a book or a sandwich. Contract law can be classified, as is habitual in civil law systems, as part of a general law of obligations (along with tort, unjust enrichment or restitution).

According to legal scholar Sir John William Salmond, a contract is "an agreement creating and defining the obligations between two or more parties".
As a means of economic ordering, contract relies on the notion of consensual exchange and has been extensively discussed in broader economic, sociological and anthropological terms. However, contract is a form of economic ordering common throughout the world, and different rules apply in jurisdictions applying civil law (derived from Roman law principles), Islamic law, socialist legal systems, and customary or local law. The primacy of discussion of common law principles in writing about contract may derive from the primacy of these systems in international business. Common law jurisdictions usually offer proceedings in the English language, which has become to an extent the lingua franca of international business, tend to have much larger law firms than in civilian jurisdictions, able to satisfy clients that their range of legal needs can be met, and unlike civilian jurisdictions, judges in common law jurisdictions are generally senior lawyers of considerable practical experience. Another possible reason is that the common law retains a high degree of freedom of contract, with parties largely free to set their own terms, whereas civilian systems typically prescribe large parts of the contents of contracts for the parties, with no opt-out provision (see, for example the French Civil Code). It is very common for businesses not located in common law jurisdictions to opt in to the common law through "choice of law" clauses, with the most common jurisdictions of choice probably being England& Wales and New York.

Contractual formation

In common law systems, the five key requirements for the creation of a contract are:

- o offer and acceptance (agreement)
- o consideration
- o an intention to create legal relations
- o legal capacity
- o formalities

In civil law systems, the concept of consideration is not central. In addition, for some contracts formalities must be complied with under what is sometimes called a statute of frauds. One of the most famous cases on forming a contract is Carlill v. Carbolic Smoke Ball Company decided in nineteenth-century England. A medical firm advertised that its new wonder drug, a smoke ball, would prevent the catching of flu by those who used it in accordance with instructions, and if it did not, buyers would receive 100. When sued, Carbolic argued the ad was not to be taken as a serious, legally binding offer. It was merely an invitation to treat, and a gimmick. But the court of appeal held that it would appear to a reasonable man that Carbolic had made a serious offer, primarily because of the reference to the 1000 deposited into the bank. People had given good "consideration" for it by going to the "distinct inconvenience" of using a faulty product. "Read the advertisement how you will, and twist it about as you will," said Lindley LJ, "here is a distinct promise expressed in language which is perfectly unmistakable".

Where a product in large quantities is advertised in a newspaper or on a poster, it may be an offer, but generally speaking it will be regarded as an invitation to treat, since even when large stock is held it is still limited, whilst the response to an advertisement may be unlimited. This was the basis of the decision in Partridge v. Crittenden a criminal case in which the defendant was charged with "offering for sale" bramblefinchcocks and hens.

The court held that the newspaper advertisement could only be an invitation to treat, since it could not have been intended as an offer to the world, so the defendant was not guilty of "offering" them for sale. Similarly, a display of goods in a shop window is an invitation to treat, as was held in Fisher v. Bell another criminal case which turned on the correct analysis of offers as against invitations to treat. In this instance the defendant was charged with "offering for sale" prohibited kinds of knife, which he had displayed in his shop window with prices attached. The court held that this was an invitation to treat, the offer would be made by a purchaser going into the shop

and asking to buy a knife, with acceptance being by the shopkeeper, which he could withhold. (The law was later amended to "exposing for sale".) A display of goods on the shelves of a self-service shop is also an invitation to treat, with the offer being made by the purchaser at the checkout and being accepted by the shop assistant operating the checkout: Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd. If the person who is to buy the advertised product is of importance, for instance because of his personality, etc., when buying land, it is regarded merely as an invitation to treat. In Carbolic Smoke Ball, the major difference was that a reward was included in the advertisement, which is a general exception to the rule and is then treated as an offer.

Offer and acceptance

The most important feature of a contract is that one party makes an offer for an arrangement that another accepts. This can be called a 'concurrence of wills' or 'ad idem' (meeting of the minds) of two or more parties. The concept is somewhat contested. The obvious objection is that a court cannot read minds and the existence or otherwise of agreement is judged objectively, with only limited room for questioning subjective intention: see Smith v. Hughes. Richard Austen-Baker has suggested that the perpetuation of the idea of 'meeting of minds' may come from a misunderstanding of the Latin term 'consensus ad idem', which actually means 'agreement to the [same] thing'. There must be evidence that the parties had each from an objective perspective engaged in conduct manifesting their assent, and a **contract** will be formed when the parties have met such a requirement. An objective perspective means that it is only necessary that somebody gives the impression of offering or accepting contractual terms in the eyes of a reasonable person, not that they actually did want to form a contract.

The case of Carlill v. Carbolic Smoke Ball Co. (above) is an example of a 'unilateral contract', obligations are only imposed upon one party upon acceptance by performance of a condition. In the U.S., the general rule is that in "case of doubt, an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offereechooses."

Offer and acceptance does not always need to be expressed orally or in writing. An implied contract is one in which some of the terms are not expressed in words. This

can take two forms. A contract which is implied in fact is one in which the circumstances imply that parties have reached an agreement even though they have not done so expressly. For example, by going to a doctor for a checkup, a patient agrees that he will pay a fair price for the service. If one refuses to pay after being examined, the patient has breached a contract implied in fact. A contract which is implied in law is also called a quasi-contract, because it is not in fact a contract; rather, it is a means for the courts to remedy situations in which one party would be unjustly enriched were he or she not required to compensate the other. For example, a plumber accidentally installs a sprinkler system in the lawn of the wrong house. The owner of the house had learned the previous day that his neighbor was getting new sprinklers. That morning, he sees the plumber installing them in his lawn. Pleased at the mistake, he says nothing, and then refuses to pay when the plumber delivers the bill. Will the man be held liable for payment? Yes, if it could be proven that the man knew that the sprinklers were being installed mistakenly, the court would make him pay because of a quasi-contract. If that knowledge could not be proven, he would not be liable. Such a claim is also referred to as "quantum meruit".

Consideration and estoppel

Consideration is known as 'the price of a promise' and is a controversial requirement for contracts under common law. It is not necessary in all common law or civil law systems, and is considered by some to be unnecessary as the requirement of intention to create legal relations by both parties meets the same requirement under contract. The reason that both exist in common law jurisdictions is thought by leading scholars to be the result of the combining by 19th century judges of two distinct threads: first the consideration requirement was at the heart of the action of assumpsit, which had grown up in the middle ages and remained the normal action for breach of a simple contract in England & Wales until 1884, when the old forms of action were abolished; secondly, the notion of agreement between two or more parties as being the essential legal and moral foundation of contract in all legal systems, promoted by the 18th century French writer Pothier in his Traite des Obligations, much read (especially after translation into English in 1805) by English judges and jurists. The latter chimed well with the fashionable will theories of the time, especially John Stuart Mill's influential ideas on free will, and got grafted on to the traditional

> common law requirement for consideration to ground an action in assumpsit.
> The idea is that both parties to a contract must bring something to the bargain, that both parties must confer some benefit or detriment (for example, money, however in some cases money will not suffice as consideration - egwhen one party agrees to make part payment of a debt in exchange for being released from the full amount). This can be either conferring an advantage on the other party, or incurring some kind of detriment or inconvenience towards oneself. Three rules govern consideration.

Consideration must be real, but need not be adequate. For instance, agreeing to buy a car for a penny may constitute a binding contract. While consideration need not be adequate, contracts in which the consideration of one party greatly exceeds that of another may nevertheless be held invalid for lack of real consideration. In such cases, the fact that the consideration is exceedingly inadequate can be evidence that there was no consideration at all. Such contracts may also be held invalid for other reasons such as fraud, duress, or being contrary to public policy. In some situations, a collateral contract may exist, whereby the existence of one contract provides consideration for another. Critics say consideration can be so small as to make the requirement of any consideration meaningless.
Consideration must not be from the past. For instance, in Eastwood v. Kenyon, the guardian of a young girl obtained a loan to educate the girl and to improve her marriage prospects. After her marriage, her husband promised to pay off the loan. It was held that the guardian could not enforce the promise because taking out the loan to raise and educate the girl was past consideration--it was completed before the husband promised to repay it.
Consideration must move from the promisee. For instance, it is good consideration for person A to pay person C in return for services rendered by person B. If there are joint promisees, then consideration need only to move from one of the promisees.

> Civil law systems take the approach that an exchange of promises, or a concurrence of wills alone, rather than an exchange in valuable rights is the correct basis. So if you promised to give me a book, and I accepted your offer without giving anything in return, I would have a legal right to the book and you could not change your mind about giving me it as a gift. However, in common law systems the concept of culpa in contrahendo, a form of 'estoppel', is increasingly used to create obligations during pre-contractual negotiations.Estoppel is an equitable doctrine that provides for the creation of legal obligations if a party has given another an assurance and the other

has relied on the assurance to his detriment. A number of commentators have suggested that consideration be abandoned, and estoppel be used to replace it as a basis for contracts. However, legislation, rather than judicial development, has been touted as the only way to remove this entrenched common law doctrine. Lord Justice Denning famously stated that "The doctrine of consideration is too firmly fixed to be overthrown by a side-wind."

