Introduction to Law

Prepared by

Dr/ Rawy Elfouly

Associate professor of commercial and maritime law

-faculty of law- university of Assuit

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Preface

"A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity, nor is that curiosity ever more agreeably or usefully employed, than in examining the laws and customs of foreign nations"

Samuel Johnson

In response to feedback that I have acquired from teaching the course of legal terms and texts in English for many years at university of Jazzera in UAE-Dubai-I have reached many conclusions concerning teaching this course in our faculty-faculty of law at university of Assuit ,the important one is concerning the book we taught to students, I think time has come to break the form and stereotype of this book especially after great two revolutions that occurred in Egypt within only two years, and I hope they to be the last, Amin With the fall of the fashy mouslim's brother's government in June 2013, Egyptians have a historic opportunity to rebuild their legal and political system from the ground up. Egyptians will elect a new government and draft a new constitution that will go before voters in a national referendum. Myriad other laws and legal institutions will be reshaped over the next several years; indeed they are already being rewritten the moment is positive trends and challenges appropriate, therefore, to take stock of the Strengthening the rule of law in Egypt.

With a population of 105 million, Egypt is by far the most populous country in the Arab World and arguably the most important in terms of regional politics, commerce, and security. This fact alone makes Egypt worthy of our sustained attention. But in the area of law and legal institutions, in particular, Egypt has served as a model of sorts. Egyptian legal professionals work throughout the Arab World and a number of Arab countries that have mimicked Egyptian legal institutions and practices. As a result of this influence, prospects for the rule of law in Egypt have

regional and not only domestic implications.

aim of this book

The main aim has been to make this a user-friendly book with the emphasis on what you need to do as a student to avoid student problems with using English terms and texts, rather than describing in detail the procedural and substantive subjects of law in general. Thus, this book may use to a wide range of persons who need to use legal English terminology in their work, such as lawyers or legal researchers to somewhat. But i can say with full confidence, this book is primarily written for law students who wish to develop their knowledge of legal English terminology to assist their legal.

In some this book has been specially written for beginners in studying English legal studies. Its purpose is to teach law-students, whose first language is not English, how to understand legal material written in English language.it is not intended to be relied upon for professional information or advice about law or the practice of law.

Finally this book is designed primarily for students studying law in Arabic language so i have assumed that the reader has no previous knowledge of legal English terminology.

Organization of this book:

As I mentioned this book is not intended to cover-in details- all branches of the law, but to deal with English legal studies in various areas of law. This book will be divided into six parts plus an introduction to the law at the beginning of the book.so it commences with an introduction to the law, classifications of the law, the judiciary system in Egypt and the international organizations, lastly the book concludes with a helpful vocabulary which gives the Arabic meaning of different kinds of words used in every chapter.

Also, at the start of each chapter i have set out the learning objective of that chapter. Learning objective is a statement of what a student should understand when he has completed the chapter; you may find it useful to match the learning objectives of each chapter against the syllabus for your Arabic law courses. This will help you to identify and concentrate your efforts on the sections of Englishctly relevant to your course of study. So this book focuses on legal terms essential to understand the basic legal concepts. There are seven parts and every part has been divided into small chapters, each chapter includes a long legal text which is supplemented by vocabulary and exercises. Vocabulary is designed to give the Arabic translation of English words.

At the end of each chapter I have provided a selection of self-test questions and activities related specifically to the material introduced in that chapter and a number of specimen examination questions. Exercises are designed to enhance as well as to evaluate your understanding of the legal texts.

Having worked through this book, I hope this book can provide the reader with a good opportunity to increase and enhance his knowledge and vocabulary in a practical manner

Part one

Introduction to the law

After studying this part you should understand the following main points:

1-what is the law.

2- The nature of the law.

3-what distinguished legal rules from other types of rules?

4- The role law plays In society.

5- Ways in which the law may be classified, including the differences between public and private law, civil and criminal law.

6- Legal systems around the world.

Chapter one

Basics of the law

Introduction:

It is suggested that we are living our lives with safety and freedom and enjoying it because we live in an order society and this order is a direct result of laws and regulations enacted to protect people.

Therefore it is idiomatic to understand certain essential legal concepts and terminology because they affect our life.

So I think it is better to address in this chapter all topics which deal with definition of law and its rule played in society, the distinctions of legal rules from other type of rules, and finally classifications of law.

1-defination of law:

There are different definitions of law ([1]) all of them raise great debate concerning three recurrent issues: How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?([2])

1--for more details about definitions of law see harbert M.Bohlman and mary Jane Dundas,he legal ethical and international Environment of business,6thed.2005,p5

2- H.L.A.HART, THE CONCEPT OF LAW, SECOND EDITION, CLARENDON PRESS · OXFORD,1994,.p13

3-Wael Allam,legal studies in English, first edition, university of sharjah,2010,p.15,alsoAbdelmoneim El-Badraui ,juridical terminology, translated by Riad Habashy,Sayed AbdallahWahba Bookshop,Egypt,1971,p5.prof El-Baraoui defines the lawas"the whole set of compulsory rule which govern the relations between persons living in a society and which are put into force by public authority"

the most accurate definition of law is the one which defines law as" a set of obligatory rules which governs and organizes relations in a given society "these obligatory rules called legal rules, constitute "the law". Every society has its law "there is no society without law.([3])

But the rule of law must be supported by a sanction introducing the idea of compulsion or enforcement ([4]) so, in many different situations in social life one person may express a wish that another person should do or abstain from doing something. When this wish is expressed not merely as a piece of interesting information or deliberate self-revelation but with the intention that the person addressed should conform to the wish expressed, it is customary in English and many other languages, though not necessary, to use a special linguistic form called the *imperative mood,* 'Go home!' 'Come here!' 'Stop!' 'Do not kill him!' The social situations in which we thus address others in imperative form are extremely diverse; yet they include some recurrent main types, the importance of which is marked by certain familiar classifications. 'Pass the salt, please', is usually a mere *request,* since normally it is addressed by the speaker to one who is able to render him a service, and there is no suggestion either of any great urgency or any hint of what may follow on failure to comply. 'Do not kill me', would normally be uttered as a *plea* where the speaker is at the mercy of the person addressed or in a predicament from which the latter has the power to release him. 'Don't move', on the other hand, may be a *warning* if the speaker knows of some impending danger to the person addressed (a snake in the grass) which his keeping still may avert.

-4-Hussein Elogugy,legal English terminology in context, brighter horizon group,2013p.22

The varieties of social situation in which use is characteristically, though not invariably, made of imperative forms of language are not only numerous but shade into each other; and terms like 'plea', 'request', or 'warning', serve only to make a few rough discriminations. The most important of these situations is one to which the word 'imperative' seems especially appropriate. It is that illustrated by the case of the gun man who says to the bank clerk, 'Hand over the money or I will shoot.' Its distinctive feature which leads us to speak of the gunman *ordering* not merely *asking*, still less *pleading with* the clerk to hand over the money, is that, to secure compliance with his expressed wishes, the speaker threatens to do something which a normal man would regard as harmful or unpleasant, and renders keeping the money a substantially less eligible course of conduct for the clerk. If the gun man succeeds, we would describe him as having *coerced* the clerk ,and the clerk as in that sense being in the gunman's power. Many nice linguistic questions may arise over such cases: we might properly say that the gunman *ordered* the clerk to handover the money and the clerk obeyed, but it would be some what misleading to say that the gunman *gave an order* to the clerk to hand it over, since this rather military-sounding phrase suggests some right or authority to give orders not present in our case. It would, however, be quite natural to say that the gunman gave an order to his henchman to guard the door.([5])

In the light of what we mentioned, we can conclude two things that societies expect from the law ([6]):-

First: that it should be predictable, so that persons can reasonably forecast what is and is not illegal behavior.

5-- H.L.A.HART,op cit p.19,20
6-Hussein El-Moguy,op cit,p.23

Second: that it should also be flexible, so that can adjust to various situations and changing needs of society.

2-Characteristics of the legal rule.

The most commonly noted characteristic of rules concerns the degree of precision, detail, or complexity they embody: how finely are different sorts of behavior to be distinguished? Such matters may arise in defining the scope of a legal command, providing for exceptions, adjusting sanctions based upon aggravating and mitigating circumstances, and so on. A related aspect of legal commands concerns *when* a given level of detail is provided - at the time of promulgation ('rules') or subsequent to individuals' actions, in the context of adjudication ('standards'). These aspects of rules are considered from a perspective that focuses upon information costs and dissemination: different sorts of legal commands involve differing costs of formulation and application by private parties (deciding upon their own conduct) and adjudicators, and the character of laws also influences how well parties actually will understand them and conform their conduct accordingly([7]).

Also there are other characteristics distinguish legal rule from ethical rules and moral rules, as follow.([8])

First: law is promulgated by state through its legislative authority, or established by custom.

Second: the legal rule is general and abstract: it tends to apply to people in general rather than to mere individuals, and we mean by saying the legal rule is abstract it concerns the formulation of it.

7- Louis Kaplow GENERAL CHARACTERISTICS OF RULES, Harvard Law School and National Bureau of Economic Researh,1999.p.504-505

8-
ibid,p.25,26

Third: the essential characteristic of law is that it is enforced by state by means of a sanction.

3- The functions of law:

Law can be said to perform four different functions ([9]), each of which is of huge importance to our welfare.

(A) Defending us from evil

The first and most basic function of law is to defend us from evil – that is, those who would seek to harm us for no good reason. This function of law underlies 20th century developments in International Law such as the Nuremberg Trials and the creation of the International Criminal Court.

(B) Promoting the common good

Law is not just concerned with bringing evil people to account for their actions. A community made up of people who bear no ill-will to anyone else and are simply concerned to pursue their own self-interest needs law because there are situations where if everyone pursues their own self-interest, everyone will be worse off than they would have been if they acted differently. So a community of self-interested actors needs law: (i) to solve 'Prisoner's dilemma' situations; (ii) to distribute into private hands property that would otherwise be exploited by everyone. (iii) to prevent people acting on their natural desire to extract 'an eye for an eye' in revenge for actual or perceived wrongs that they have suffered at other people's hands.

(c) Resolving disputes over limited resources

As every family knows, in any community there will always be disputes over who should have what of a limited number of resources. Law is needed to resolve these disputes.

9-Roscoe Pound,social control through law ,hamdan :Archon Books,1968,pp.23-30,alsoH.L.A. Hart ,concept of law,oxford,1994.p.45

(D) Encouraging people to do the right thing

It was thought even from classical times that law performed a fourth function – that of encouraging and helping people to do the right thing. For example, Aristotle (384 BC – 322 BC) argued that people needed the discipline of law to habituate them into doing the right thing, from which standpoint they could then appreciate why doing the right thing was the right thing to do. Up until the 20th century, this view of law was accepted by law makers, with the result that the Egyptian legal system contained a large number of 'morals rules' – that is, laws that were designed purely and simply to stop people acting immorally, according to the lights of prophet Mohamed teaching on what counted as immoral behaviour. However, in the 20th century, the 'harm principle' propounded by John Stuart Mill in his book 'On Liberty', according to which the law should not sanction people for acting immorally unless their conduct involved some harm to others, gained more and more popularity, and resulted in the abolition of large numbers of 'morals laws'. These trends triggered what is now known as the Hart-Devlin debate over the extent to which it is legitimate for the law to enforce morality. Lord Devlin – at the time, a judge in the House of Lords, the highest court in the UK – argued that law should enforce morality so as to preserve the cohesiveness of society. Professor H.L.A. Hart – at the time, the most famous legal philosopher in the world – based his position squarely on Mill's harm principle, though subject to the caveats that the law might legitimately prevent someone acting immorally if doing so involved harm to himself or would cause offence to others. alienates people from each other, and discourages people from helping other people for fear that doing so might result in their being sued.

4- Relation between law and moral.

Law, unlike morality, is made by someone. So it may, unlike morality, have aims, which are the aims of its makers (either individually or collectively). Not all law has aims, however, because not all law-making is intentional. Customary law is made by convergent actions that are performed without the intention of making law, and so without any further intention to achieve anything by making law, i.e. without any aim. There are also some other modes of accidental law-making. However for the time being we will focus on law that is intentionally made and therefore is capable of having aims.

Some have thought that law must, by its nature, have certain distinctive moral aims when it has aims at all. If it lacks those aims it is not law. It must aim to be just ,or aim to serve the common good ,or aim to justify coercion, or aim to be in some other way morally binding or morally successful.([10])

Does morality ever form part of law?