Intention to be legally bound

There is a presumption for commercial agreements that parties intend to be legally bound (unless the parties expressly state that they do not want to be bound, like in heads of agreement). On the other hand, many kinds of domestic and social agreements are unenforceable on the basis of public policy, for instance between children and parents. One early example is found in Balfour v. Balfour. Using contract-like terms, Mr. Balfour had agreed to give his wife 30 a month as maintenance while he was living in Ceylon (Sri Lanka). Once he left, they separated and Mr. Balfour stopped payments. Mrs. Balfour brought an action to enforce the payments. At the Court of Appeal, the Court held that there was no enforceable agreement as there was not enough evidence to suggest that they were intending to be legally bound by the promise. The case is often cited in conjunction with Merritt v. Merritt. Here the court distinguished the case from Balfour v. Balfour because Mr. and Mrs. Merritt, although married again, were estranged at the time the agreement was made. Therefore any agreement between them was made with the intention to create legal relations.

Third parties

The doctrine of privity of contract means that only those involved in striking a bargain would have standing to enforce it. In general this is still the case, only parties to a contract may sue for the breach of a contract, although in recent years the rule of privityhas eroded somewhat and third party beneficiaries have been allowed to recover damages for breaches of contracts they were not party to. There are two times where third party beneficiaries are allowed to fall under the contract. The duty owed test looks to see if the third party was agreeing to pay a debt for the original party. The intent to benefit test looks to see if circumstances indicate that the

promisee intends to give the beneficiary the benefit of the promised performance. Any defense allowed to parties of the original contract extend to third party beneficiaries. A recent example is in England, where the Contract (Rights of Third Parties) Act 1999 was introduced.

Formalities and writing

Contrary to common wisdom, an exchange of promises can still be binding and legally as valid as a written contract. A spoken contract should be called an oral contract, which might be considered a subset of verbal contracts. Any contract that uses words, spoken or written, is a verbal contract. Thus, all oral contracts and written contracts are verbal contracts. This is in contrast to a "non-verbal, non-oral contract," also known as "a contract implied by the acts of the parties", which can be either implied in fact or implied in law.

Most jurisdictions have rules of law or statutes which may render otherwise valid oral contracts unenforceable. This is especially true regarding oral contracts involving large amounts of money or real estate. For example, in the U.S., generally speaking, a contract is unenforceable if it violates the common law statute of frauds or equivalent state statutes which require certain contracts to be in writing. An example of the above is an oral contract for the sale of a motorcycle for US$5,000 in a jurisdiction which requires a contract for the sale of goods over US $500 to be in writing to be enforceable. The point of theStatute of Frauds is to prevent false allegations of the existence of contracts that were never made, by requiring formal (i.e. written) evidence of the contract. However, a common remark is that more frauds have been committed through the application of the Statute of Frauds than have ever been prevented. Contracts that do not meet the requirements of common law or statutory Statutes of Frauds are unenforceable, but are not necessarily thereby void. However, a party unjustly enriched by an unenforceable contract may be required to provide restitution for unjust enrichment. Statutes of Frauds are typically codified in state statutes covering specific types of contracts, such as contracts for the sale of real estate.

In Australia and many, if not all, jurisdictions which have adopted the common law of England, for contracts subject to legislation equivalent to the Statute of Frauds, there is no requirement for the entire contract to be in writing. Although for property

transactions there must be a note or memorandum evidencing the contract, which may come into existence after the contract has been formed. The note or memorandum must be signed in some way, and a series of documents may be used in place of a single note or memorandum. It must contain all material terms of the contract, the subject matter and the parties to the contract. In England and Wales, the common law Statute of Frauds is only now in force for guarantees, which must be evidenced in writing, although the agreement may be made orally. Certain other kinds of contract must be in writing or they are void, for instance, for sale of land under s. 52, Law of Property Act 1925.

If a contract is in a written form, and somebody signs the contract, then the person is bound by its terms regardless of whether they have read it or not, provided the document is contractual in nature. Furthermore, if a party wishes to use a document as the basis of a contract, reasonable notice of its terms must be given to the other party prior to their entry into the contract. This includes such things as tickets issued at parking stations.

Bilateral v. unilateral contracts

Contracts may be bilateral or unilateral. The more common of the two, a bilateral contract, is an agreement in which each of the parties to the contract makes a promise or promises to the other party. For example, in a contract for the sale of a home, the buyer promises to pay the seller $200,000 in exchange for the seller's promise to deliver title to the property. In a unilateral contract, only one party to the contract makes a promise. A typical example is the reward contract: A promises to pay a reward to B if B finds A's dog. B is not obliged to find A's dog, but A is obliged to pay the reward to B if B finds the dog. In this example, the finding of the dog is a condition precedent to A's obligation to pay.

An offer of a unilateral contract may often be made to many people (or 'to the world') by means of an advertisement. In that situation, acceptance will only occur on satisfaction of the condition (such as the finding of the offeror'sdog). If the condition is something that only one party can perform, both the offeror and offeree are protected the offeror is protected because he will only ever be contractually obliged

to one of the many offerees; and the offeree is protected, because if she does perform the condition, the offeror will be contractually obliged to pay her. In unilateral contracts, the requirement that acceptance be communicated to the offeroris waived. The offeree accepts by performing the condition, and the offeree's performance is also treated as the price, or consideration, for the offeror'spromise.

A common type of unilateral contract is the offer of a reward, eg, 'Dog Lost, Answers to Bad Wolf, 50 reward for safe return'. This is unilateral because although the offeror commits to paying 50 if the dog is safely returned, nobody is actually contractually committed to finding and returning the dog.

Courts generally favour bilateral contracts. The general rule in the United States is: "In case of doubt, an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses." Restatement (Second) of Contracts 32 (1981) (emphasis added). Here the law attempts to provide some protection from the risk of revocation in a unilateral contract to the offeree. Note that if the offer specifically requests performance rather than a promise, a unilateral contract will exist. See option contracts for more information on protection given to the offeree in a unilateral contract.

Uncertainty, incompleteness and severance

If the terms of the contract are uncertain or incomplete, the parties cannot have reached an agreement in the eyes of the law. An agreement to agree does not constitute a contract, and an inability to agree on key issues, which may include such things as price or safety, may cause the entire contract to fail. However, a court will attempt to give effect to commercial contracts where possible, by construing a reasonable construction of the contract. Courts may also look to external standards, which are either mentioned explicitly in the contract or implied by common practice in a certain field. In addition, the court may also imply a term; if price is excluded, the court may imply a reasonable price, with the exception of land, and second-hand goods, which are unique. If there are uncertain or incomplete clauses in the contract, and all options in resolving its true meaning have failed, it may be possible to sever and void just those affected clauses if the contract includes a severability clause. The test of whether a clause is severable is an objective testwhether a reasonable person

would see the contract standing even without the clauses.

Contractual terms

A contractual term is "[a]ny provision forming part of a contract". Each term gives rise to a contractual obligation, breach of which can give rise to litigation. Not all terms are stated expressly and some terms carry less legal weight as they are peripheral to the objectives of the contract.

Boilerplate

As discussed in Tina L. Stark's Negotiating and Drafting Contract Boilerplate, when lawyers refer to a boilerplate provision, they are referring to any standardized, one size fits all contract provision. But lawyers also use the term in a more narrowcontext to refer to certain provisions that appear at the end of the contract. Typically, these provisions tell the parties how to govern their relationship and administer the contract. Although often thought to be of secondary importance, these provisions have significant business and legal consequences. Common provisions include the governing law provision, venue, assignment and delegation provisions, waiver of jury trial provisions, notice provisions, and force majeure provisions.

Classification of term

- **Condition or Warranty**: Conditions are terms which go to the very root of a contract. Breach of these terms repudiate the contract, allowing the other party to discharge the contract. A warranty is not so imperative so the contract will subsist after a warranty breach. Breach of either will give rise to damages.

It is an objective matter of fact whether a term goes to the root of a contract. By way of illustration, an actress' obligation to perform the opening night of a theatrical production is a condition, whereas a singersobligation to perform during the first three days of rehearsal is a warranty.Statute may also declare a term or nature of term to be a condition or warranty; for example the Sale of Goods Act 1979 s15A provides that terms as to title, description, quality and sample (as described in the Act) are conditions save in certain defined

circumstances.

- **Innominate term**: Lord Diplock, in Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., created the concept of an innominate term, breach of which may or not go to the root of the contract depending upon the nature of the breach. Breach of these terms, as with all terms, will give rise to damages. Whether or not it repudiates the contract depends upon whether legal benefit of the contract has been removed from the innocent party. MegawLJ, in 1970, preferred the legal certainty of using the classic categories of condition or warranty. This was interpreted by the House of Lords as merely restricting its application in Reardon Smith Line Ltd. v Hansen-Tangen.

- **Status as a term:** Status as a term is important as a party can only take legal action for the non fulfillment of a term as opposed to representations or mere puffery. Legally speaking, only statements that amount to a term create contractual obligations. There are various factor that a court may take into account in determining the nature of a statement. In particular, the importance apparently placed on the statement by the parties at the time the contract is made is likely to be significant. In Bannerman v. White it was held a term of a contract for sale and purchase of hops that they had not been treated with sulphur, since the buyer made very explicit his unwillingness to accept hops so treated, saying that he had no use for them. The relative knowledge of the parties may also be a factor, as in Bissett v. Wilkinson in which a statement that farmland being sold would carry 2000 sheep if worked by one team was held merely a representation (it was also only an opinion and therefore not actionable as misrepresentation). The reason this was not a term was that the seller had no basis for making the statement, as the buyer knew, and the buyer was prepared to rely on his own and his son's knowledge of farming.