Morality is gappy and sometimes needs law to help fill in the gaps. But the same is also true in reverse. Often law is gappy and needs morality's help to make it less so. Legal norms, like moral norms, often conflict among themselves, and often such conflicts cannot be resolved using legal norms alone. Indeterminacies of language and intention on the part of law-makers, moreover, can afflict law in such a way as to frustrate its role as a filler of moral gaps. Legal conflict and indeterminacy require extra-legal resources to overcome them. And the need to overcome them is often pressing in law. Many legal officials, notably judges, are bound by their oaths (or

10- Chaxiys E.Clarxt,the function of law in a democratic society, the university of Chicago law review,p.56

11- JOHN GARDNER, Law and Morality,p.3,4

12-Hussein El-moguy, op cit.p.33,34

other duties) of office to decide any case before them that falls within their jurisdiction. They cannot suspend their judgment. Whereas the rest of us can often suspend judgment and keep it suspended.([11])

5-law and justice:

Achieving justice is cornerstone of any legal system, but what is justice? And what is its relationship with law?

There is no general agreement on the meaning of the term justice; and perfect justice is still a dream of humanity. What man strives for is a relative justice .most modern legal systems are based on the idea that, to achieve justice ,this objective requires precise rules, so that judges base their judgments on the application of this rules to the case before them and not on arbitrary factors.([12])

Chapter one assessment

I Choose the correct answer:

1-it is a set of obligatory rules which governs and organizes relations in a given society

A) Legal rule.

B) Law

C) Justice

D) Custom

2-It is so important for application of law but it hasn't any sanctions applied over its violators.

A) Custom.

B) Justice.

C) moral.

D) All what mentioned

3-law is promulgated by state through its…….

A) Legislative authority

B) Judiciary authority

C) Executive authority

D) All what mentioned

4- The essential characteristic of law is that it is enforced by……

A) State

B) Town

C) The president of the state

D) None of what mentioned

5- The legal rule is …….. and abstract

A) Private

B) General

C) General and Private

D) None of what mentioned

6- The first and most basic function of law is to defend us from……..

A) Evil

B) Sanction

C) Custom

D) All what mentioned

7- The rule of law must be supported by a …….

A) Reward

B) Gift

C) Sanction

D) None of what mentioned

8-one of these items is a main characteristic of the legal rule……

A) It is private

B) It is complex

C) Its abstract

D) None of what mentioned

9- Perfect justice is still a ……. of humanity

A) Nightmare

B) Dream

C) Fact

D) None of what mentioned

10- Community of self-interested actors needs law to……

A) Solve 'Prisoner's dilemma' situations;

B) Distribute into private hands property that would otherwise be exploited by everyone.

C) Prevent people acting on their natural desire to extract ‘an eye for an eye’ in revenge for actual or perceived wrongs that they have suffered at other people’s hands.

D) All of what mentioned

II state whether these statements true or false

1- Achieving justice is cornerstone of any legal system,

2- Law, like morality, is made by someone.

3- Customary law is made by convergent actions that are performed with the intention of making law.

4- Law Encouraging people to do the wrong things.

5- Law must, by its nature, have Not distinctive moral aims when it has aims at all.

6- Law is concerned only with bringing evil people to account for their actions

7- Law should be flexible, so that can adjust to various situations and changing needs of society.

8- There is only one definition of law.

9- There are also some other modes of accidental law-making.

10-There is no general agreement on the meaning of the term justice.

Chapter two

Classification of law

There are several ways in which the law may be classified what follows will set out these whilst at the same time trying to overcome the confusion inherent in such duality and Nature of the topic, I think the confusion comes from the Repetition of the same terms to mean different things.

Before addressing the classifications of law it is better to make a brief comparison between the maim two legal system prevail the world today which are common law and civil law systems.

Civil law system and common law system:

The civil law and common law systems are the products of tow fundamentally different approaches to the legal process. in the civil law(13), the main principles and rules are contained in codes and statutes which applied by the courts, hence, codes and statutes prevail while case law constitutes only a secondary source of law, on the other hand, in the common law system, the law has been dominantly created by judicial decisions. This difference is the result of different role of legislator in civil law and common law, the former is based on the theory of separation of powers, whereby the role of legislator is to legislate, while the courts should apply the law ,in the other hand the latter gives the courts the main task in creating the law(14).

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(13) The term civil law has two meanings, in its narrow meaning it designates the law relating to the areas covered by the civil codes while Broader meaning of the civil law relates to the legal systems based on codes as contrasted to the common law system.

(14) kzweigert & H. Kotz, introduction to comparative law 3rd ed Clarendon press, Oxford ,1988 pp. 40- 62 .also. R.B. Sehlesinger, comparative law, new York, 1998 pp. 10- 12 J.KH. Merryman, the civil law traditions: in introduction to the legal system of western Europe and Latin America, 2nd Ed., Stanford university press, 1985 pp. 65-37.

The other main difference between the civil law and common law systems is[15] the binding force of precedents. While the courts in the civil law system have as their main task deciding particular case by applying and interpreting legal norms, in the common law the courts are supposed not only to decide disputes between particular parties but also to provide guidance as to how similar disputes should be settled in the future. The interpretation of a legislation given by a court in specific case is binding on lower courts, so that under common law the court decisions, still make the basis for interpretation of legislation.

On the other hand , in contrast to common law, the case law in civil law system does not have binding force. The doctrine of star decisis does not apply to civil law courts, so that court decisions are not binding on lower courts in subsequent cases, nor are they binding on the same courts, and it is not uncommon for courts to reach opposite conclusions in similar cases.

finally[16] civil law system has its origin in roman law, as codified in the corpus iuris civilis of Justinian under this influence in the ensuing period the civil law has been developed in continental Europe and in many other parts of the world and it has become the most widespread legal system in the world, it is currently in practice in many countries such as, France, Austria ,Swiss and Egypt etc. the main feature of civil law is that it is contained in civil code while the common law system was developed in England since around the11th century and was latter adopted in the USA, Canada, Australia. New Zealand, and other countries of the British Commonwealth.

The legal system prevailed in Egypt.

([15]) M A Glandon, comparative legal traditions, west publishing co, 1994 pp. 14-16.
([16]) Wael Allam, legal studies in English 1st Ed, university of Sharjah ,2010.p33.

The legal system in Egypt is essentially influenced by Islamic law(shari'aa) and civil law. Therefore, the courts are not bound by principle of the case law. This means that previous judgments of higher courts are not binding upon the lower courts.

But I think time has come for Egypt to join the trend prevailed around the world and apply the modern trend of convergence between the legal systems of the civil and common law traditions, I think this trend will offering a unique opportunity for mixed legal Jurisdictions to gain the strengths and avoid the weaknesses of the two legal systems, especially many Arabic countries like the UAE begins to follow this trend.

Classifications of law:

There are many ways, in which the law may be classified, but the most important and widespread way concerning classifications of law as follows:

1- Public and private law

As I have mentioned this classification of law is the widespread and traditional one prevailed in the roman law and continue till now(17).

Public law is "a set of legal Rules governing relationships between the state and its citizens". While private law is" a set of legal Rules which regulates private Relationships between individuals, or between them and the state if the later or one of its public authority party in this relation as it is ordinary person with out any sovereignty(18).

Basis of distinction between public and private law.

(17) Denis Keenman and Sarah Riches, business law, 7 th Ed, Pearson Longman, 2005 p.3.

(18) Elsanhory, op cit p.59.

From the previous definitions we can lay down the basis by which the distinction between public and private law is made. The common element in the two definitions is the state, if it maintained its sovereignty in it's relation then the public law will govern this relation , but if it renounced its sovereignty while dealing with others ,then the private law will govern this deal[19].

Branches of public law:

Since the public law is concerned with the Relationship between the state and its citizens this comprises several specialist areas such as:

1- Constitutional law:

The term "constitution "may be used in several different contexts in the context of the state, a constitution can be defined as" the organic law creating a system of government and protecting the individuals rights and freedoms "[20] But the term constitutional law as a branch of the public law has, many definitions as follow[21] .

a) That branch of public law which treats of the organization and frame of government, the origin and powers of sovereignty, the distribution of political and governmental authorities and functions, the fundamental principles which are to regulate the relations of government and subjects.

([19]) Noaman Jomaa, lessons in introduction to legal sciences, Dar Ellnahda Elarabiya, 1977. p. 15.

([20]) Steven Gifis, law Dictionary, 6 th ed, Barrons, 2010 p.109. In American law. The written instrument agreed upon by the people of the union or of a particular state, as the absolute rule of action and decision for all departments and officers of the government in respect to all the points covered by it, which must control until it shall be the changed by the authority which established it. Henry Campbell, Black's law dictionary p.385.

([21]) Henry Campbell , Blake's law Dictionary. Op cit p. 385.

b) That department of the science of law which treats of constitutions, their establishment construction, and interpretation, and of the validity of legal enactments as tested by the criterion of conformity to the fundamental law.

Since constitutions establish the original and fundamental principles according to which a country is governed .they are considered the superior law of the land. Also they usually adopted after a major political changes, such as a revolution or gaining independence(22)

2-Administrative law.

There has been a remarkable increase in the activities of governments around the world during the last hundred years. every government introduces schemes to help ensure a minimum standard of living for its citizens. Government agencies are involved and a large number of disputes arise from the administration of these schemes, so the administrative law has developed to deal with the complaints of individual against the decisions of the administration(23) .

We can conclude from what we have mentioned that the definition of Administrative law is not easy process(24) . specially when we learn that administrative law consists of all the laws relating to public administration, this truth makes it a very vast subject, but for own purposes we can define administrative law as "the law governing the organization and operation of the executive branch of

(22) Neil Parworth, constitutional and administrative law, 6th ed. Oxford, 2010 p.5.
(23) Denis Keenan and Sarah Riches, business law, op cit.p.4.
(24) the difficulty of giving a precise and accurate definition of administrative law comes from the assertion of some writers that there was no administrative law in some counties in the sense that there is no separate system of administrative law applied in separate courts in those countries, examples of these countries is the UAE, see, Dicey, law of the constitution, 10th Ed. p.330.

government, and the relations of the executive with legislative, the judiciary, and the public[25].

3-Criminal law:

Criminal[26] law is the branch of law which deals with offences against state, or society in general. According to modern constitutions all crimes and punishments must be defined by the law[27].

Criminal law divides into two main branches:

a) Penal law.
b) Law of criminal procedures.

The penal law contains the provisions which determine the crimes and its penalties.

The general rules that penal statutes are to be construed strictly. By the word penal in this connection is meant not only such statutes as in terms impose a fine or forfeiture as a consequence of violating laws, but all acts which impose by way of punishment damages, beyond compensation for the benefit of the injured party[28]. While the law of criminal procedures contains the provision, which organize the methods which must be followed to investigate, to prove the violations of law, to prosecute and punish the guilty persons[29].

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(25) Black's law dictionary, 77th Ed, west, 1999 p.46.
(26) the term criminal may use as an adjective having the character of a crime in the nature of a crime criminal mischief, as amount criminal means one who has committed a criminal offence and one who has convicted of a crime, Black's law Dictionary 7 th Ed, op cit p. 380.
(27) Hussein Elmoguy, legal English terminology, in context, Brighter. Horizon publishers, 2013, p.151.
(28) William M. lile, Brief making and the use of law Book 3rd Ed, 1914 p.344.
(29) AP Simister and GR Sullivan, criminal law, Hart publishing ,2nd ed.2003.p.1-26

The Purpose of Criminal Law

We have seen that the criminal law primarily protects the interests of society, and the civil law protects the interests of the individual. The primary purpose or function of the criminal law is to help maintain social order and stability. The Egyptian criminal code proclaims that the purpose of criminal law is to "establish a system prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate." we can set out the basic purposes of criminal law as follows:

•• *Harm.* To prohibit conduct that unjustifiably or inexcusably causes or threatens substantial harm to individuals as well as to society.

•• *Warning.* To warn people both of conduct that is subject to criminal punishment and of the severity of the punishment

•• *Definition.* To define the act and intent that is required for each offense

•• *Seriousness.* To distinguish between serious and minor offenses and to assign the appropriate punishments

•• *Punishment.* To impose punishments that satisfy the demands for revenge, rehabilitation, and deterrence of future crimes.

Definition of crime.

There are various definitions of the term crime, depending on the approach adopted by the person defining it, this text suggest a strict legal definition of the term crime. It means a positive or negative act threatens the order and security of the society and this act is regarded as a legal wrong which can be punishable[30] .

([30]) the community is threatened by the crime for example, the crime of rape causes great harm not only to the victim ,but also to the society which be comes less secure by the rape. therefore the matter should not be left to the victim to take action against

Elements of the crime:

The crime has two elements required to establish the criminal liability. These two elements are the material element and the mental element.([31])

1-the material element (known as *actus reus*)may consist of an illegal act (conduct),prohibited criminal result(consequence) and causation between the illegal act and the result

2-the mental element (known as *mens rea*) requires the existence of the mental intention or recklessness (a degree of blameworthiness).