- **Implied terms:** A term may either be express or implied. An express term is stated by the parties during negotiation or written in a contractual document. Implied terms are not stated but nevertheless form a provision of the contract. Terms may be implied due to the facts of the proceedings by which the

contract was formed. The Privy Council proposed a five stage test in BP Refinery Westernport v. Shire of Hastings. todetermine situations where the facts of a case may imply terms (this only applies to formal contracts in Australia). However, the English Court of Appeal sounded a note of caution with regard to the BP case in Philips Electronique Grand Public SA v. British Sky Broadcasting Ltdin which the Master of the Rolls described the test as "almost misleading" in its simplicity. The classic tests have been the "business efficacy test" and the "officious bystander test". The first of these was proposed by Lord Justice Bowen in The Moorcock. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied - the bare minimum to achieve this goal. The officious bystander test derives its name from the judgment of Lord Justice Mackinnon in Shirlaw v. Southern Foundries (1926) Ltd but the test actually originates in the judgment of Lord Justice Scrutton in Reigate v. Union Manufacturing Co (Ramsbottom) Ltd This test is that a term can only be implied in fact if it is such a term that had an "officious bystander" listening to the contract negotiations suggested that they should include this term the parties would "dismiss him with a common 'Oh of course!'". It is at least questionable whether this is truly a separate test or just a description of how one might go about arriving at a decision on the basis of the business efficacy test.

Some jurisdictions, notably Australia, Israel and India, imply a term of good faith into contracts. A final way in which terms may be implied due to fact is through a previous course of dealing or common trade practice. The Uniform Commercial Code of the United States also imposes a duty of good faith in performance and enforcement of contracts covered by the Code, which cannot be derogated from.

- **Common law**

Liverpool City Council v. Irwin established a term to be implied into all contracts between tenant and landlord in multi-storey blocks that the landlord

is obliged to take reasonable care to keep the common areas in a reasonable state of repair.

Wong MeeWan v Kwan Kin Travel Services Ltd.established that when a tour operator contracts to for the sale of goods.

- **Statutory**

The rules by which many contracts are governed are provided in specialized statutes that deal with particular subjects. Most countries, for example, have statutes which deal directly with sale of goods, lease transactions, and trade practices. For example, most American states have adopted Article 2 of the Uniform Commercial Code, which regulates contracts for the sale of goods. The most important legislation implying terms under United Kingdom law are the Sale of Goods Act 1979, the Consumer Protection (Distance Selling) Regulations 2000 and the Supply of Goods and Services Act 1982 which imply terms into all contracts whereby goods are sold or services provided.

Three ways of evaluating a contracted exchange as coercive or voluntary

- **Moral consideration**: Objective consideration of right or wrong outside of the objective cause, or the perceived cause. Example: X occurs everyday at 5 pm. X is wrong. Anything that avoids X is good, allowing X, even if all parties agree, is bad.

- **Phenomenological consideration** - what models did the participants have which influenced the perception of what was to occur or what had occurred. Example: I observe X,Y every day at 5 pm. I contract against X. Today I did / did not see Y occur.

- **Statistical consideration** - did the participants have a statistical prediction, likelihood of an event occurring which is covered by the contract. Example: X happens every day at 5 pm, I enter a contract to avoid X. X does or does not occur.

Setting aside the contract

There can be three different ways in which contracts can be set aside. A contract may be deemed 'void', 'voidable' or 'unenforceable'. Voidness implies that a contract never came into existence.Voidability implies that one or both parties may declare a contract ineffective at their wish. Unenforceability implies that neither party may have recourse to a court for a remedy. Rescission is a term which means to take a contract back.

Misrepresentation

Misrepresentation means a false statement of fact made by one party to another party and has the effect of inducing that party into the contract. For example, under certain circumstances, false statements or promises made by a seller of goods regarding the quality or nature of the product that the seller has may constitute misrepresentation. A finding of misrepresentation allows for a remedy of rescission and sometimes damages depending on the type of misrepresentation.There are two types of misrepresentation in contract law, fraud in the factum and fraud in inducement. Fraud in the factum focuses on whether the party in question knew they were creating a contract. If the party did not know that they were entering into a contract, there is no meeting of the minds, and the contract is void. Fraud in inducement focuses on misrepresentation attempting to get the party to enter into the contract. Misrepresentation of a material fact (if the party knew the truth, that party would not have entered into the contract) makes a contract voidable.According to Gordon v. Selico it is possible to make a misrepresentation either by words or by conduct, although not everything said or done is capable of constituting a misrepresentation. Generally, statements of opinion or intention are not statements of fact in the context of misrepresentation. If one party claims specialist knowledge on the topic discussed, then it is more likely for the courts to hold a statement of opinion by that party as a statement of fact.

Mistake

A mistake is an incorrect understanding by one or more parties to a contract and may be used as grounds to invalidate the agreement. Common law has identified three different types of mistake in contract: unilateral mistake, mutual mistake, and common mistake.

- A common mistake is where both parties hold the same mistaken belief of the facts. This is demonstrated in the case of Bell v. Lever Brothers Ltd., which established that common mistake can only void a contract if the mistake of the subject-matter was sufficiently fundamental to render its identity different from what was contracted, making the performance of the contract impossible.

- A mutual mistake is when both parties of a contract are mistaken as to the terms. Each believes they are contracting to something different. The court usually tries to uphold such a mistake if a reasonable interpretation of the terms can be found. However, a contract based on a mutual mistake in judgementdoes not cause the contract to be voidable by the party that is adversely affected. See Raffles v. Wichelhaus.

- A unilateral mistake is where only one party to a contract is mistaken as to the terms or subject-matter. The courts will uphold such a contract unless it was determined that the non-mistaken party was aware of the mistake and tried to take advantage of the mistake. It is also possible for a contract to be void if there was a mistake in the identity of the contracting party. An example is in Lewis v. Avery where Lord Denning MR held that the contract can only be avoided if the plaintiff can show that, at the time of agreement, the plaintiff believed the other party's identity was of vital importance. A mere mistaken belief as to the credibility of the other party is not sufficient.

Duress and undue influence

Duress has been defined as a "threat of harm made to compel a person to do something against his or her will or judgment; esp., a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition." An example is in Barton v. Armstrong, a decision of the Privy Council. Armstrong threatened to kill Barton if he did not sign a contract, so the court set the contract aside. An innocent party wishing to set aside a

contract for duress to the person need only to prove that the threat was made and that it was a reason for entry into the contract; the burden of proof then shifts to the other party to prove that the threat had no effect in causing the party to enter into the contract. There can also be duress to goods and sometimes, the concept of 'economic duress' is used to vitiate contracts. Undue influence is an equitable doctrine that involves one person taking advantage of a position of power over another person. The law presumes that in certain classes of special relationship, such as between parent and child, or solicitor and client, there will be a special risk of one party unduly influencing their conduct and motives for contracting. As an equitable doctrine, the court has the discretion to vitiate such a contract. When no special relationship exists, the general rule is whether there was a relationship of such trust and confidence that it should give rise to such a presumption. See Odorizzi v. Bloomfield School District.

Incapacity

Sometimes the capacity of either natural or artificial persons to either enforce contracts, or have contracts enforced against them is restricted. For instance, very small children may not be held to bargains they have made, or errant employees or directors may be prevented from contracting for their company, because they have acted ultra vires(beyond their power). Another example might be people who are mentally incapacitated, either by disability or drunkenness. When the law limits or bars a person from engaging in specified activities, any agreements or contracts to do so are either voidable or void for incapacity. The law on capacity can serve either a protective function or can be a way of restraining people who act as agents for others.

Illegal contracts

A contract isvoid if it is based on an illegal purpose or contrary to public policy. One example, from Canada, is Royal Bank of Canada v. Newell. A woman forged her husband's signature on 40 checks, totaling over $58,000. To protect her from prosecution, her husband signed a letter of intent prepared by the bank in which he agreed to assume "all liability and responsibility" for the forged checks. However, the agreement was unenforceable, and struck down by the courts because of its essential goal, which was to "stifle a criminal prosecution." Because of the contract's illegality,

and as a result voided status, the bank was forced to return the payments made by the husband. In the U.S., one unusual type of unenforceable contract is a personal employment contract to work as a spy or secret agent. This is because the very secrecy of the contract is a condition of the contract (in order to maintain plausible deniability). If the spy subsequently sues the government on the contract over issues like salary or benefits, then the spy has breached the contract by revealing its existence. It is thus unenforceable on that ground, as well as the public policy of maintaining national security (since a disgruntled agent might try to reveal all the government's secrets during his/her lawsuit). Other types of unenforceable employment contracts include contracts agreeing to work for less than minimum wage and forfeiting the right to workman's compensation in cases where workman's compensation is due.

Remedies for breach of contract

A breach of contract is failure to perform as stated in the contract. There are many ways to remedy a breached contract assuming it has not been waived. Typically, the remedy for breach of contract is an award of money damages. When dealing with unique subject matter, specific performance may be ordered. As for many governments, it was not possible to sue the Crown in the UK for breach of contract before 1948. However, it was appreciated that contractors might be reluctant to deal on such a basis and claims were entertained under a petition of right that needed to be endorsed by the Home Secretary and Attorney-General. S.1 Crown Proceedings Act 1947 opened the Crown to ordinary contractual claims through the courts as for any other person.