Each crime has its own elements, for example, in the crime of murder the material element is established when the unlawful killing of a person has done and the mental element is established when the criminal intended to kill the person.

Classifications of the crimes: Felonies and Misdemeanors

There are a number of approaches to categorizing crimes. The most significant distinction is between a **felony** and a **misdemeanor**.([32]) A crime punishable by death or by imprisonment for more than three years is a felony. Misdemeanors are crimes punishable by less than three years in prison. Note that whether a conviction is for a felony or misdemeanor is determined by the punishment provided in the statute under which an individual is convicted rather than by the actual punishment imposed. Many states subdivide felonies and misdemeanors into several classes or

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the criminal but the state must take the necessary proceedings to protect the society. See Michael Jefferson, criminal law, Longman, London, 6th Ed. 2003 . 11-14.

31-Michael Jefferson, criminal law, London,6th edition,2003,pp.11-14,also Wael Allam,op cit, p.62

32- Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 3rd ed.(Mineola,NY:foundation press,1982)pp.-1-46

degrees to distinguish between the seriousness of criminal acts. **Capital felonies** are crimes subject to the death penalty or permanently imprisonment (life in prison).

The term **gross misdemeanor** is used in some states to refer to crimes subject to penalties applicable for felony, whereas other misdemeanors are termed **petty misdemeanors**.

Several states designate a third category of crimes that are termed **contravention** or **infractions**. These tend to be acts that cause only modest social harm and carry fines. These offenses are considered so minor that imprisonment is prohibited. This includes the violation of traffic regulations.

Classifications of crimes as to its Subject Matter

This textbook is organized in accordance with the subject matter of crimes, the scheme that is followed in most state criminal codes.

There is disagreement, however, concerning the classification of some crimes. Robbery, for instance, involves the theft of property as well as the threat or infliction of harm to the victim, and there is a debate about whether it should be considered a crime against property or against the person. Similar issues arise in regards to burglary. Subject matter offenses in descending order of seriousness are as follows.([33])

•• *Crimes Against the State.* Treason, sedition, espionage, terrorism.

•• *Crimes Against the Person,.* Homicide, murder, manslaughter .

•• *Crimes Against the Person, Sexual Offenses, and Other Crimes.* Rape, assault and battery, false imprisonment, kidnapping .

•• *Crimes Against Habitation.* Burglary, arson, trespassing.

33- Criminal law and developm Wayne LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West publishing,2000)pp.45-50

•• *Crimes Against Property.* Larceny, embezzlement, false pretenses, receiving stolen property, robbery, fraud .

•• *Crimes Against Public Order.* Disorderly conduct, riot .

•• *Crimes Against the Administration of Justice.* Obstruction of justice, perjury, bribery

•• *Crimes Against Public Morals.* Prostitution, obscenity.

The principle of legality of crimes and penalties.

This principle refers to the fact that an act is not considered a crime and deserves No punishment, unless the legislator determines and announce the criminal and its penalty before.

The principle of legality protects individual security by ensuring basic individual liberties against the arbitrary and unwarranted intrusion of the state. Thus, the criminal Judge cannot call the individual's acts crime and assign punishment for them or exert punishments that aren't prescribed by the legislator without any letter of law. If an act is morally rebutted or is socially against the public order, it is not regarded as crime and the legislator is the only authority who can recognize some acts as crime and punish the actor(34) .

The modern constitutions included the principle of legality, for example Article 95 of the Egyptian constitution provides that a crime and punishment shall be defined by the law "also the constitution of many countries prohibit the process of punishing someone for conduct that accrued before it was made illegal by a properly promulgated law, for example, article 95 of the Egyptian constitution provides that"

(34) Mohammed Ja'far, legality principle of crimes and punishments in Iranian legal system. Educational research and review, vol.I.,2006 p 108.

No penalty shall be imposed for any act or omission committed before the relevant law has been promulgated(35).

Criminal versus Civil Law

Criminal law defines breaches of duty to society at large. It is society, through government employees called prosecutors, that brings court action against violators. If you are found guilty of a crime such as theft, you will be punished by imprisonment or a fine. When a fine is paid, the money generally goes to the state, not to the victim of the crime.(36)

Private duties owed by one person (including corporations) to another are established by civil law. For example, we have a duty to carry out our contractual promises.

Tort law defines a host of duties people owe to each other. One of the most common is a duty to exercise reasonable care with regard to others. Failure to do so is the tort of negligence.

Suit for the breach of a civil duty must be brought by the person wronged. Generally, the court does not seek to punish the wrongdoer but rather to make the wronged party whole through a money award called damages. For example, if someone carelessly runs a car into yours, that person has committed the civil wrong (tort) of negligence.

If you have suffered a broken leg, you will be able to recover damages from the driver (or his or her insurance company). The damages will be an amount of money sufficient to repair your auto, to pay your medical bills, to pay for wages you have

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([35]) Hussein El moguy, selected legal readings, University Book shop, 2011, p.84.

33-1 Fargo Women's Health Organization v. FM Women's Help and Caring Connection, 444 N.W.2d 683(N.D. Sup. Ct. 1989).

lost, and to give you something for any permanent disability such as a limp. Damages for "pain and suffering" also may be awarded.

Although the civil law generally does not aim to punish, there is an exception. If the behavior of someone who commits a tort is outrageous, that person can be made to pay *punitive* damages (also called *exemplary damages*). Unlike a fine paid in a criminal case, punitive damages go to the injured party.

Sometimes, the same behavior can violate both the civil law and the criminal law. For instance, a person whose drunken driving causes the death of another may face both a criminal prosecution by the state and a civil suit for damages by the survivors of the victim. If both suits are successful, the driver would pay back society for the harm done with a criminal fine and/or prison sentence and compensate the survivors with the payment of money damages.

Public international law:

Public international law is a set of legal rules which regulates Relations between states whether in time of peace or war, and their relation with international originations[37] .

The origins of public international law go back to the peace of Westphalia in 1648, this event marked, Not only the end of feudalism, but also the birth of the modern state with central governmental institutions that could control its population and defend its territory[38].

([37]) Ahmed Elkandry, op cit, p.46.

([38]) Westphalia is often used as shorthand for a system of equal and sovereign states, and the peace treaties of Westphalia concluded in 1648 at munster and Osrabruck and ending the thirty years war, are sometimes said to have established the modern concept of sovereign statehood, the peace of Westphalia earns its fame as the first world charter of sovereign nations, influencing the foundation of the congress of Aixla Chappell of 1818,the Paris settlement of 1919, the league of nations, and ultimately, united Nations charter which left greatly uncharged the peace of west

It goes without saying that public international law, in my opinion, hasn't become a law as exactly this term means, if you ask about the accomplishments which done by international organizations and all international agencies, you can account them by one of your hands, furthermore the international organizations today are a means in hands of the big states to impose its own policies over other states.

Branches of private law:

Private law is primarily concerned with the rights and duties of individuals towards each other. The role of state in this area is confined to providing a civilized method of resolving disputes that has arisen, thus in the light of what we have mentioned we can divide the private law into these main Branches:

1- Civil law:

Civil law is the fundamental branch of private law. Indeed, civil law includes the most basic principles of law be it public or private. Civil law may define as a set of legal rules which regulates private relations between individuals or between them and the state as the later is an ordinary person[39].

Civil law is considered to be the general Rules which regulate and apply to all private Relations arisen between individuals unless a special provision governing

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aphelia's framework. see, Benjamin Straumann, the peace of Westphalia as a secular constitution, constellations volume 15, No 2,2003, p.173.

([39]) civil law is the kind of law that evolved from Roman law, based on a written civil code this was adopted in France after the French revolution in 1789 called the code Napoleon, it covered only matters of private law as follow:-

- The legal attributes of persons. (e.g. Name, age of majority).
- The relationship between individuals (e.g.: marriage, adoption, parentage).
- property (e.g.: possession, land boundaries)
- the legal institutions governing or administering these relationships (e.g.: wells, sales, lease, partnerships) see, Brierly, Canadian Encyclopedia Historica, Foundation of Canada,p200.

the relation which is the subject of dispute. Thus the first article of the Egyptian civil law asserted this truth by providing[40].

1- Legislative provisions apply to all matters which are in letter and in spirit organized by these provisions.
2- In absence of any applicable legislative provision, the Judge will rule in accordance with the shar'a islamic.
3- In absence of the shariaa., the Judge. Will rule in accordance with the custom.

2 - Commercial law.

Commercial law is the branch of law regulating commercial transactions and relations between traders. Many principles of commercial law developed long time ago from whet was known as the law merchant[41].

The law merchant has its historical roots in medieval times. since then, its definition has undergone significant change and remains disputable, at best, at its core, the law merchant practice, to govern mercantile transactions, irrespective of the immediate locations of the transactions or the nationalities of the merchants[42].

The Republic Arab of Egypt has its unique commercial code:

([40]) Wael Allam, op cit, p.83.
([41]) Herbert M.Bohlman and Mary Jane Dundas, the legal, Ethical, and international Environment. of Business, 6th Ed. Thomson, 2005, p.254.
([42]) the law merchant, is sometimes depicted as an exemplification of a spontaneous ordering, a libertarian concept popularized by philosophers like karl Friadridrich Hayek. Merchants supposedly devised merchant law out of merchant practice and usage spontaneously, or in liberal terminology, freely and voluntarily. The law merchant developed overtime among merchants in England and Eventually In other. Countries.see, Leon E. Trakman, the twenty-first century law merchant, http://ssRn.com/abstract,p.2

The new Egyptian commercial law No 17 of 1999 Article 1 of this law provides that the law shall apply to traders, as well as to various commercial transactions carried out by any person even though he is not a trader[43].

Finally, commercial law addresses many subjects, like commercial transactions, trader, obligations and commercial contracts, negotiable instruments, bankruptcy, Brokerage, commission agency, corporations, partnerships and intellectual property, etc..

(3) Private international law.

The private international law is that part of the law of every state which deals with cases, having a foreign element. Private international law, then, comes in to play when the issue before the court affects some facts, events, or transactions that are so closely connected with a foreign system of law as to necessitate recourse to that system. The legal systems of the world consists of a variety of territorial systems, each dealing with the same phenomena of life, birth, death, marriage, divorce, bankruptcy, contracts, will, and so on. But in most cases dealing with them differently. The moment that a case is seen to be affected by a foreign element, the court must look beyond its own internal law, test the relevant rule of the internal system to which the case most appropriately belongs should happen to be in conflict with that of the forum. The forms in which this foreign element may appear are numerous one of the parties maybe foreign by nationality or domicile a businessman may be declared bankrupt in Egypt having numerous creditors abroad; the action may concern property situated abroad or a disposition made a broad of property situated in Egypt[44].

([43]) Hussein Elmoguy, legal English terminology, op cit, p.227.

([44]) private international law has been described as meaning the rules voluntarily chosen by a given state for the decision of case which has a foreign complexion.

English judges and textbook writers have frequently used the term comity of nations to justify reference to a foreign law. Although , analysis of it reveals that it has been employed in a meaningless or misleading way. The word it self is incompatible with the judicial function, for comity is a matter for sovereigns not for judges, required to decide a case according to the rights of parties[45] .

I agree with the perspective which attributed the application of a foreign law not to courtesy, or sacrifice of sovereignty but to the desire to achieve Justice.

Finally, in contradiction to public international law, which seeks primarily to regulate the relations between different sovereign states and is at any rate in theory, the same everywhere, the rules of PIL are different from country to country.

3-Civil and commercial procedures law.

Civil and commercial procedures law is a set of legal Rules regulating civil and commercial Jurisdiction[46].

Generally, procedural law distinguished from substantive law which crates, defines the rights and duties of individuals and judicial decisions form the substantive civil law on matters such as, contracts, torts and probate. Procedural law prescribes the methods by which individuals may enforce substantive laws. the basic concern of

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see,Cheshire, North and Faweett, private international law, 14th ed. Oxford university press, 2008. p.-5.

([45])another criticize to the tern comity of nations to justify applying the foreign law is, the word comity is given its normal meaning of courtesy it is scarcely consistent with the redlines of English courts to apply enemy law in time of war, moreover, if courtesy formed the basis of private international law ,a judge might feel compelled to ignore the law of utopia on proof that utopian courts apply No law but their own, since comity implies a bilateral not a unilateral, relationship if on the other hand, comity means that No foreign law is applicable in England except with the permission of the sovereign it is nothing more than a truism. see, Nadelmann, conflict of laws: international and interstate,p.141.

([46]) El sanhory, op cit, p.189.

procedural law is the fair, orderly, Efficient, and predictable application of substantive.

Chapter two assessment

What are the major legal systems around the world?,

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Define a crime.

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Distinguish between criminal and civil law. Distinguish between a criminal act and a tort.

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What is the purpose of criminal law?

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Distinguish between felonies, misdemeanors, capital felonies, gross and petty misdemeanors.

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Chooswe the correct answer:

1-The common law system is based on.

A) Customary rule

B) Legislations and codifications

C) Precedents

2-Egypt follows

A) Common law system

B) Civil Law system

C) Socialism system

Part two

Sources of law

Learning objectives

After studying this part you should understand the following main points

1- Causes and sources of legal change and law reform.

2-The characteristics of the main sources of law, including law made by parliament (legislation)-judge-made law (judicial precedent) .

3- Importance of each source in modern legal systems.

4-Determine the priority of the sources of law.

Introduction

The word source can mean different things with regard to law it primarily refers to the process of law-making. Law stems from various sources which we will deal briefly with them.

Chapter one

The Constitution

The constitution is usually a document or group of documents.it is the highest source of law, since it establishes the structure of the government and the process for creating all other laws .from the constitution flows the other sources of law.

The need for a constitution is generally felt when a country has just had a revolution, has been defeated in a war or has become an independent state.([47])

In the light of what I mentioned, Egypt has an amended Constitution, which made after the revolution of 30 June 2013 mainly on January15-2014. This constitution is considered to be one of the best Egyptian constitutions, especially it came after so bad one which issued by dethroned Muslim's brotherhood, constitution is the highest source of law in Egypt .Every other form of law must be consistent with the Constitution or it will be struck down by the supreme constitutional court.

In general, the constitution provides for:-([48])

1-system of government:

A) presidential system:

In presidential system, like the United States of America, the president of state has substantial powers and the members of legislative power are elected independently of the election of the president.

B) Parliamentary system

47-Wael Allam,op cit p.39
48-ibid.p.39-41

In parliamentary system, like the united Kingdome, the legislative power is supreme and the executive power emerges from the democratically elected legislative power .the prime minister usually is the leader of the majority party in the parliament.

2-distribution of powers:

The constitution provides for the distribution of powers among the legislative power, the executive power, and the judicial power. The constitution generally defines the principles the three powers should respect when exercising their powers.

The principle of Separation of powers:

Separation of the three powers doesn't mean that the legislative power and the executive power don't have any influence or control over the acts of each other. It means that any power should not exercise the whole power of the other, there is no strict separation between these powers.

3-form of the state:

The elements of the state are people, territory, and sovereignty. Some forms of the state are federation and confederation.

A federal state consists of certain political units: called states or province. These units retain some control over their internal affairs and the federal government is responsible for the significant common matters ,like defence, the federal budget, external affairs, etc. according to the first article of the Egyptian constitution, Egypt is an independent ,sovereign state.

On the other hand the confederation is a union of some states for the purpose of cooperation and defence but the confederate state does not have direct authority over the allied states.

Forms of the constitutions :

Traditionally, constitutions are classified into written and unwritten and to flexible and rigid.([49])

Written constitution means the constitution which is set out in a document which may possibly be amended .Nearly all states except the United Kingdom have unwritten constitution.

This kind of constitution is supported by judicial decisions interpreting its provisions and by customs and conventions regulating the working the machinery of the government.

While concerning **unwritten constitution** The British constitution is described as a famous practical application of the unwritten constitution. That means that in Britain, there is no single document in which one may find a constitutional law .Instead, there are judicial precedents and conventions, from which constitutional law is drawn.

A **flexible constitution** is defined as one which may be altered or amended in the same way as a law on any other topic. In this sense, a flexible constitution is very rare.

Because an unwritten constitution is flexible, in this sense, the British constitution is extremely flexible as all laws are passed in the same way to the parliament.

Finally **the rigid constitution** it is one which may be amended only by a special procedure, in this way the constitutions is safeguarded against rash alteration. Almost all constitutions are rigid.

The Egyptian constitution

The Egyptian constitution is written one so it is flexible since it can be changed easily be the majority of the voting people.

49-Alex Carroll, constitutional and administrative law,Longman,London,2002,2nd edition,p.3,4

Freedoms, rights, and public duties.

The new Egyptian constitution contains many article regarding freedom and rights and public duties that every citizen has and bear, some of these articles as follow:-([50])

All persons are equal before the law, without distinction between the Egyptian citizens in in regard to origin, domicile, nationality, religious, believe or social status.

-personal liberty is guaranteed to all citizens.no person may be arrested, searched, detained, or imprisoned except in accordance with the provisions of law.

-no person shall be subjected to torture or to degrading treatment.

-crimes and penalties shall be defined by the law.no penalty shall be imposed for any act or omission committed before the relevant law has been promulgated.

Penalty is personal. An accused shall be presumed innocent until proved guilty in a legal and fair trial. The accused shall have the right to appoint the person who is capable to conduct his defence during the trial. The law shall prescribe the cases in which the presence of a lawyer on behave of the accused shall be mandatory. Physical and moral abuse of the accused is prohibited.

Freedom of movement and residence shall be guaranteed to citizens within the limits of law.

-freedom of opinion and expressing it verbally, in writing or by other means of expression shall be guaranteed within the limits of law.

-freedom of communication and its secrecy shall be guaranteed in accordance with law.

50-see the articles,9, 12, 14 ,38, 51, 52, 53, 54, 57, 62, 64, 65, 73, 89, 95, 96, 97, 98,202.from the Egyptian constitution which becomes into force from January 15-2014

-Freedom to exercise religious worship shall be guaranteed in accordance with established traditions, provided that it does not conflict with public order or violate public morals.

-freedom of assembly and forming association shall be guaranteed within the limits of law.

-every citizen shall be free to choose his gob, trade or profession within the limits of law, Due consideration being given to legislation organization some of such professions and trades.no person may be subjected to forced labor except in exceptional circumstances provided for by the law and In return for compensation.

-Every person shall have the right to submit complaint to the competent authorities, including the judicial authorities, concerning the abuse or infringement of the right and freedom.

Payment of taxes and public charges determined by law is a duty of every citizen.

-Defence of the state is a sacred duty of every citizen and military service is an honors for citizens which shall be organized by law.

-respect to the constitution, laws and orders issued by public authorities in execution thereof, observance of public order and respect of public morality are duties upon all inhabitants of the state.

Chapter one assessment

What are the basic three things included in the constitution?

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There are three elements required to form a state. Mention them.

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What are the classifications of the constitutions?

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Why do we consider the Egyptian constitution flexible one?

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Choose the correct answer:

1-The supreme power in the parliamentary system is……

A) The legislative power.

B) The executive power.

C) Both of them.

2-The law which considers the supreme law in the land is…….

A) The legislation.

B) The constitution.

C) The administrative decision.

Chapter two

The legislation

Within each legal system, federal or state, legislation (statutes) stand next in the hierarchy. Legislation is the product of the lawmaking of a legislature. Statutes may add details to the government framework by establishing a regulatory agency or an agency to provide a public service. Or statutes may establish rules that govern certain kinds of activities, such as the use of automobiles on highways. The entire criminal law, the law applicable to sales of goods, and almost all law limiting or regulating business activities make up statutory law.

Both parliament and the state legislatures enact a large number of statutes at every session. People tend to turn to Parliament and/or the state legislatures to urge the passage of "a law" (statute) whenever they recognize a problem. This seems to be true whether it is primarily an economic problem (such as the dwindling availability of petroleum), a moral problem (such as sexual abuse), or a health problem (such as misuse of drugs).

In general legislation is considered to be a primary source of law in most modern legal systems. If the legislature enacts legislation, all persons in the country must obey it.

Also it is suggested that an enacted legislation will continue to exist as law until either the legislature repeals it or a competent authority (such as the supreme constitutional court) declares it unconstitutional.([51])so that legislation must comply with the constitution.

There are two types of legislation, parliamentary and delegated legislation the functions of acts of parliament are as follows:([52])

51-Beth Walson ,introduction to law,West,3rd.,ed.,1999,11

52-Keith Abbotte,Norma Pendlebury,Kevin Wardman,Business law,8ed.,Thomson learning 2007,p.25,26

-*law reform* .relatively few statutes are concerned with changing substantive rules of law.

-*Consolidation*. Where existing legislation is gathered into one act this known as consolidation.

-*Codification.* This takes place when all the law on a topic is included in one act.

An act will come into force on the day on which it published in Egyptian gazette, unless other date is specified in the act itself. It will cease to have
effect only when it is repealed by another act .whilst in force an act is presumed to be operative throughout Egypt and nowhere else.

The superiority of legislation: the rational for the supremacy of legislation is that the will of elected representatives should prevail over that of appointed judges.

The need for statutory interpretation: where the words of a statute are absolutely clear the need for statutory interpretation will not arise, because the person affected by the statute will have no difficulty in conducting their affairs according to the statute, however, there is ambiguity or uncertainty interpretation is necessary.([53])

a .*ambiguity* is caused by an error in drafting where by the words used are capable of two or more literal meanings.

b. un*certainty* arises when the words of a statute are intended to apply to various factual situations and the courts have to decide whether the case before them falls within the factual situations envisaged by the act. Uncertainty is far more common than ambiguity.

Delegated legislation:

a. delegated legislation comes into being when parliament confers on persons or bodies, particularly ministers in charge of government department, power to make

53-ibid,pp.25-29

regulations for specified purposes. Such regulations have the same legal force as the act under which they are made.

b. types of delegated legislation

i-Rules and regulations, Statute may authorize a minister or government department to make a wide variety of rules and regulations. These rules and regulations are collectively known as statutory instruments.

ii-By laws, these are rules made by local authorities. Their operation is restricted to the locality to which they apply.

Advantages of delegated legislation:

i. It saves the time of parliament, allowing parliament to concentrate on discussing matters of general bodies.

ii.it van be brought into existence swiftly, enabling ministers to deal with urgent situations, such as a strike in an essential industry.

iii.it enables express to deal with local or technical matters.

It provides flexibility, in regulations can be added to modified from time to time without the necessity for a new act from parliament.

Disadvantages of delegated legislation

i. law making is taken out of the direct control of elected representatives and is placed in the hands of employees of government departments This in theory less democratic.

ii. Parliament doesn't have enough time to effectively supervise delegated legislation or discuss the merits of the rules being created.

ii. A vast amount of law is created, statutory instruments out-numbering by far the amount of acts passed each year.

Chapter two assessment

List the advantages of delegated legislation.

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What are the disadvantages of delegated legislation?

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Chapter Three

Custom

Uses of the word custom: the word "custom "may be used in several different sense. In one sense it is the main source of English law since it is the original source of common law. It would, however, be wrong to equate "common law and custom today since most common law rules owe their origins to judicial decisions rather

than ancient custom. In its second sense "custom" describes a conventional trade usage. custom in this sense is not a source of law, but a means by which terms are implied into contracts .the third use of custom is to describe rules of law which apply in a particular area, for example a country. In this sense custom is a distinct source of law. In addition to the characteristics of restriction to a particular locality, it must be an exception to the common law.

Proof of existence of custom: a person who alleges the existence of a custom must prove its existence by satisfying the following tests:-

a.*antiquity* local custom must have existed since time "immemorial" if this is shown the person denying the existence of the custom must prove that it could not have existed.

b.*continuity*. the right to exercise the custom must not have been interrupted. This doesnot mean that the custom itself must have been continuously exercised.

c.*peacable enjoyment*. A custom can only exist by common consent. It must not have been exercised by the use of force, secrecy, or permission.

d. *obligatory force*. Where a custom impose a specific duty that duty must be compulsory, not voluntary. Blackstone said in this affair

A custom that the entire inhabitant shall be rated towards the maintenance of a bridge will be good, but a custom that every man is to contribute thereto at his own pleasure is idle and absurd, and indeed no custom at all.

e. *certainty*.an alleged custom allowing tenants to take away turf in such quantity as occasion may require was held void for uncertainty.

f. *consistency*. Customs are by their nature inconsistent with common law, but they cannot, in a defined locality, be inconsistent with one another.

g. *reasonableness*, A custom must be reasonable. A custom cannot be reasonable if it conflict with a fundamental principle of the law

In recent years the tendency has been to standardize law by statute. This has led to the decline of custom as a source of law so that it is now almost extinct. The types of customary rights that do still exist are, for example, rights of way and rights to indulge in sports or pastimes on a village green.

Chapter three assessment

What are the requirements for a customary rule to be a law?

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Chapter four

Principles of Islamic Shariea'a

The constitutions of all Arab and Islamic countries provide that the sharia'a commonly referred to as" Islamic law "is an important supreme or even sole source of law.