Damages

There are five different types of damages.

o Compensatory damages which are given to the party which was detrimented by the breach of contract. With compensatory damages, there are two heads of loss, consequential damage and direct damage.

o Exemplary damages which are used to make an example of the party at fault to

discourage similar crimes. Fines can be multiplied by factors of up to 50 for such damages. Some jurisdictions do not allow exemplary damages for breach of contract, eg, England & Wales.

o Liquidated Damages really a pre-estimate of loss agreed upon in the contract, so that the court is saved the process of calculating compensatory damages and the parties have greater certainty. Liquidated damages clauses are often called "penalty clauses" in ordinary language, but the law distinguishes between liquidated damages (legitimate) and penalties (invalid). A penalty clause is one which is intended to operate "in terrorem" to deter breach and are typically excessive in amount compared with the greatest loss which the parties could have anticipated as resulting from breach at the time the contract was made (though it will still be an invalid penalty if circumstances change and the sum is reasonable by the time of the actual breach). The parties' terminology is not determinative and the court will decide whether the clause is a penalty or one for liquidated damages. A test for determining which category a clause falls into was established by the English House of Lords in Dunlop Pneumatic Tyre Co. Ltd v. New Garage & Motor Co. Ltd

o Nominal damages which consist of a small cash amount where the court concludes that the defendant is in breach but the plaintiff has suffered no quantifiable pecuniary loss (often sought to obtain a legal record of who was at fault).

o Punitive damages which are used to punish the party at fault. These are not usually given regarding contracts but possible in a fraudulent situation. Again, these are not permitted in all jurisdictions, with England & Wales, for instance, prohibiting them.

Compensatory damages aim at compensating the plaintiff for actual losses suffered as accurately as possible. They may be "expectation damages", "reliance damages" or "restitutionarydamages". Expectation damages are awarded to put the party in as good of a position as the party would have been in had the contract been performed as promised. The court assesses what the likely benefit to the plaintiff of the proper performance of the contract would have been, on a balance of probabilities. Reliance damages are usually awarded where no reasonably reliable estimate of expectation loss can be arrived

at, or at the option of the plaintiff (the plaint will include a claim by the plaintiff for damages, so the plaintiff sets the agenda to an extent). Reliance losses cover expense suffered in reliance on the promise made by the defendant which the defendant has breached, rather than lost profits. Examples where reliance damages have been awarded because profits are too speculative include the Australian case of McRae v. Commonwealth Disposals Commission which concerned a contract for the rights to salvage a ship which was not in fact there. It was not possible to evaluate with any reliability the profits that might have been made, given the risks and uncertainties of the venture, but the plaintiff's expenditure in conducting a fruitless search for the vessel could be awarded. In Anglia Television Ltd v. Reed the English Court of Appeal went so far as to award the plaintiff expenditure incurred before the contract was executed, in preparation for performance of the contract, when a contract was subsequently executed and then breached by the defendant. Furthermore, once a breach has occurred, the non-breaching party is said to have a duty to mitigate damages. Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation. The UCC states, "Consequential damages... include any loss... which could not reasonably be prevented by cover or otherwise." UCC 2-715. In English law the chief authority on mitigation is British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railway Co. of London[1912] AC 673, see especially 689 per Lord Haldane.</ref> but Professor Michael Furmston having stated that the rule is that a plaintiff will not recover damages for loss that would not have occurred had he taken reasonable steps to mitigate loss, has warned that "it is wrong to express this rule by stating that the plaintiff is under a duty to mitigate his loss", citing Sotiros Shipping Inc v. Sameiet, The Solholt.

Hadley v. Baxendale establishes general and consequential damages. General damages are those damages which naturally flow from a breach of contract. Consequential damages are those damages which, although not naturally flowing from a breach, are naturally supposed by both parties at the time of contract formation. An example would be when someone rents a car to get to a business meeting, but when that person arrives to pick up the car, it is not there. General damages would be the cost of renting a different car. Consequential damages would be the lost business if that person was unable to get to the meeting, if both parties knew the reason the party was renting the car. However, there is still a duty to cover; the fact that the car was not there does not give the party a right to

not attempt to rent another car.Whenever you have a contract that requires completing something, and a person informs you before they begin your project that it will not be completed, this is referred to as anticipatory breach. When it is neither possible nor desirable to award damages measured in that way, a court may award money damages designed to restore the injured party to the economic position that he or she had occupied at the time the contract was entered (known as the "reliance measure"), or designed to prevent the breaching party from being unjustly enriched ("restitution").

Specific performance

There may be circumstances in which it would be unjust to permit the defaulting party simply to buy out the injured party with damages. For example where an art collector purchases a rare painting and the vendor refuses to deliver, the collector's damages would be equal to the sum paid. The court may make an order of what is called "specific performance", requiring that the contract be performed. In some circumstances a court will order a party to perform his or her promise (an order of "specific performance") or issue an order, known as an "injunction," that a party refrain from doing something that would breach the contract. A specific performance is obtainable for the breach of a contract to sell land or real estate on such grounds that the property has a unique value. In the United States, specific performance is an illegal remedy for personal services contracts or employment contracts, due to the fact that such remedy is regarded as involuntary servitude which, by way of the 13th Amendment to the United States Constitution, is only legal "as punishment for a crime whereof the criminal shall be dully convicted."

Both an order for specific performance and an injunction are discretionary remedies, originating for the most part in equity. Neither is available as of right and in most jurisdictions and most circumstances a court will not normally order specific performance. A contract for the sale of real property is a notable exception. In most jurisdictions, the sale of real property is enforceable by specific performance. Even in this case the defenses to an action in equity (such as laches, the bona fide purchaser rule, or unclean hands) may act as a bar to specific performance. Related to orders for specific performance, an injunction may be requested when the contract prohibits a certain action. Action for injunction would prohibit the person from performing the act specified in the contract.

Procedure

In the United States, in order to obtain damages for breach of contract or to obtain specific performance or other equitable relief, the aggrieved injured party may file a civil (non-criminal) lawsuit in state court (unless there is diversity of citizenship giving rise to federal jurisdiction). If the contract contains an arbitration clause, the aggrieved party must submit an arbitration claim in accordance with the procedures set forth in the agreement. Many contracts provide that all disputes arising thereunder will be resolved by arbitration, rather than litigated in courts. Customer claims against securities brokers and dealers are almost always resolved by arbitration because securities dealers are required, under the terms of their membership in self-regulatory organizations such as the NASD or NYSE to arbitrate disputes with their customers. The firms then began including arbitration agreements in their customer agreements, requiring their customers to arbitrate disputes. On the other hand, certain claims have been held to be non-arbitrable if they implicate a public interest that goes beyond the narrow interests of the parties to the agreement (i.e., claims that a party violated a contract by engaging in illegal anti-competitive conduct or civil rights violations). Arbitration judgments may generally be enforced in the same manner as ordinary court judgments. However, arbitral decisions are generally immune from appeal in the United States unless there is a showing that the arbitrator's decision was irrational or tainted by fraud. Virtually all states have adopted the Uniform Arbitration Act to facilitate the enforcement of arbitrated judgments. Notably, New York State, where a sizable portion of major commercial agreements are executed and performed, has not adopted the Uniform Arbitration Act. In England and Wales, a contract may be enforced by use of a claim, or in urgent cases by applying for an interim injunction to prevent a breach. Likewise, in the United States, an aggrieved party may apply for injunctive relief to prevent a threatened breach of contract, where such breach would result in irreparable harm that could not be adequately remedied by money damages.

Other Contract

An online contract is easily made, and on a lower scale its usually for a period of one month to three months and on bigger scale its normally about five years.As with all

things legal in general with regard to the ever-evolving law of the Internet in particular, general rules are often riddled with exceptions. All cases are truly evaluated on their own merits, which merits are defined by the facts presented in each instance. Thus, it is the visionary site owner that does what it can do to enhance the odds in its favor even though there can be no guarantees of any enforceability. E-signature law made the electronic contract and signature as legally valid as paper contracts so this is the reason 90% people do online contract before reading the content and It has been observed that within one second around one hundred and ten contracts are being signed. With all of the components of the contract, it makes it a legal and binding contract.

Contractual theory

Contract theory is the body of legal theory that addresses normative and conceptual questions in contract law. One of the most important questions asked in contract theory is why contracts are enforced. One prominent answer to this question focuses on the economic benefits of enforcing bargains. Another approach, associated with Charles Fried, maintains that the purpose of contract law is to enforce promises. This theory is developed in Fried's book, Contract as Promise. Other approaches to contract theory are found in the writings of legal realists and critical legal studies theorists.More generally, writers have propounded Marxist and feminist interpretations of contract. Attempts at overarching understandings of the purpose and nature of contract as a phenomenon have been made, notably 'relational contract theory' originally developed by U.S. contracts scholars Ian Roderick Macneil and Stewart Macaulay, building at least in part on the contract theory work of U.S. scholar Lon L. Fuller, while U.S. scholars have been at the forefront of developing economic theories of contract focussing on questions of transaction cost and so-called 'efficient breach' theory.