In Egypt, Islamic sharia'a is the principle source of law(according to article 2 of the Egyptian constitution of 2014) thus any law in conflict with sharia'a, regardless of its source, cannot be enforced.

An essential characteristic of Islamic sharia'a is that it merely lays down the guiding principles and objectives without attempting to address details. This are because it was meant to evolve according to the changing needs of society. Such details are to be elaborated by Muslims as situations occur, within the broader basic principles of sharia'a.([54])

WHAT IS ISLAMIC (*SHARIE'A*) LAW?

The concept "Islamic *Sharie'a*" has imperceptibly various meanings and sharply different implications in Egypt than it often does in the European countries or the United States of America. There is a reason that numerous intellectuals, academics, and scholars claim that defining it as "Islamic law"—as it is often described in non-Muslim countries—is occasionally overly narrow. Islam is very much a law-oriented religion, it sets the framework for permissible economic, social, and political systems, and formulates the principles and rules upon which laws and regulations are to be established It provides a wealth of prescriptions and guidelines governing legal relationships as well as spiritual inspiration.([55])

One should bear in mind that *Sharie'a* encompasses enormous areas of personal conduct not generally covered by legal rules in several societies.

Not only does it include private practice, ethics, and public law, but it also includes categories according to the theory of the "Scale of the Five Qualifications" such as *fard* or *wajib* (mandatory), *mobaah* (recommended),

54-Hussein El-Moguy,op. cit.p.55

55- M. CHERIF BASSIOUNI, INTRODUCTION TO ISLAM (Chicago 1988).

mandoub (preferred but not required, which make moral but petite legal sense), *makrouh* (reprehensible or derive detestable but not banned), and *moharam* (forbidden). In one word, it might be "the Islamic way of doing things". It is something quite different to declare that one prefers to do things in a non-Islamic way or that Islamic teachings have no application in public life. It would be as unpredicted as U.S. politicians claiming they favor the "un-American manner." Public opinion keens on the subject provoke the equivalent response among the broader community.([56])

56- The term *Sharie*‘*a* is often erroneously equated with Islamic law. Although both in Western and Muslim discourses it is common to use "*Sharie*‘*a*" interchangeably with "Islamic law", *Sharie*‘*a* is a much broader concept. For theologians, ethicists, and jurists, the broad meaning of *Sharie*‘*a* is the way or path to well-being or goodness, the life source for well-being and prosperity, and the natural and innate order created by God. Hence, in Islamic literature the term is employed to refer not just to the way of life, or what one may call the philosophy and method of life of Muslims, but also to any other group of people bonded by a common set of beliefs or convictions. Therefore, Islamic literary sources such as the *Qur*’*an* will often speak of "the ways of previous generations" (*shra*‘/*sharie*‘*at an sabaq* or *man qablana*), or "the Jewish way of life" (*sharie*‘*at al-yahud*) or even "the methods of the Greek logicians" (*shar*‘ *al-falasifa or tariqat al-falasifa*). *See* Mohamed ‘Arafa, *Corruption and ribery in Islamic Law*: *Are Islamic Ideals Being in Practice*?, 18 GOLDEN GATE ANNU. SURV. INT'L. & COMP. L. (2012), at 184-186. In Islamic legal usage, typically, the expression *sharie*‘*at Allah* or s*har*‘ *Allah* refers to the broad concept of the all-inclusive and total path to God, which is equated with the path leading to social goodness (*ma*‘*ruf*) and moral goodness (*husn* or *husna*). *Shar*‘ *Allah* or s*harie*‘*a* does not denote a positive set of divine commands with which humans must comply, but rather the ultimate good God desires for human beings. *Id*. On the other hand, Islamic law, or what is called *al-ahkam al-Shar*‘*iyya* or *ahkam al- Sharie*‘*a*, refers to the cumulative body of jurisprudential thought of numerous communities and schools of thought regarding the "divine will" and its relation to the public good. Islamic law is thus the fallible and imperfect attempt by human beings over centuries to explore right and wrong and discern what is good. The moral and ethical foundations and values of natural justice in *Sharie*‘*a* are accessible and cognizable by human beings, but this does not necessarily lead to a

In this respect, there is another terminological peculiarity that can shed some light on the connotations of the Islamic *Sharie*‘*a*. Egyptians will sometimes refer to other religious communities as *Sharie‘as/Sharie*‘*a*. Muslims would still esteem the Islamic *Sharie*‘*a* as superior—and indeed, as historically overriding those that came before—but they will sometimes refer to other religion’s *Sharie*‘*as* such as Christian or Jewish *Sharie*‘*as*, specifically regarding their provisions for personal status law (covering marriage, divorce, adoption, alimony, and inheritance).

In short, the term *Sharie*‘*a* is often erroneously equated with Islamic law. Although both in Western and native conversations it is common to use *Sharie*‘*a* interchangeably with Islamic law, *Sharie*‘*a* is a much broader concept. In the linguistic practices of theologians, ethicists, and jurists, the extensive significance of *Sharie*‘*a* is “the right way or path to well-being or goodness, the life source for well-being and prosperity, and the natural and essential ways and order created by God (*Allah*).”[57]

While the Islamic *Sharie*‘*a* sometimes means more than simply Islamic law, it certainly has extensive legal content. Commercial business transactions, contracts, torts, criminal punishments (*quesas*/*hudud/ta*‘*azir*), inheritance, legal procedures, international commitments, and human rights among many other areas, have been the theme of scholarship by those who searched religious sources to discover the

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determinative system of law. *Sharie*‘*a*, as the foundation of and pathway to goodness, is everlasting, unchangeable, eternal, and perfect. But this pathway is not perfectly cognizable by human beings. Moreover, positive legal commandments that follow from or are based on these foundations and pathways are indeterminate, changeable, and contextual.

57- M. CHERIF BASSIOUNI, INTRODUCTION TO ISLAM (Chicago 1988).p.12

ways that a community of Muslims should operate. Furthermore, the Islamic *Sharie*‘*a* provides some guidance on how violations must be treated, by compensation, penalties, or the voiding of contracts.([58])

The Islamic *Sharie*‘*a* law, is based on two fundamental sources, which are the Holly *Qur*’*an* (the constitution of Muslims) and the *Sunnah* (the sayings and the authentic deeds of the Prophet Muhammad Peace and Blessing Be Upon Him) along with the secondary sources, as *Ijma*‘*a* (consensus) and *Qiyyas* (analogical deduction through *Ijtihad*: *individual reasoning*).([59])

Opinions over the centuries have diverse considerably about what God has required and what the earthly consequences are of breaching a rule. For that reason, Muslims will sometimes distinct between the Islamic *Sharie‘a* as “unchanging divine guidance”, and *Fiqh* (jurisprudence) refers to “the understanding of Islamic rules and principles, as the fallible human effort to understand the content of that guidance.” The four major schools of jurisprudential thought (*fiqhal-madhhabs*) in Islam have impacted the development of *Sharie*‘*a*. In that domain, we can say “one *Sharie*‘*a* but numerous interpretations”. Nor is the varied nature of *fiqh* seen as a problem; it is not rare to hear several Muslims today cite the multiplicity of

58- For further discussion on the Islamic criminal justice system, its fundamental principles, and the Islamic criminal taxonomy of crimes and punishments, see ‘Arafa, *supra* note 56, at 187-196.

59- M. Cherif Bassiouni & Gamal Badr, *The Sharia*’*h*: *Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. (2002), at 135, 150. *Ijm*‘ *60-RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARIE‘A) 392-396 (2009)* .

Interpretations in their legal heritage as a virtue, since it indicates how attempts to discover and apply the Islamic *Sharie‘a* naturally evolve with prevailing conditions and community needs.([60])

Eventually, then, a call to apply or follow the Islamic *Sharie‘a* will have to confront the queries of which rules to apply from this rich tradition of legal and ethical speculation and—perhaps more critically—who has the authority (power) to decide which interpretations or visions are to be enforced or implemented. These are difficult issues, but there are surprising areas of convergence on them in Egyptian deliberations. Such conjunction sets the terms for debates but it hardly resolves them. All in all, one of the most outstanding features of the discussion is how flexible key concepts and positions are.([61])

Part three

Resolving disputes

Learning objectives:

61- Raymond Ibrahim, *Egypt*: *Islamists vs*. *Copts*: *An Animosity that Seeks Any Excuse to Attack*, GATESTONE INSTITUTE (Jun. 20, 2012)

After studying this part you should understand the following main points:

1- The sources of legal advice and assistance available to individuals.

2-the ordinary and non ordinary court systems including conditions in which every kind of courts applied

3- the nature and distinctive features of tribunals.

4-Alternative to litigation and the different forms of alternative deputes resolutions.

Chapter one

The Egyptian judicial system

Written on the French judicial structure, the bulk of the Egyptian judiciary is composed of two separate hierarchies, one focused on civil and criminal law and the other dealing with administrative law.

Additional judicial bodies include the Supreme Constitutional Court (SCC) and exceptional courts.

The organisation and functions of the judiciary are detailed in articles 165-178 of the 1971 Constitution and additional legislation for each arm of the judiciary further governs appointments and disciplinary procedures.

The Court of Cassation (sits at the apex of the ordinary court system and acts as the final appellate court for all matters of civil and commercial law, personal status law, and criminal law. Judges in the regular judiciary are appointed by decree of the President of the Republic with the approval of the Supreme Judiciary Council. The Supreme Judiciary Council is made up of the President of the Court of Cassation, the President of the Cairo Court of Appeal, the Attorney General and the two most senior presidents of the Courts of Appeal. Judges "may not be dismissed, suspended or sent to retirement before the legal age. Moreover, they may not be transferred to a non-judicial function." Disciplinary proceedings are presided over by the President of the Court of Cassation, the three most senior heads of the Courts of Appeal and the three most senior councilors of the Court of Cassation. The ordinary judiciary is generally considered to be independent of the direct control of the executive branch of government, although there have been occasions in which reform-minded judges faced disciplinary hearings.[62]

62-6 For detailed treatments of the Egyptian legal system, *see* Nathalie Bernard-. Maugiron and Baudouin Dupret (eds
Egypt and Its Laws, 2002 . *See also* Adel Sherif, 'The Origins and Development of the Egyptian Judicial System', in Boyle and Sherif (eds.), *Human Rights and* . *Democracy, The Role of the Supreme Constitutional Court of Egypt*, 1996

63- A comprehensive treatment of Administrative Court rulings and the political context can be found in Farouq Abd al- Bur, *Dor Majlis al-Dawla al-Misri fi Hamayit al-Haquq wa al-Hurriyat al-'Ama* [*The Role of the State Council in Protecting Public Rights and Freedoms*], 1991

The Supreme Administrative Court sits at the apex of the administrative court system and acts as the final appellate court for all matters of administrative law. The administrative courts serve as an important forum in which citizens can challenge executive actions or any agency within the state bureaucracy. Citizens can challenge state agencies on the grounds that they violated administrative laws or that administrative laws themselves contradict the Constitution. The Administrative Courts regularly rule against the executive authority. The functions of the Administrative Courts are governed by article 172 Law 47 of 1972. These regulations provide the administrative courts with substantial independence in matters of appointments, promotions, and other internal functions.([63])

The Supreme Constitutional Court (SCC), established in 1979, plays a leading role in the Egyptian judiciary. It has exclusive authority to perform three important roles: issue binding interpretations of existing legislation when divergent views emerge; resolve conflicts of jurisdiction between different judicial bodies; and perform judicial review of legislation.([64])

Articles 174-178 of the Law 48/1979 govern the activities of the Supreme Constitutional Court. Article 29 of Law 48 of 1979 specifies that the SCC is empowered to perform judicial review when it receives cases transferred from courts of merit. If any court, in the course of deciding a concrete case finds that a law being

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64- For more on the SCC and the political context that it operates within, see Tamir Moustafa, The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt, 2007 . The official website for the Supreme Constitutional . Court can be found at http://hccourt.gov.eg/

applied may be unconstitutional, it can request judicial review by the Supreme Constitutional Court. In most cases, petitions for judicial review are initiated at the request of litigants themselves. However, judges also have the right to initiate petitions for judicial review if they question the constitutionality of the laws they are applying. In technical terms, judicial review in Egypt is centralized rather than diffused, the timing of judicial review is *a posteriori* rather than *a priori*, and the SCC practices concrete review rather than abstract review, with legal standing restricted to litigants engaged in real legal controversies.

The SCC struck down many laws, particularly through the 1980s and 1990s. It was much less assertive vis-à-vis the executive after 2005. Justices on the Supreme Constitutional Court are appointed by the President from among two candidates, one chosen by the General Assembly of the Court and the other by the Chief Justice.

The President of the Republic formally appoints the Chief Justice of the SCC, but for the first two decades following its establishment, the President appointed the most senior justice serving on the SCC to the position of Chief Justice. Mubarak eventually departed from this norm in 2001, asserting direct and exclusive control over selection of the Chief Justice of the SCC.

SCC Justices cannot be removed, although they are subject to the mandatory retirement age for state employees. The General Assembly of the SCC is the only body empowered to discipline members of the Court. Articles 56-60 of Law 48of 1979 also give the SCC full control of its own financial and administrative Matters.

Exceptional Courts - Running parallel to the regular judiciary are exceptional courts. As one study explains, "The procedural organisation of the exceptional courts is different from that of ordinary and special courts. The accused does not enjoy the same guarantees. He has no right to challenge sentences; the prosecution has more power than in ordinary circumstances and the executive power plays an important

role in the ratification of the judgments, in the composition of the courts and in distribution of jurisdictions."([65]) The two exceptional courts now in operation in Egypt are the Emergency State Security Courts and the Military Courts.

Emergency State Security Courts - Law 162 of 1958 governs the activities of the state security courts, which applies sanctions for violations of the Law on the State of Emergency. Article 9 of that law authorizes the President to transfer trials of ordinary crimes from the regular judiciary to the Emergency

State Security Courts. The President is not required to give justifications for his request and the grounds need not have any tie to the reasons for which the state of emergency was originally declared. Three ordinary judges staff the emergency state security courts. Two of these judges may be replaced by Military judges appointed by the President.([66]) There are far fewer procedural protections in place at the emergency state security courts as compared with regular courts. A state of emergency has been in effect in Egypt for all but 18 months since 1967, essentially making the Emergency State Security Courts a permanent feature of the Egyptian judiciary.

Military Courts - Law 25 of 1966 provides for military courts . These courts have jurisdiction over matters within the ranks of the military, but article 6 of Law 25/1966 additionally provides for military trials of civilians during a state of emergency. As with the emergency state security courts, there are many fewer procedural protections as compared with the regular judiciary.

65- A. Seif el-Islam, 'Exceptional Laws and Exceptional Courts', in Bernard-Maugiron and Dupret (eds.), *Egypt and Its Laws*, 2002, p. 369.

66- *See* Law 162 of 1958. *See also* United Nations Human Right Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', 14 October 2009, p.13

Judges are military officers appointed directly by the Minister of Defence and the President for a two-year renewable term. Judges are not required to have training in law, and they are under the jurisdiction of the Ministry of Defence rather than the Ministry of Justice. Finally, there are fewer procedural safeguards in the military courts, trials may be held in secret, and there is no right to appeal.

Arbitration

In recent years the development and growing complexity of international commercial transactions defined the need for speedy and internationally acceptable means of settling disputes. The concept of arbitration was devised for that particular purpose and Egypt was one of the first countries in the region where the concept of arbitration has gradually been gaining popularity for more than three decades now.

At the outset, contracts between Egyptian and foreign parties commonly provide for some form of international arbitration in the event of any disputes. The Egyptian Court of Cassation has, on a number of occasions, confirmed the validity of such arbitration clauses. An Egyptian court will generally respect an arbitration clause and stay proceedings brought before it. Arbitration may be conducted under any set of rules chosen by the parties. One of the most popular set of rules used in contracts between Egyptian and foreign parties is the Rules of Arbitration of the International Chamber of Commerce (ICC). Arbitration proceedings under the ICC Rules may be held in Egypt or abroad.

A regional arbitration body that is often used is the Cairo Regional Center for International Commercial Arbitration (the "**Center**"). The Center applies the rules of the United Nations Commission on International Trade Law (UNCITRAL). With the rare exception of technology transfer contracts where arbitration must be held in Egypt, there is generally no requirement under Egyptian law that arbitration be conducted under the auspices of the Center or in Egypt.

The Arbitration Law 27 of 1994 brings Egypt further into line with the UNCITRAL model law on international commercial arbitration (which it appears to have been largely modeled after) and is a comprehensive statement of the law on Arbitration and therefore facilitates the conduct and enforcement of international arbitration proceedings in Egypt. The Arbitration Law also clarifies certain aspects of Egyptian arbitration law by legislating in areas that have previously been neglected.

Under the Arbitration Law and provided certain formalities are satisfied, the Egyptian Government is specifically deemed accountable for arbitration agreements it enters into and may no longer take the position that it is not subject to commercial arbitration clauses. In addition, the procedures surrounding the appointment of experts are outlined in the text of the Arbitration Law.

The Arbitration Law provides for an exhaustive set of grounds for the annulment of arbitration awards. Provided one (or more) of those grounds is satisfied, annulment proceedings against an arbitration award must be initiated within 90 days from notification of the award's issuance.

However, this requirement does not preclude the enforcement of the award except under extreme circumstances (e.g. where there is clear evidence of fraud). Applications for the enforcement of arbitral awards must be accompanied by the original or a signed copy of the award, a copy of the agreement to arbitrate, an Arabic translation of the award authenticated by the competent authority if the award was not issued in Arabic, and a copy of the minutes evidencing deposit of the award with the competent court in Egypt (usually the Cairo Court of Appeal). The Arbitration Law therefore provides a firm base for arbitration and enforcement of awards in Egypt.

Chapter one assessment

Put right or wrong sign against the following sentences

1-the judiciary system in Egypt consists of three main categories.

2-members of the Egyptian supreme constitutional court are appointed by a decree from the president of republic.

3-court of cassation has the right to hear suits for firs time.

4-Applying exceptional judicial system is considered to be an aspect of democracy.

5-ordinary courts contain four tire of litigation.

Chapter two

legal services

introduction

The question of who is allowed to provide particular type of legal services has undergone significant changes as a result of many reforms to laws that regulate these matters.

There are many persons presenting aids and assistance to the parties of the case, but I will concentrate in this study only on the important ones which are barristers and notaries public notaries.

1-Barristers

Barristers are the consultant specialists; they specialize in advocacy (i.e. representing a client in a court) and have a right to appear in any court or tribunal.

Historically, the Egyptian legal profession has played an important role in advancing law reform and fighting against government abuses. In the 1930s and 1940s, Egypt's lawyers were among the most highly educated in the Arab world Despite this proud history, Egyptian human-rights lawyers and defenders today face wide-ranging challenges in advising and acting for clients and advocating for human rights.63.

During its mission, the IBAHRI noted the following main challenges for lawyers in Egypt today: (i) lack of respect for basic due process guarantees in military and emergency courts; (ii) inadequate protection of due process in the ordinary criminal courts; (iii) interference with human rights lawyers work; (iv) the poor quality of legal education and training; (v) a lack of detailed ethical regulation; (vi) tensions between lawyers and judges; and (vii) low pay. Other obstacles relate specifically to the EBA, and will be discussed later.

Relevant international standards

All constitutions provide that all persons shall be equal before the courts and tribunals, and are entitled to a fair and public hearing. Lawyers are essential to the delivery of this right. In explaining what these provisions mean in criminal cases, the UN Human Rights Committee issued General Comment in 2007 which provides in paragraph 34 that 'lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized

professional ethics without restrictions, influence, pressure or undue interference from any quarter'.

International fair trial guarantees include the right of a defendant to free assistance from counsel of his own choosing.72 The defendant must be able to communicate with counsel confidentially. Defence counsel must also receive adequate and timely disclosure of the case file, and have adequate time and facilities to prepare the defence.

The UN Human Rights Committee has emphasised that these provisions will 'apply to all courts and tribunals .whether ordinary or specialised', and that civilian trials before military or special courts should 'take place under conditions which genuinely afford the full guarantees stipulated under Article

The UN Declaration on Human Rights Defenders also makes clear in Article 12 that: a '[s]tate shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.'

The UN Basic Principles on the Role of Lawyers also provide that: 'in exercising their rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession'. Codes of professional conduct for lawyers should be established by the legal profession through its associations, or by legislation Disciplinary proceedings against lawyers should be brought before an impartial disciplinary committee (Principle 28) and be determined in accordance with a code of professional conduct

Current challenges

(i) Lack of due process in military and emergency courts

In addition to concerns regarding independence and impartiality , the lack of basic due process in military and emergency courts present a fundamental obstacle to lawyers. This issue had assumed particular relevance in light of the significant increase in the use of military courts to try civilians in the months following the revolution.

Defence attorneys interviewed by the delegation spoke of the difficulty of locating clients being detained by the military. One lawyer recalled how there had been no declaration of martial law or initial public statement by the SCAF about the arrests being made. There was therefore confusion amongst lawyers as to which authority had ordered an arrest and where the arrested individual was taken to, with lawyers sometimes spending hours or days trying to locate clients being held incommunicado.

Delegates heard from lawyers that during the investigation stage, defence counsel did not always have the right to attend their client's interview by the military prosecutor.76 Often, lawyers would arrive at a distant military facility only to find that the interview had been completed in their absence. Military personnel would sometimes allegedly obstruct lawyers' entry to the facility, further delaying access to clients. In one case involving protesters outside the Israeli Embassy on 15 May 2011, an interrogation was reportedly conducted in a military prison instead of at the military prosecution headquarters (as it ought to have been).

Some interviewees reported the inadequacy of court-appointed defence counsel in these cases. They explained that the military court maintains a list of lawyers paid by the Ministry of Defence for this purpose and once in court the military prosecutor asks the detainee if he has a lawyer. If he does not, the court designates one present in court at that time from the list.

Unprepared, and in some cases lacking the relevant experience, these lawyers were alleged to often simply plead for mercy on behalf of their client, without first examining the propriety of the charges or the strength of the evidence against them.

Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

The IBAHRI was told that military trials could last as little as five minutes; and that the longest trials took just one week, a period inadequate for a complex multi-defendant trial. One such trial allegedly took place in the kitchen of a military prison at 4am.77 Interviewees stated that a session would typically run for about an hour-and-a-half at most, though sometimes the judges would agree to adjourn the session until the next day. Observers needed government permission to attend court sessions, and human rights activists were generally excluded from the public gallery.78

Delegates were also alerted to problems with the sentencing process. Some sentences were allegedly handed down minutes after the end of a trial. Sometimes, by the time the lawyer gained access to the court, the sentence had already been announced. Most sentences were read out *in absentia*. Defendants were reported to have received disproportionately harsh sentences with some taken to prisons very far from Cairo (for instance 1,200 km south, close to the border with Sudan) to serve these sentences, making it very difficult for families to visit.

. Some defence lawyers did report a few improvements in the conduct of military trials. Delegates heard how non court-appointed defence counsel had been able to attend more investigations and hearings, and had better access to their clients' case file in some cases.

Although interviewees spoke specifically of trials before military courts, the IBAHRI notes that the UN has found that due process concerns apply equally to emergency courts.

After his 2009 mission to Egypt, the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin concluded that 'deep concerns' remain regarding due process in the Egyptian emergency court system. These include the fact that there is no right to appeal convictions or sentences, and the failure to respect the principle of *non bis in idem* enshrined in Article 14 of the ICCPR.79 And, as in the military courts, the death penalty may be imposed.

Lawyers defending clients before both types of exceptional courts therefore face significant challenges in trying to secure a just outcome for their clients. Lawyers have so far also been unable to challenge the very existence of these courts through a judicial review of their constitutionality. According to judges at the Supreme Constitutional Court, there have been challenges to the constitutionality of trials of civilians by military and emergency courts, but none has so far managed to satisfy procedural requirements. The IBAHRI was, however, informed that a prominent NGO, the Egyptian Center for Economic and Social Rights, planned to seek a judicial review of trials of civilians by military courts on the basis that they failed to provide due process guaranteed in the constitution.80 It is hoped that this will happen soon.

(ii) Inadequate due process guarantees in ordinary criminal courts

In the ordinary criminal court system, lawyers told the IBAHRI that a gap existed between the protection of due process rights under the law and their patchy implementation in practice.

Particular concerns were reported at the investigation stage of a case. In theory, the right of the lawyer to attend interviews at the pre-trial stage of a case is guaranteed under the law. However, delegates heard that they were often not allowed to attend interrogations by the Public Prosecutor's office. Civil society groups have also repeatedly reported that indigent defendants have inadequate access to defence counsel, including at police stations upon arrest.