Another dimension of the theoretical debate in contract is its place within, and relationship to a the wider law of obligations. Obligations have traditionally been divided into contracts, which are voluntarily undertaken and owed to a specific person or persons, and obligations in tort which are based on the wrongful infliction of harm to certain protected interests, primarily imposed by the law, and typically owed to a wider class of persons. Recently it has been accepted that there is a third

category, restitutionary obligations, based on the unjust enrichment of the defendant at the plaintiffs expense. Contractual liability, reflecting the constitutive function of contract, is generally for failing to make things better (by not rendering the expected performance), liability in tort is generally for action (as opposed to omission) making things worse, and liability in restitution is for unjustly taking or retaining the benefit of the plaintiffs money or work.

3. Real Property

In the common law, real property (or realty) refers to one of the two main classes of property, the other class being personal property (personalty). Real property generally encompasses land, land improvements resulting from human effort including buildings and machinery sited on land, and various property rights over the preceding.
The concept is variously named and defined in other jurisdictions: heritable propertyin Scotland, immobilierin France, and immovable property in Canada, United States, India, Pakistan, Bangladesh, Malta, Cyprus, and in countries where civil law systems prevail, including most of Europe, Russia, and South America.

Estates & ownership interests defined

The law recognizes different sorts of interests, called estates, in real property. The type of estate is generally determined by the language of the deed, lease, or bill of sale through which the estate was acquired. Estates are distinguished by the varying property rights that vest in each, and that determine the duration and transferability of the various estates. A party enjoying an estate is called a "tenant."
Some important types of estates in land include:

o Fee simple: An estate of indefinite duration, that can be freely transferred. The most common and perhaps most absolute type of estate, under which the tenant enjoys the greatest discretion over the disposition of the property.

o Conditional Fee simple: An estate lasting forever as long as one or more conditions stipulated by the deed's grantor does not occur. If such a condition does occur, the property reverts to the grantor, or a remainder interest is passed on to a third party.

o Fee tail: An estate which, upon the death of the tenant, is transferred to his heirs.

o Life estate: An estate lasting for the natural life of the grantee, called a "life tenant." If a life estate can be sold, a sale does not change its duration, which is limited by the natural life of the original grantee.

A life estate pur autre vieis held by one person for the natural life of another person. Such an estate may arise if the original life tenant sells her life estate to another, or if the life estate is originally granted pur autre vie.

o Leasehold: An estate of limited duration, as set out in a contract, called a lease, between the party granted the leasehold, called the lessee, and another party, called the lessor, having a longer lived estate in the property. For example, an apartment-dweller with a one year lease has a leasehold estate in her apartment. Lessees typically agree to pay a stated rent to the lessor.

A tenant enjoying an undivided estate in some property after the termination of some estate of limited duration, is said to have a "future interest." Two important types of future interests are:

o Reversion: A reversion arises when a tenant grants an estate of lesser maximum duration than his own. Ownership of the land returns to the original tenant when the grantee's estate expires. The original tenant's future interest is a reversion.

o Remainder: A remainder arises when a tenant with a fee simple grants someone a life estate or conditional fee simple, and specifies a third party to whom the land goes when the life estate ends or the condition occurs. The third party is said to have a remainder. The third party may have a legal right to limit the life tenant's use of the land.

Estates may be held jointly as joint tenants with rights of survivorship or as tenants in common. The difference in these two types of joint ownership of an estate in land is basically the inheritability of the estate. In joint tenancy (sometimes called tenancy of the entirety when the tenants are married to each other) the surviving tenant (or tenants) become the sole owner (or owners) of the estate. Nothing passes to the heirs of the deceased tenant. In some jurisdictions the magic words "with right of

survivorship" must be used or the tenancy will assumed to be tenants in common. Tenants in common will have a heritable portion of the estate in proportion to their ownership interest which is presumed to be equal amongst tenants unless otherwise stated in the transfer deed.

Real property may be owned jointly with several tenants, through devices such as the condominium, housing cooperative, and building cooperative.

Jurisdictional peculiarities

In the law of almost every country, the state is the ultimate owner of all land under its jurisdiction, because it is the sovereign, or supreme lawmaking authority. Physical and corporate persons do not have allodialtitle; they do not "own" land but only enjoy estates in the land, also known as "equitable interests."

England and Wales

In the United Kingdom, the The Crown is held to be the ultimate owner of all real property in the realm. This fact is material when, for example, property has been disclaimed by its erstwhile owner, in which case the law of escheat applies. In some other jurisdictions (not including the United States), real property is held absolutely. English law has retained the common law distinction between real property and personal property, whereas the civil law distinguishes between "movable" and "immovable" property. In English law, real property is not confined to the ownership of property and the buildings sited thereon often referred to as "land." Real property also includes many legal relationships between individuals or owners of land that are purely conceptual. One such relationship is the easement, where the owner of one property may enjoy the right to pass over a neighboring property. Another is the various "incorporeal hereditaments," such as profits a prendre, where an individual may have the right to take crops from land that is part of another's estate. English law retains a number of forms of property which are largely unknown in other common law jurisdictions such as the advowson, chancel repair liability and lordships of the manor. These are all classified as real property, as they would have been protected by real actions in the early common law.

USA

Each U.S. State except Louisiana has its own laws governing real property and the estates therein, grounded in the common law. In Arizona,, real property is generally defined as land and the things permanently attached to the land. Things that are permanently attached to the land, also can be referred to as improvements, include homes, garages, and buildings. Manufactured homes can obtain an affidavit of affixture.

Economic aspects of real property

Land use, land valuation, and the determination of the incomes of landowners, are among the oldest questions in economic theory. Land is an essential input (factor of production) for agriculture, and agriculture is by far the most important economic activity in preindustrial societies. With the advent of industrialization, important new uses for land emerge, as sites for factories, warehouses, offices, and urban agglomerations. Also, the value of real property taking the form of man-made structures and machinery increases relative to the value of land alone. The concept of real property eventually comes to encompass effectively all forms of tangible fixed capital. with the rise of extractive industries, real property comes to encompass natural capital. With the rise of tourism and leisure, real property comes to include scenic and other amenity values.

Starting in the 1960s, as part of the emerging field of law and economics, economists and legal scholars began to study the property rights enjoyed by tenants under the various estates, and the economic benefits and costs of the various estates. This resulted in a much improved understanding of the:

Property rights enjoyed by tenants under the various estates. These include the right to:

- o Decide how a piece of real property is used;
- o Exclude others from enjoying the property;
- o Transfer (alienate) some or all of these rights to others on mutually agreeable terms;

Nature and consequences of transaction costs when changing and transferring estates.

For an introduction to the economic analysis of property law, see Shavell(2004), and Cooter and Ulen(2003). For a collection of related scholarly articles, see Epstein (2007). Ellickson (1993) broadens the economic analysis of real property with a variety of facts drawn from history and ethnography.

Historical background

In common law, real property was property that could be protected by some form of real action, in contrast to personal property, where a plaintiff would have to resort to another form of action. As a result of this formalist approach, some things the common law deems to be land would not be classified as such by most modern legal systems, for example an advowson (the right to present to the living of a church) was real property. By contrast the rights of a leaseholder originate in personal actions and so the common law originally treated a leasehold as part of personal property.
The law now broadly distinguishes between real property (land and anything affixed to it) and personal property (everything else, e.g., clothing, furniture, money). The conceptual difference was between immovable property, which would transfer title along with the land, and movable property, which a person would retain title to. (The word is not derived from the notion of land having historically been "royal" property. The word royal and its Spanish cognate real come from the unrelated Latin word rex, meaning king.)In modern legal systems derived from English common law, classification of property as realor personal may vary somewhat according to jurisdiction or, even within jurisdictions, according to purpose, as in defining whether and how the property may be taxed.
Bethell (1998) contains much historical information on the historical evolution of real property and property rights.

4. Wills and Intestate Succession

Inheritance is the practice of passing on property, titles, debts, and obligations upon the death of an individual. It has long played an important role in human societies. The rules of inheritance differ between societies and have changed over time. In common law jurisdictions, an heir is a person who is entitled to receive a share of the decedent's property via the rules of inheritance in the jurisdiction where the decedent died or owned property at the time of death. Strictly speaking, one becomes an heir only upon the death of the

decedent. It is improper to speak of the "heir" of a living person, since the exact identity of the persons entitled to inherit are not determined until the time of death. In a case where an individual has such a position that only her/his own death before that of the decedent would prevent the individual from becoming an heir, the individual is called an heir apparent. There is a further concept of jointly inheriting, pending renunciation by all but one, which is called coparceny.In modern legal use, the terms inheritance and heir refer only to succession of property from a decedent who has died intestate (that is, without a will). It is a common mistake to refer to the recipients of property through a will as heirs when they are properly called beneficiaries, devisees, or legatees.

History

Detailed studies have been made in the Anthropological and sociological customs of patrilineal succession, also known as gavelkind, where only male children can inherit. Some cultures also employ matrilineal succession only passing property along the female line. Other practices include primogeniture, under which all property goes to the eldest child, or often the eldest son, or ultimogeniture, in which everything is left to the youngest child. Some ancient societies and most modern states employ partible inheritance, under which every child inherits (usually equally). Historically, there were also mixed systems:

- According to Islamic inheritance jurisprudence, sons inherit twice as much as daughters when no will is left. The complete laws governing inheritance in Islam are complicated and take into account many kinship relations (so wills are usually recommended), but in principle males inherit twice as much as females. There is one interesting exception: The Indonesian Minangkabaupeople from West part of Sumatra island despite being strong Muslims employ only complete matrilineal succession with property and land passing down from mother to daughter. They find no contradiction between their culture and faith.

- Among ancient Israelites, the eldest son received twice as much as the other sons.

- Among Galician people it was typical that all children (both men and women) had a part of the inheritance, but one son (the one who inherited the house) inherited one-third of all the inheritance. This son was called the mellorado. In some

villages the mellorado even received two-thirds of all the inheritance. This two-thirds would be all the family's lands, while other children received their part in money.

- In eastern Swedish culture, from the 13th century until the 19th century, sons inherited twice as much as daughters. This rule was introduced by the Regent BirgerJarl, and it was regarded as an improvement in its era, since daughters were previously usually left without.

Employing differing forms of succession can affect many areas of society. Gender roles are profoundly affected by inheritance laws and traditions. Primogeniture has the effect of keeping large estates united and thus perpetuating an elite. Withpartible inheritance large estates are slowly divided among many descendants and great wealth is thus diluted, leaving higher opportunities to individuals to make a success. (If great wealth is not diluted, the positions in society tend to be much more fixed and opportunities to make an individual success are lower.)

Inheritance can be organized in a way that its use is restricted by the desires of someone (usually of the decedent). An inheritance may have been organized as a fideicommissum, which usually cannot be sold or diminished, only its profits are disposable. A fideicommissum'ssuccession can also be ordered in a way that determines it long (or eternally) also with regard to persons born long after the original descendant. Royal succession has typically been more or less a fideicommissum, the realm not (easily) to be sold and the rules of succession not to be (easily) altered by a holder (a monarch).

In more archaic days, the possession of inherited land has been much more like a family trust than a property of an individual. Even in recent years, the sale of the whole of or a significant portion of a farm in many European countries required consent from certain heirs, and/or heirs had the intervening right to obtain the land in question with same sales conditions as in the sales agreement in question.

5. Taxes

5.1 Tax education from law schools

In law schools, "tax law" is a sub-discipline and area of specialist study. Tax law

specialists are often employed in consultative roles, and may also be involved in litigation. Many U.S. law schools require about 30 semester credit hours of required courses and approximately 60 hours or more of electives. Law students pick and choose available courses on which to focus before graduation with the J.D. degree in the United States. This freedom allows law students to take many tax courses such as federal taxation, estate and gift tax, and estates and successions before completing the Juris Doctor and taking the bar exam in a particular U.S. state. There are many fine LLM or Masters in Laws Graduate programs currently being offered in the United States, United Kingdom,Australia,Netherlands etc. Many of these programs offer the opportunity to focus on domestic and international taxation. In the United States most LLM programs require that the candidate be a graduate of an American Bar Association-accredited law school while a mere graduate law degree is a sufficient eligibility criterion in other countries for admission to LLM in Taxation law programmes.

5.2 Tax education from business school programs

There are hundreds of accredited business schools in the USA. Many are accredited by the AACSB or ACBSP or recognized by AAFM. These undergraduate or graduate programs may allow the student to major or graduate with a tax related degree such as a Masters in Taxation. Also, the undergraduate focus on accounting would allow a student to go the Certified Public Accountant (CPA) track. After a student completes the individual state or jurisdictional requirements for accounting, the applicant may sit for the Uniform Certified Public Accountant Examination.

6. Legislation

Legislation (or "statutory law") is law which has been promulgated (or "enacted") by a legislature or other governing body. The term may refer to a single law, or the collective body of enacted law, while "statute" is also used to refer to a single law. Before an item of legislation becomes law it may be known as a bill, which is typically also known as "legislation" while it remains under active consideration. Legislation can have many purposes: to regulate, to authorize, to provide (funds), to sanction, to grant, to declare or to restrict. In some jurisdictions legislation must be confirmed by the executive branch of

government before it enters into force as law. Under the Westminster system, an item of legislation is known as an Act of Parliament after enactment. Legislation is usually proposed by a member of the legislature (e.g. a member of Congress or Parliament), or by the executive, whereupon it is debated by members of the legislature and is often amended before passage. Most large legislatures enact only a small fraction of the bills proposed in a given session. Whether a given bill will be proposed and enter into force is generally a matter of the legislative priorities of government. Those who have the formal power to create legislation are known as legislators, while the judicial branch of government may have the formal power to interpret legislation (see statutory interpretation).

7. Alternative Dispute Resolution

Alternative dispute resolution (ADR) (also known as External Dispute Resolution in some countries, such as Australia) includes dispute resolution processes and techniques that fall outside of the government judicial process. Despite historic resistance to ADR by both parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute

7.1 Types

- ADR is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration. (Sometimes a fifth type, conciliation, is included as well, but for present purposes it can be regarded as a form of mediation. See conciliation for further details.) ADR can used alongside existing legal systems such as Sharia Courts within Common Law juridictions such as the UK.

- ADR traditions vary somewhat by country. There are significant common elements which justify a main topic, and each country or region's difference should be delegated to sub-pages.

o ADR or Alternative Dispute Resolution is of two historic types. First, methods for resolving dispute outside of the official judicial mechanisms. Second, informal methods attached to or pendant to official judicial mechanisms. The methods are similar, whether or not they are pendant, and generally use similar tool or skill sets, which are basically sub-sets of the skills of negotatiation.

o The basic ADR types are informal tribunals, informal mediative processes, formal tribunals and formal mediative processes. The classic formal tribunal forms of ADR are arbitration (both binding and advisory or non-binding) and private judges (either sitting alone, on panels or over summary jury trials). The claissic formal mediative process is referall for mediation before a court appointed mediator or mediation panel. Structured transformative mediation as used by the U.S. Postal Service is a formal process. Classic informal methods include social processes, referrals to non-formal authorities (such as a respected member of a trade or social group) and intercession. The major difference between formal and informal processes are (a) pendancy to a court procedure or (b) the possession or lack of a formal structure for the applicaitonof the procedure.

o For example, freeform negotiation is merely the use of the tools without any process. Negotiation within a labor arbitration setting is the use of the tools within a highly formalized and controlled setting.

o Referal to an ombudsman's office is a formal procedure. Informal referal to a co-worker known to help people work out issues is an informal procedure. HR departments are probably a formal procedure. Co-worker interventions are usually informal.

o Conceptualizing ADR in this way makes it easy to avoid confusing tools and methods (does negotiation once a law suit is filed cease to be ADR? If it is a tool, then the question is the wrong question)(is medation ADR unless a court orders it? If you look at court orders and similar things as formalism, then the answer is clear, court annexed mediation is merely a formal ADR process).

o In addition, dividing lines in ADR processes are often provider driven rather than consumer driven. For example, whether or not ADR professioanls should be paid

or if being paid creates a conflict of interest that destroys the neutrality of the provider -- that is a provider driven dividing line. The same is true as to whether ADR providers should be evaluative or not. Generally, trade groups whose members are either paid or unpaid, competent to evaluate or not competent to evaluate, tend to drive these definitions; the same is true of transformative and other methodologies what claim to be the essential or only correct method. Educated consumers will often chose to use all of the methodologies depending on the needs and circumstances that they face and are the strongest force against trade group pressures.

o Finally, it is important to realize that conflict resolution is the target of all the tools and processes. If a process leads to resolution, it is a dispute resolution process. If a tool or a skill helps with the process, then it is a tool in the dispute resolution spectrum. That is why such a wide variety of processes and tools fits within the topic of ADR, though ADR and

o The salient features of each type are as follows:

o In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution. (NB --- a third party like a chaplain or organizational ombudsperson or social worker or a skilled friend may be coaching one or both of the parties behind the scene, a process called "Helping People Help Themselves" --see Helping People Help Themselves, in Negotiation Journal July 1990, p 239-248, which includes a section on helping someone draft a letter to someone who is perceived to have wronged them.)

o In mediation, there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does not impose a resolution on the parties. In some countries (for example, the United Kingdom), ADR is synonymous with what is generally referred to as mediation in other countries.

o In collaborative law or collaborative divorce, each party has an attorney who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the attorneys (who are trained in the process)

and mutually-agreed experts. No one imposes a resolution on the parties. However, the process is a formalized process that is part of the litigation and court system. Rather than being an Alternative Resolution methodology it is a litigationvarient that happens to rely on ADR like attitudes and processes.

o In arbitration, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration. This is known as a 'Scott Avery Clause'. In recent years, the enforceability of arbitration clauses, particularly in the context of consumer agreements (e.g., credit card agreements), has drawn scrutiny from courts. Although parties may appeal arbitration outcomes to courts, such appeals face an exacting standard of review.

o Beyond the basic types of alternative dispute resolutions there are other different forms of ADR:

o Case evaluation: a non-binding process in which parties present the facts and the issues to a neutral case evaluator who advises the parties on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a jury or other adjudicator.

o Early neutral evaluation: a process that takes place soon after a case has been filed in court. The case is referred to an expert who is asked to provide a balanced and neutral evaluation of the dispute. The evaluation of the expert can assist the parties in assessing their case and may influence them towards a settlement.

o Family group conference: a meeting between members of a family and members of their extended related group. At this meeting (or often a series of meetings) the family becomes involved in learning skills for interaction and in making a plan to stop the abuse or other ill-treatment between its members.

o Neutral fact-finding: a process where a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving

complex scientific and factual disputes.

o Ombuds: third party selected by an institution for example a university, hospital, corporation or government agency to investigate complaints by employees, clients or constituents. The ombudsworks within the institution to look into complaints independently and impartially.

o "Alternative" dispute resolution is usually considered to be alternative to litigation. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to violence.

o In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster "appropriate" dispute resolution. That is, some cases and some complaints in fact ought to go to formal grievance or to court or to the police or to a compliance officer or to a government IG. Other conflicts could be settled by the parties if they had enough support and coaching, and yet other cases need mediation or arbitration. Thus "alternative" dispute resolution simply means a method that is not the courts. "Appropriate" dispute resolution considers all the possible responsible options for conflict resolution that are relevant for a given issue.

o Arbitration and Mediation are the best known and most commonly used forms of ADR within the UK. However in recent years Adjudication is rapidly gaining notoriety as a quick, fair and cheap was to settle disputes.

o ADR can increasingly be conducted online, which is known as online dispute resolution (ODR, which is mostly a buzzword and an attempt to create a distinctive product). It should be noted, however, that ODR services can be provided by government entities, and as such may form part of the litigation process. Moreover, they can be provided on a global scale, where no effective domestic remedies are available to disputing parties, as in the case of the UDRP and domain name disputes. In this respect, ODR might not satisfy the "alternative" element of ADR.