The problem appears to be largely one concerning the proper implementation of Article 124 of the Criminal Procedure Code. Under this provision, the prosecutor is permitted to begin an interrogation if the lawyer is not there in 'exceptional circumstances'. In practice, what may amount to 'exceptional circumstances' is susceptible to subjective interpretation by individual prosecutors. In addition, in misdemeanour cases, which are *not* punishable by mandatory imprisonment, the investigator is not obliged to notify the lawyer of the accused before beginning the investigation, and therefore, the questioning can take place in the lawyer's absence. Rephrasing this law; providing published guidance as to how the right to access to counsel should be interpreted so as to conform to applicable human rights standards; and/or ensuring that interviews that took place improperly without counsel are not admissible as evidence, would all be helpful steps to improve the position of criminal defendants in this regard.

Another challenge for defence counsel in criminal cases is their restricted access to clients more broadly. Under Article of the Advocates Law, a lawyer who is 'authorized by the Prosecution' to visit a detained person at a prison 'may visit such person at any time and meet him or her in private in decent surroundings inside the prison'. But a number of lawyers explained that in practice access was restricted.

This concludes that approximately 30–60 per cent of lawyers were able to meet their clients, while 40–70 per cent could not.

A further problem identified in relation to safeguarding defendants' human rights in criminal cases is the legal aid system. Although Article 64 of the Advocates Law provides that a 'lawyer must provide legal aid' to those 'unable to bear the costs', one lawyer remarked that the concept of pro bono work is alien to the vast majority of lawyers in Egypt.

Article 124(1) Criminal Procedure Code (Law No 145 of 2006) 'With respect to felonies and misdemeanors punishable by mandatory imprisonment, the investigator may not interrogate the accused or confront him with other accused persons or witnesses except after inviting his lawyer to attend the investigation, with the exception of the case of in-flagrante-delicto and cases of urgency resulting from the fear of losing evidence, in the manner established by the investigator in the minutes of the investigation. The accused must declare the name of his lawyer in writing in the court's register or to the prison's officer, or to notify the investigator thereof.'

The Court of Cassation ruled that the investigator's determination of the existence of a case of urgency is subject to the review of the court that hears the merits of the case and, therefore, the investigator is required to demonstrate the elements of urgency and the reasons behind it (judgment rendered on 15 February 1976). However, it is not clear whether the result of any such review would affect the admissibility of the interview as evidence.

See The United Group 'Crime and Punishment: The Vision of Egyptian Lawyers on the Phenomenon of Torture and the Means to Fight it',

Lawyers told the IBAHRI that what happens in many legally-aided cases is that in court the judge will appoint defence counsel on the spot, and then simply put the case to the end of the day's list, meaning that counsel only has about two hours (or less) to prepare the defence. This would mean that in practice, the system may

restrict criminal defendants 'right to select a lawyer of their choice, as well as the right to effective legal representation.

The IBAHRI was also told by practising defence counsel that their access to case files is unsatisfactory. Sometimes, defence counsel was not permitted to photocopy files in the possession of the prosecution. The IBAHRI heard from one lawyer that, since the revolution, public prosecutors' offices are more open, and there is better access for lawyers. Others did not agree. The matter still appears – unacceptably – to be left to individual prosecutors' discretion.

Some lawyers highlighted the challenge of inadequate technology in the courts and of patchy access to legal documents. Although some legislation is available online,86 a fully searchable database that also includes case law is only available by subscription. This means that smaller law offices and solo practitioners may not have adequate and affordable access to the law in defending their clients' interests.

(iii) Interference in human rights lawyers' work

Although human rights litigation remains a niche field in Egypt, lawyers and other individuals working in the human rights arena are extremely active. Human rights organisations report that human rights defenders are subject to harassment, stigmatisation and restrictions on freedoms of expression and association. During its mission, the IBAHRI heard that physical attacks and arrests of human rights lawyers were relatively uncommon and had become less frequent in 2011. However, a number of arrests and attacks on lawyers were reported to have occurred in the aftermath of the revolution.

In one incident that took place in February 2011, human rights lawyers involved in documenting violence against civilians and providing legal advice to demonstrators arrested in Tahrir Square were themselves arrested and detained by military police.

(iv)Declining quality of legal education and inadequate training

With the exception of a small number of private institutions, and despite an elite standing in legal education in decades past, the system of legal education in Egypt appears to be in crisis.

The admissions policy for public Egyptian law schools is clearly problematic. Since 1961, the Egyptian Government has provided free higher education to all Egyptians who possess a secondary certificate. With the increase in population, the number of students admitted to public Egyptian universities has likewise increased. In the 1960s, Alexandria University's College of Law admitted approximately 300 students. This number increased to approximately 7,000 by 1997.94 Now, up to 38,00095 students are enrolled at the Cairo University law faculty is determined by the Ministry of Higher Education. The university has no decision making control over admissions, or even the curriculum. According to one interviewee: in a letter, the Ministry tells a student which university to attend and which subject to study based on eligibility requirements. Students who attain high grades are usually given the opportunity to enter the medical and engineering faculty, whilst those with lower grades are assigned to languages, literature and law. Practical skills training is not integrated into the Egyptian law school curriculum.

Many interviewees also raised concerns regarding current professional training opportunities. Although there is some training delivered at the Institute of Lawyers (and, for prosecutors, at the National Judicial Institute), the IBAHRI heard from lawyers that this is grossly inadequate for the needs of the modern lawyer. Lawyers told the delegation that these training sessions are not all compulsory. In addition, the IBAHRI was told on many occasions that the vast majority of lawyers are completely unfamiliar with international law. One lawyer considered that 'more than 90 per cent of Egyptian lawyers have never been acquainted with the international

conventions, though in the Constitution these conventions take the status of the laws'.

Opportunities for training contracts and continuing legal education are also scarce. The American Bar Association Rule of Law Initiative has partnered with Cairo University to conduct additional trainings for young lawyers in Cairo and Alexandria. Other ad hoc courses are offered by other institutions. But there is no compulsory, rigorous training for every practicing lawyer or even every young lawyer.

(v) Lack of a clear ethical code and disciplining system

Ethical rules sometimes referred to as the rules of professional responsibility, are a set of standards that govern the way in which lawyers conduct their professional lives. Ethical rules usually address four main areas of concern: conflict of interest, confidentiality, competence and independence.

During its consultations, the IBAHRI did not hear of any case of individual misconduct within the Egyptian legal profession. However, unscrupulous practices have been reported. In March, one human rights NGO denounced, for instance, the military court trial of a 15-year-old boy whose court-appointed lawyer did not raise the issue of the boy's age, or question the court's jurisdiction over him.102 Delegates also heard of questionable practices by court-appointed defence counsel in military courts.103

Under Article 56 of the 1971 Egyptian Constitution, 'trade unions and associations are obliged to examine their members' conduct in the course of duty in accordance with codes of ethics, and to defend the rights and liberties accorded to their members by law.'

Delegates were told that the EBA has not, however, adopted any document that constitutes a code of professional conduct of lawyers.

100. There is an indication in the Advocates Law (Law No 17 of 1983) of the basis upon which a lawyer can be disciplined, in Article 98. This provides that any lawyer who violates the duties of the profession, who perpetrates acts that affect the integrity of the profession or renders it in a non-respectable light shall be liable to disciplinary measures ranging from a notice to permanent disbarment. In addition, the Advocates Law and EBA By-laws include the following scattered provisions relevant to ethical conduct:

a. the text of the oath to be taken before becoming a practicing lawyer includes an obligation 'to carry out the duties of a lawyer with honour and integrity', 'to protect the ethics of the profession and its traditions and to respect the Constitution and the Law'.

b. the duties of the lawyer include requirements of ethics, integrity and honesty, duties towards the client and to provide legal aid; a duty of confidentiality; and to avoid conflicts of interest.

c. lawyers' dress code and demeanour in court should be respectable; and

d. there is an obligation to supervise subordinates to ensure their integrity.

What is the structure of the legal profession?

Lawyers are self-employed or work as part of a firm, as partners or associates. Very few law firms are constituted of more than ten lawyers.

All lawyers must be registered at the Bar Association. The law does not distinguish between attorneys and advocates, barristers and solicitors; they are all lawyers. Lawyers registered at the Bar Association are ranked according to the level of the tribunal before which they are admitted to appear. All lawyers must undertake a two years training period before being admitted before a court of first instances. After having practiced for at least five years before a court of first instance, a lawyer may be registered to appear before the Court of Appeal. A lawyer may be admitted

before the Court of Cassation (the highest court in Egypt) and the Constitutional Court only after practicing as a lawyer admitted to appear before the Court of Appeal for ten years.

Only lawyers admitted to appear before the Court of Appeal and the Supreme Court have the right to issue written legal advice. Lawyers are generally specialise in commercial law, tax law, intellectual property law, criminal law, maritime law, administrative law, or family law.

How is the legal profession regulated?

The Advocacy Law No. 17 of 1983 regulates the Bar Association (www.baegypt.org/index.php) (website in Arabic) and the registration of lawyers at the Bar Association at all levels. The law includes the code of professional conduct of the lawyers.

Every lawyer in Egypt must renew his registration at the Bar Association every year. A card is issued to each lawyer to evidence his registration at the Bar Association and the level of courts before which the lawyer is admitted.

Chapter three

Public notaries

A notary public is an officer of the law who is authorized, among other things, to draw up, attest and certify deeds and other documents

To prepare wills and probate documents, to administer others and take a statement of truth.

The Governor's Notary Section answers hundreds of telephone inquiries every week regarding the notary law and proper notarial procedures. In talking with notaries, it is surprising how many of them do not understand the basic act of "notarizing a signature."

Many incorrectly assume that they are just verifying identification and witnessing a signature. But, the act of notarization is much different.

When you notarize a signature, you must perform one of two official notarial acts: take an acknowledgment from or administer an oath (or affirmation) to the document signer. These two acts have different purposes. The lack of understanding of these basic duties causes confusion and often leads to errors in notarizations, even among the most experienced notaries.

To take an acknowledgment, the document signer must personally appear before you, the notary public, and declare that he or she has signed the document voluntarily. You should ensure that the signer understands the document and has not been coerced into signing. If there is any question about the signer's willingness to execute the document or his or her understanding of the contents of the document, you should refuse to notarize and perhaps refer the person to an attorney for legal advice.

You may want to ask the signer, "Do you acknowledge that this is your signature and that you are executing this document of your own free will?" If the answer is yes, you should then complete a certificate which states that the execution of the document was acknowledged by the signer.

Documents typically requiring an acknowledgment include deeds, mortgages, contracts, and powers of attorney (except those pertaining to motor vehicle titles).

An oath or affirmation is administered to a document signer when the signer is required to make a sworn statement about certain facts. The signer personally

appears before you to swear (or affirm) to you, an officer duly appointed to administer oaths, that the information contained in the document is true. A person who makes a false oath or affirmation is subject to criminal charges for perjury. Sworn statements are commonly used in affidavits, depositions, and applications.

A notarization requiring an oath begins with the administration of an oath or affirmation. The courts have held that there should be a verbal exchange between the notary and the document signer in which the signer indicates that he or she is taking an oath. An oath similar to one administered in court by a judge or bailiff would be sufficient. Or, you may simply ask, “Do you swear (or affirm) that the information contained in this document is true?”

After receiving an affirmative answer, you must complete a proper notarial certificate indicating that an oath or affirmation was taken.

If the document you are asked to notarize contains a prepared notarial certificate, look for the key words “acknowledged” or “sworn to” to tell you which notarial act is required. If there is no notarial certificate on the document, the signer must direct you whether he or she wants to make an acknowledgment or take an oath. Unless you are an attorney, you are not authorized to advise a person which notarial act is appropriate for the document presented for notarization, and you may not advise the person about the contents of the document.

In order to correctly perform the duties of your office, you need to understand what it means to “notarize a signature” and the difference between the acknowledgment and the oath.

Affidavits

An affidavit is a common form of sworn statement requiring an oath.

. Please note that the affiant is the person making the sworn statement.

Depositions

A deposition is the testimony of a witness, under oath or affirmation, taken outside of court in which lawyers ask oral questions of the witness. The testimony is usually reduced to writing and duly authenticated and is intended to be used in a trial of a civil action or a criminal prosecution. The person giving the testimony is called the deponent.

Notaries are authorized to administer an oath for a deposition for use in a court case or an investigation. When administering the oath, the notary must require the deponent's physical presence and properly identify him or her. If the notary keeps a journal or record of notarial acts, the journal entry should be made at this point, including the deponent's signature. The notary would then administer the oath or affirmation, perhaps by having the deponent raise his or her right hand and asking:

"Do you swear (or affirm) that the testimony you are about to give in this matter is the truth, the whole truth, and nothing but the truth?"

Once an affirmative answer is given, the deponent is now under oath, and the notary's responsibility is over.

Part four

The civil law

After studying this part you should understand the following points:

1-the nature of liability in tort and contract and the types of harmful activity for which the law of tort provides a remedy:

2-Circumistances in which liability is imposed without fault.