In Section 4 of this course you will cover these topics:
Legal Ethics

Topic : Legal Ethics

Topic Objective:

Objectives:

At the end of this topic student would be able to:

Understand the concept of Precedent
Learn about the Regulation and Administrative Decisions
Understand Secondary Sources

Definition/Overview:

Legal ethics encompasses an ethical code governing the conduct of people engaged in the practice of law. In the United States, the American Bar Association has promulgated model rules that have been influential in many jurisdictions. The model rules address the client-lawyer relationship, duties of a lawyer as advocate in adversary proceedings, dealings with persons other than clients, law firms and associations, public service, advertising, and maintaining the integrity of the profession. Respect of client confidences, candor toward the tribunal, truthfulness in statements to others, and professional independence are some of the defining features of legal ethics. American law schools are required to offer a course in professional responsibility, which encompasses both legal ethics and matters of professionalism that do not present ethical concerns.

Enforcement: Every state in the United States has a regulatory body (usually called a state bar association) that polices lawyerconduct. When lawyers are licensed to practice in a state, those lawyers subject themselves to this authority. Overall responsibility often lies with the highest court in a state (such as state supreme court). The state bar associations, often in consultation with the court, adopt a set of rules that set forth the applicable ethical duties. As of 2007, 47 states have adopted a version of the American Bar Association's model rules. One state, New York, follows a version of the ABA's older ethical model, the Model Code of Professional Responsibility. California and Maine are the only states that have not adopted

either -- instead these states have written their own rules from scratch. There is some debate over whether state ethical rules apply to federal prosecutors. The Department of Justice has held differing opinions through different administrations, with the Thornburgh Memo suggesting these rules do not apply, and the Reno Rules asserting that they do apply. Lawyers who fail to comply with local rules of ethics may be subjected to discipline ranging from private (non-public) reprimand to disbarment.

Key Points:

1. Precedent

In common law legal systems, a **precedent** or **authority**is a legal case establishing a principle or rule that a court or other judicial body adopts when deciding subsequent cases with similar issues or facts.The precedent on an issue is the collective body of judicially announced principles that a court should consider when interpreting the law. When a precedent establishes an important legal principle, or represents a new or changed law on a particular issue, that precedent is often known as a landmark decision.
Precedent is central to legal analysis and rulings in countries that follow common law like the United Kingdom (except Scotland which retains its own legal system) and Canada (except Quebec). In some systems precedent is not binding but is taken into account by the courts.

1.1 Types of precedents

Binding precedent: Precedent that must be applied or followed is known asbinding precedent (alternately mandatory precedent, mandatory or binding authority, etc.). Under the doctrine of stare decisis, a lower court must honor findings of law made by a higher court that is within the appeals path of cases the court hears. In state and federal courts in the United States, jurisdiction is often divided geographically among local trial courts, several of which fall under the territory of a regional appeals court. All appellate courts fall under a supreme court. By definition, decisions of lower courts are not binding on each other or any courts higher in the system, nor are appeals court decisions binding on each other or on local courts that fall under a different appeals court. Further, courts must follow their own proclamations of law made earlier on other cases, and honor rulings made by other courts in disputes among the parties before them pertaining to the same pattern of facts or events,

unless they have a strong reason to change these rulings.
One law professor has described mandatory precedent as follows:

Given a determination as to the governing jurisdiction, a court is "bound" to follow a precedent of that jurisdiction only if it is directly in point. In the strongest sense, "directly in point" means that: (1) the question resolved in the precedent case is the same as the question to be resolved in the pending case, (2) resolution of that question was necessary to disposition of the precedent case; (3) the significant facts of the precedent case are also present in the pending case, and (4) no additional facts appear in the pending case that might be treated as significant.

In extraordinary circumstances a higher court may overturn or overrule mandatory precedent, but will often attempt to distinguish the precedent before overturning it, thereby limiting the scope of the precedent in any event.
Under the U.S. legal system, courts are set up in a sort of hierarchy. At the top is the United States Supreme Court, and underneath are lower federal courts (the Circuit Courts of Appeals, federal district courts, and some courts of specialized jurisdiction, such as bankruptcy courts) and also there are state courts.
On questions as to the meaning of federal law, including the U.S. Constitution, the U.S. Supreme Court has the final say. So, when the U.S. Supreme Court says, for example, that the First Amendment applies in a specific way to suits for slander, then every court is bound by that precedent in its interpretation of the First Amendment as it applies to suits for slander.
If a lower court judge disagrees with the Supreme Court on what the First Amendment should mean, he cannot rule however he wants; instead, he must rule according to the binding precedent. Until the Supreme Court changes its mind (or, in the case of a federal statute, Congress changes the law), that is what the law means. Although state courts are not part of the federal system, state courts are also bound by Supreme Court rulings as to the meaning and scope of federal law.
Lower courts are also bound by precedent (that is, prior decided cases) of higher courts within their region. Thus, a federal district court that falls within the geographic boundaries of the Third Circuit Court of Appeals is bound by rulings of the Third Circuit Court, but not by what was said in the Ninth Circuit, for example. (The Circuit Courts of Appeals have jurisdiction defined by geography.) The Circuit

Courts of Appeals can interpret the law how they want, so long as there is no binding Supreme Court precedent. In fact, one of the common reasons the Supreme Court grants certiorari (that is, they agree to hear a case) is if there is a conflict among the circuit courts as to the meaning of a federal law.

1.2 Persuasive precedent

Precedent that is not mandatory but which is useful or relevant is known as persuasive precedent (or persuasive authority or advisory precedent). Persuasive precedent includes cases decided by lower courts, by peer or higher courts from other geographic jurisdictions, cases made in other parallel systems (for example, military courts, administrative courts, indigenous/tribal courts, State courts versus Federal courts in the United States), and in some exceptional circumstances, cases of other nations, treaties, world judicial bodies, etc.

In a case of first impression, courts often rely on persuasive precedent from courts in other jurisdictions that have previously dealt with similar issues. Persuasive precedent may become binding through the adoption of the persuasive precedent by a higher court.

1.3 Critical analysis of precedent

- **Court formulations**

  The United States Court of Appeals for the Third Circuit has stated:

  > A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.

  The United States Court of Appeals for the Ninth Circuit has stated:

  > Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et non quietamovere "to stand by and adhere to decisions and not disturb what is settled." Consider the word "decisis." The word means, literally and legally, the decision. Under the doctrine of stare decisis a case is important only for what it decides for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, stare decisis

is important only for the decision, for the detailed legal consequence following a detailed set of facts.

1.4 Academic study

Precedents viewed against passing time can serve to establish trends, thus indicating the next logical step in evolving interpretations of the law. For instance, if immigration has become more and more restricted under the law, then the next legal decision on that subject may serve to restrict it further still.

Scholars have recently attempted to apply network theory to precedents in order to establish which precedents are most important or authoritative, and how the court's interpretations and priorities have changed over time.

1.5 Super stare decisis

Super-stare decisis is a term used for important precedent that is resistant or immune from being overturned, without regard to whether correctly decided in the first place. It may be viewed as one extreme in a range of precedential power, or alternately, to express a belief, or a critique of that belief, that some decisions should not be overturned.In 1976, Richard Posner and William Landes coined the term "super-precedent," in an article they wrote about testing theories of precedent by counting citations. Posner and Landes used this term to describe the influential effect of a cited decision. The term "super-precedent" later became associated with different issue: the difficulty of overturning a decision. In 1992, Rutgers professor Earl Maltzcriticized the Supreme Court's decision in Planned Parenthood v. Casey for endorsing the idea that if one side can take control of the Court on an issue of major national importance (as in Roe v. Wade), that side can protect its position from being reversed "by a kind of super-stare decisis

2. Regulation and Administrative Decisions

Regulation and Administrative Decisions is also known as Extrajudicialpunishment is punishment by the state or some other official authority without the permission of a court or legal authority. Agents of a state apparatus often carry out this type of punishment if they come to the conclusion that a person is an imminent threat to the overall security of its political system. The existence of extrajudicial punishment is considered proof that some

governments will break their own legal code if deemed necessary. Improper use of force by non-state actors is not usually called extrajudicial punishment, such actions are more properly called assassination, guerrilla warfare, murder (in the case of attacks on unarmed civilians) or vigilantism instead.

2.1 The Existence

Although the legal use of capital punishment is generally decreasing around the world, individuals or groups deemed threateningor even simply "undesirable"to a government may nevertheless be targeted for punishment by a regime or its representatives. Such actions typically happen quickly, with security forces acting on a covert basis, performed in such a way as to avoid a massive public outcry and/or international criticism that would reflect badly on the state. Sometimes, the killers are not members of the government, but rather sotto voce, or paid agents, authorized in their activity. Another possibility is for overtly uniformed security forces to punish a victim, but under circumstances that make it appear as self-defense, such as by planting recently-fired weapons near the body, or fabricating evidence suggesting suicide. In such cases, it can be difficult to prove that the perpetrators acted wrongly. Because of the dangers inherent in armed confrontation, even police or soldiers who might strongly prefer to take an enemy alive may still kill to protect themselves or civilians, and potentially cross the line into extrajudicial murder. Only in the most obvious cases, such as the Operation Flavius triple killing or the shooting of Jean Charles de Menezes will the authorities admit that "kill or capture" was replaced with "shoot on sight".

Extrajudicial punishment is often a feature of politically repressive regimes, but even self-proclaimed or internationally recognized democracies have been known to use extrajudicial punishment under certain circumstances.

Extrajudicial punishment may be planned and carried out by a particular branch of a state, without informing other branches, or even without having been ordered to commit such acts. Other branches sometimes tacitly approve of the punishment after the fact. They can also genuinely disagree with it, depending on the circumstances, especially when complex intragovernment or internal policy struggles also exist within a state's policymaking apparatus. In times of war, natural disaster, societal

collapse, or in the absence of an established system of criminal justice, there may be increased incidences of extrajudicial punishment. In such circumstances, police or military personnel may be unofficially authorised to punish severely individuals involved in rioting, looting or other violent acts, especially if caught in flagrantedelicto. This position is sometimes itself corrupted, resulting in the death of merely inconvenient persons, that is, relative innocents who are just in the wrong place at the wrong time. A "disappearance" occurs where someone who is believed to have been targeted for extrajudicial execution does not reappear alive. Their ultimate fate is thereafter unknown or never fully confirmed.

2.2 Around the world

The NKVD troika and Special Council of the NKVD are examples from the history of the Soviet Union, where extrajudicial punishment "by administrative means" was part of the state policy. Most Latin American dictatorships have regularly instituted extrajudicial killings of their enemies; for one of the better-known examples, see Operation Condor. Some consider the killing of Black Panther Fred Hampton to have been an extrajudicial killing ordered by the United States government. Also, the US has been accused of exercising a covert prison system set up by the CIA in several countries, especially Egypt, to evade US jurisdiction. The deaths of the leaders of the leftist urban guerilla group, the Red Army Faction's Ulrike Meinhof, Andreas Baader, Gudrun Ensslin, and Jan-Carl Raspe are regarded as extrajudicial killings by many, a theory partly based on the testimony of IrmgardMller.

The government of Israel has also carried out extrajudicial killings, which they term "targeted assassinations" against leaders of organisations involved in carrying out attacks against Israel. During the apartheid years South Africa's security forces were also accused of using extrajudicial means to deal with their political opponents. After his release, Nelson Mandela would refer to these acts as proof of a Third Force. This was denied vehemently by the administration of F.W. de Klerk. Later the South African Truth and Reconciliation Commission, led by Archbishop Desmond Tutu would find that both military and police agencies such as the Civil Cooperation Bureau and C10 based at Vlakplaas were guilty of gross human rights violations. This led the International Criminal Court to declare apartheid a crime against

humanity.

2.3 Torture

Torture has been a tool of many states throughout history and for many states. Despite worldwide condemnation and the existence of treaty provisions that forbid it, torture is still practiced in two thirds of the world's nations.

Torture remains a frequent method of interrogation and repression in totalitarian regimes, terrorist organizations, and organized crime. In authoritarian regimes, torture is often used to extract false confessions from political dissenters, so that they admit to being spies or conspirators, preferably manipulated by a foreign country. Most notably, such a dynamic of forced confessions marked the justice system of the Soviet Union during the reign of Stalin (thoroughly described in AleksandrSolzhenitsyn's Gulag Archipelago).

3. Secondary Sources

An important part of legal research is based upon secondary research. In its broadest sense, legal research includes each step of a course of action that begins with an analysis of the facts of a problem and concludes with the application and communication of the results of the investigation. The processes of legal research vary according to the country and the legal system involved. However, legal research generally involves tasks such as: 1) finding primary sources of law, or primary authority, in a given jurisdiction (cases, statutes, regulations, etc.); 2) searching secondary authority (for example, law reviews, legal dictionaries, legal treatises, and legal encyclopedias such as American Jurisprudence and Corpus Juris Secundum), for background information about a legal topic; and 3)searching non-legal sources for investigative or supporting information.

4. Research Aids

Law libraries around the world provide research services to help their patrons find the legal information they need in law schools, law firms and other research environments. Many law libraries and institutions provide free access to legal information on the web, either individually or via collective action, such as with the Free Access to Law Movement.

In Section 5 of this course you will cover these topics:

- Legal Research

Topic : Legal Research

Topic Objective:

At the end of this topic student would be able to:

- Understand the basics of Legal Research
- Learn about the various ways to research legal problems

Definition/Overview:

Legal Research: Legal research is performed by anyone with a need for legal information, including lawyers, law librarians, and paralegals. Sources of legal information range from printed books, to free legal research websites and information portals to fee database vendors such as LexisNexis and Westlaw. The three main sources of law correspond with the three branches of government: executive, legislative and judicial. Judicial decisions form the largest body of written law over million reported cases. They are collected and published in reporters. The legislative enactments, statutes, stem from modern times. The Congressional Record is a verbatim transcript of all proceedings in the House and the Senate. If a statute is vague, the legislative history may furnish clarification. In recent years, administrative and executive agencies adopt regulations that have the force of law. The Code of Federal Regulations records administrative regulations. Secondary sources such as encyclopedias, law reviews, legal treatises and form books often carry the weight of law. Law reviews are published at law schools. Treatises are written by law professors and other legal scholars.

Shepards Citations lists all reported cases and later cases that have cited or referred to the case.

Key Points:

1. Basis of Legal Research

Legal research, according to one source, is "the process of identifying and retrieving information necessary to support legal decision-making.

2. Process of Legal Research

In its broadest sense, legal research includes each step of a course of action that begins with an analysis of the facts of a problem and concludes with the application and communication of the results of the investigation."The processes of legal research vary according to the country and the legal system involved. However, legal research generally involves tasks such as finding primary sources of law, or primary authority, in a given jurisdiction (cases, statutes, regulations, etc.), searching secondary authority for background information about a legal topic (law review, legal treatise, legal encyclopedias, etc.), and searching non-legal sources for investigative or supporting information..Legalresearch is performed by anyone with a need for legal information, including lawyers, law librarians, and paralegals. Sources of legal information range from printed books, to free legal research websites and information portals to fee database vendors such as LexisNexis and Westlaw. Law libraries around the world provide research services to help their patrons find the legal information they need. Many law libraries and institutions provide free access to legal information on the web, either individually or via collective action, such as with the Free Access to Law Movement.

3. Creating a Research Plan

The research plan helps to focus on the issues, sources, and methods for finding the answer and controlling law.

4. What Is the Issue or Legal Question?

What are the relevant facts or statutory materials?

5. What Is the Appropriate Search Terminology?

Print research materials require finding material based on a printed index of individual words as selected by editors of the service

Computer research allows for searches of words found in the documents using a text search of requested words in the search query.

6. What Type of Research Material Is Available?

The paralegal must be able to find the information needed when the familiar resources are not available. Paralegals cannot be sure whether the research will be done using a traditional paper library or a computer search; they must understand how each resource files the information.

7. What Jurisdiction or Jurisdictions Are Involved?

Focusing on a single jurisdiction or a minimum number of jurisdictions reduces the numbers of traditional volumes of books necessary and saves online computer search time.

8. What Is the Controlling Law?

Knowing which set of materials to use, the statutes of the jurisdiction, the regulation of a given administrative agency, or the courts of a given jurisdiction will save time in doing the research.

9. What Are the Types of Resources to Be Used?

1. Primary sources of law are used in preparing the legal memo or brief.

2. Secondary sources are useful, efficient ways to get an overview of an area of law or learn the terminology of a particular field of law in which the paralegal is not familiar.

3. Finding tools are publications containing tools for finding both primary and secondary sources.

10. Where Should the Needed Research Material Be Located?

The needed material may have to be located at a remote library such as a bar association library or a law school library.

11. Creating a List of Research Terms

Separate lists should be created for online searches and traditional print sources.

12. Executing the Research Plan

As with the execution of any plan, detours can be expected, as the law is in a constant evolutionary state. New statutes are enacted, and new case interpretations are handed down. During the research process, the researcher must look for changes and potential changes from pending legislation and cases on appeal.

13. Finding the Law

The controlling law may be found at federal, state, or local legislative or judicial levels.

14. Primary Sources and Authority

Primary sources include the law, constitutions, statutes, regulations, court rules, and case decisions.