3-Details of liability in negligence for defective goods and services.

4-Meaning and elements of a contract.

5 Requirements for a person to be a party to a contract.

6- differences between an offer and an invitation to treat.

Chapter one

Kinds of civil liability

The Egyptian Civil Code discusses various sources of obligation, the most important of which for present purposes are contract and tort. The applicable Egyptian legal provisions are quite similar to those prevailing in most European civil law jurisdictions. In general, a claim for compensation under the Egyptian Civil Code, unlike the law in some other Arab jurisdictions, must be based on either contractual or tort liability. In other words, a plaintiff may not base its claim against a defendant on a combination of the two types of liability. Where a contract exists, a contractual party seeking compensation for harm suffered generally must proceed under contract principles.

(a) Contractual Liability

In the case of harm suffered by a purchaser of a product, the seller's liability would be based on contract. Under Egyptian law, the seller of a product implicitly warrants that it is free from any defect.

Article 447 of the Egyptian Civil Code contains some general rules as to a seller's liability to a purchaser: C A seller is liable to a purchaser if, at the time of delivery, the relevant product does not possess those qualities that the seller guaranteed, or if the product has a defect(s) that diminishes its value or usefulness

for the purpose intended, as indicated in the contract or from the nature or destined use of that product. The seller is liable for harm caused by the defect even if the seller was unaware of such defect. C However, the seller is not liable for any defect of which the purchaser was aware at the time of the sale, or for any defect that the purchaser could have discovered by examining the product with the care of a reasonable person. As an exception to this general rule, a seller would be liable to the purchaser if the seller had assured the purchaser that the product was free of any defect, or if the seller fraudulently concealed such defect.

Despite such generally applicable rules on seller liability, the Egyptian Civil Code allows contractual parties relatively broad freedom to negotiate their respective obligations and liabilities, through specific contractual provisions on warranty, indemnification and waiver. For example, Article 453 of the Egyptian Civil Code states that the parties to a contract may agree to increase, decrease or eliminate the seller's warranty, again provided that the seller has not fraudulently concealed defects from the purchaser. Along these same lines, general contract rules in the Egyptian Civil Code allow parties to agree that the obligor be discharged from all liability for its failure to perform contractual obligations, with the exception of liability arising from the obligor's fraud or gross negligence

(b) Tort Liability

Absent a contractual relationship between a manufacturer and the purchaser of a defective product, the manufacturer’s liability to the purchaser would be based on tort, i.e., liability for damages and injuries arising out of non-contractual obligations.

According to Article 163 of the Egyptian Civil Code, a person committing any fault, causing harm to another, is obliged to compensate for the damages suffered. Thus, three elements must be present for tort liability to arise: (i) a fault or error

(which may be either an act or a failure to act); (ii) damage to another; and (iii) a casual connection between the fault and damage.

The Egyptian Civil Code does not permit parties to disclaim liability for tortious acts, unlike the case with contractual liability. Article 217(3) of the Egyptian Civil Code provides that "any clause discharging a person from responsibility for wrongful acts [torts] is void". Nonetheless, Egyptian tort principles favorable to a defendant -- such as contributory fault, intervening cause, and necessity may help to reduce the number of product liability lawsuits that are actually initiated in Egypt.

(c) Damages

Article 221 of the Egyptian Civil Code contains some general principles for quantifying damages resulting from breach of an obligation, whether arising under contract or tort. (The Civil Code often refers to the party breaching its obligation as the ‘debtor’, and the party suffering harm from that breach as the 'creditor’.)

The judge will determine the amount of damages, if it has not been established within the parties’ contract (e.g., a liquidated damages clause) or by law. The amount of damages shall include losses suffered by the creditor as well as lost profits, provided such are the normal result of the debtor’s failure to perform its obligation (or its delay in performing). For these purposes, such losses shall be considered to be a ‘normal result’ if the creditor is not able to avoid those losses despite making reasonable efforts. If the relevant obligation arises from contract (rather than tort) principles, then a debtor will not be liable for damages greater than what could have been normally foreseen at the time of entering into the contract although this limitation does not apply if the debtor committed fraud or gross negligence.

Egyptian Civil Code liability provisions do not explicitly use the term "consequential" damages.

In Egypt, a person generally is not liable for indirect damages. A person may be liable for direct damages, including both “material damage” and “moral damage.

Contractual liability includes those damages which are both direct and foreseeable, i.e., the “natural result” of a contractual breach.

Tort liability includes all direct damages, i.e., whether foreseeable or unforeseeable. Egyptian jurists have summarized these rules in the following examples: Direct/Indirect. If a less r fails to fulfill the provisions of a lease and the lessee is forced to move its business to other premises, the cost of the move (including increased rent at the new premises) would be direct damages arising from the contractual breach. However, if the new premises contain certain harmful bacteria which cause the lessee's employees to become ill, this harm would be indirect damages for which the lessor would not be liable under either contract or tort principles.

Foreseeability. A bus company can foresee that a passenger will carry luggage containing articles of more or less considerable value (as opposed to items of quite exceptional value). Consequently, if the bus company misplaces a passenger's luggage, it will be liable for such damages.

Compare the situation where a passenger is traveling to a destination in order to participate in a special event, such as a jockey at a horse race, a student at an important university exam, or a businessman at an important contract negotiation. If the bus arrived late at the destination, the passenger normally cannot recover the damages suffered by not participating in the event, unless circumstances indicate that the bus company foresaw the special risk which it was assuming.

Loss of Profit, If a singer breaks his/her contract with a theater owner, the latter can claim expenses incurred in preparing for the performance, advertising, set designs and the like, as well as for the loss of profits which the theater owner would

have derived from the concert. In addition to these material damages, a court may consider whether the theater owner also suffered moral damages (e.g., loss of reputation with the public) due to the singer's breach of contract.

Mitigation, If a farmer hires a moving company to transport a broken piece of equipment to be repaired, but the equipment is lost by the moving company, the farmer cannot wait for months to pass and then claim losses for being without the equipment for an entire season. Rather, when the farmer learns that the equipment is lost, he should use his best efforts to obtain replacement equipment.

The Egyptian Civil Code also contains some other rules on damages that apply specially to either contractual liability or tortious liability, but not both. For example, contractual parties may agree in advance as to "liquidated damages" owed in the event of contractual breach. Articles 224 and 225 of the Egyptian Civil Code contain three important general principles:

The liquidated amount is not owed if the debtor proves that the creditor did not suffer any damage; The liquidated amount may be reduced if the debtor proves that the parties' estimation was excessive, or if the debtor has partly performed the contractual obligation; and The creditor is not entitled to claim more than the liquidated damages, even if harmed in excess of the Liquidated amount, unless the debtor has committed fraud or gross error.

Chapter two

Law of contract

What is a contract?

The whole essence of business life is the making of contracts – contracts to perform work; contracts to buy and sell; contracts to make something; or to employ

someone; or to use something. We must, therefore, know what a contract **is**, and **when we have one**.

A contract is an **agreement** between **two or more people**. Every contract is an agreement – but not every agreement is a contract. Two people agree about something to be done. They are called "the parties". First, the subject of their agreement may be such that neither of them has the remotest intention that any legal consequences should flow from it. For example, you invite someone to dinner and he says "*Yes, I would love to come*". You have an agreement. However, if he just does not turn up, neither of you would expect to hurry round to court and sue for the cost of the wasted food! So, the first essential of a contract is that the parties should intend their agreement to have legal consequences.

In the second place, the agreement reached may have certain aspects about it which make it such that the law will not enforce it. In other words, although it is a contract, it is not a **valid** contract.

Essential Elements of a Valid Contract

In order that an agreement can be a valid contract which the law recognizes and will enforce, it must contain certain essential features. We shall be discussing them all in much greater detail later, but at this stage you should know what they are.

(a) There must be agreement between the parties, or a **meeting of minds**. This is called "consensus ad idem".

(b) Usually, there must be "**consideration**" present – that is, something of **value** must be given in exchange for a promise.

(c) There must be an intention to **create legal relations**.

(d) The parties must have **legal capacity** to contract.

(e) There must be no circumstances surrounding the contract which make it **unenforceable, void** (i.e. as if it had never existed), **voidable**, or **illegal**.

Form of Contract

Most contracts are equally valid and effective, whether they are oral or written. The only difficulty with oral contracts is that the parties may not properly remember what they actually agreed, and it is more difficult – should need arise – to prove the details of the agreement. However, certain contracts must be in writing, and others are unenforceable unless evidenced by writing.

Contracts which by Statute Must be in Writing

! A **bill of exchange** or **promissory note** must be made in writing .

! **Contracts of marine insurance** are void unless made in writing in the form of a policy.

! A **consumer credit agreement**, such as a hire-purchase or loan agreement must be in writing and signed by both parties.

! A **bill of sale** must not only be in writing but also in a certain form; otherwise, it is void .

! Contracts for the sale of land – but not contracts to grant a leasehold – must be in writing and must be signed by or on behalf of both parties **.**

THE AGREEMENT

As we have seen, in order to have a contract there must be an agreement, a "consensus ad idem" – there must be an offer, and an acceptance. However simple or however complicated the contract may be, this rule is invariable. For example, at one end of the scale you may say: "*I will sell you this book for £1*". The other person replies: "*OK*". Offer has been followed by acceptance – hence there is a contract. At the other end of the scale, a civil engineering contractor may submit tender documents for the construction of a dam for £200 million. After months of

negotiation, all the details will finally be accepted. Once again, an offer has been made and accepted. A contract exists.

As you can imagine, a number of rules have grown up to regulate and decide on whether a valid offer or acceptance has been made

The Offer

An offer is an expression by one person (the "offeror") that he is willing to contract with another (the "offeree") on specified terms. If it is to form the basis of a contract, the offeror must intend that legal consequences shall result.

An offer can be made to one or more specified people, or it can be general, made to "the world at large". It can take a number of forms – as follows.

! An offer made to a specified person, either verbally or in writing. This is straightforward.

! An offer made to the "world at large". This is where a person announces that he will do so and so, if anyone who cares to accept will do what is required by the offer.

For example, a person puts an advertisement in the newspaper: "*£5 reward will be given to anyone who returns my lost dog, Fido*". That is a valid offer to anybody who finds Fido, and duly returns him. If the offer is in the form of a promise by the offeror to do or pay something in return for some act by the offeree, then the performance of the required act is in itself an indication of acceptance of the offer.

The company manufactured a patent "smoke ball" which, it claimed, prevented influenza. It advertised in the press that it would pay £100 to anyone who contracted influenza after taking one of its smoke balls. Mrs Carlill read the advertisement, bought a smoke ball from the chemist, and used it as directed. However, she promptly got influenza, and she sued the company for the promised sum of £100. The company claimed that it was a "mere puff", and not meant to be taken seriously.

HELD: The promise to pay £100 was a valid offer to the world at large. Mrs Carlill had accepted by complying with the conditions, and was entitled to the money.

Of course, only one person can return a dog; the smoke ball situation is different.

! An offer can be inferred from conduct. This type of offer is very frequent in everyday life. For example, if you board a bus, you are offering to pay the fare if it takes you to your destination.

Or if you go into the newsagent, pick up a copy of a paper and hold out the correct money, you are offering to buy the newspaper for the price printed on it.

However, even in more complicated transactions, an offer can also be inferred from conduct.

Invitations to Treat

An offer must be distinguished both from a **request for information**, and from an **invitation tomake an offer**. Neither of these creates the basis of contractual relations.

! An example of a request for information P sent a telegram to D, saying: "*Will you sell us Bumper Hall Pen? Telegraph lowest cash price*". D replied by wire: "*Lowest cash price Bumper Hall Pen for £900*". P promptly sent another telegraph: "*We agree to buy Bumper Hall Pen for £900*". The sale never went ahead, and P sued.

HELD: The first telegram was a mere request for information. The second was information supplied as requested. The third was the only one with any contractual meaning, as it constituted an offer to buy for £900. This offer was never accepted, so no contract came into being.

! There are many instances of "offers to treat".

A shopkeeper (or supermarket) displaying goods marked at a certain price is inviting the public to make an offer. The price tag is merely an indication of the price he (or it) is likely to accept.

What happens is that, in a shop or supermarket, the act of taking goods off the shelf contractually means nothing. However, putting them down in front of the shopkeeper or cashier constitutes an offer to buy (at the named price, unless otherwise stated in the offer). Ringing up the price on the till, for example, constitutes acceptance.

Communication of Offer

In order to be effective, an offer must be communicated to the offeree – or, at least, he must know about it. This is not quite as ***Communication of Offer***.

In order to be effective, an offer must be communicated to the offeree – or, at least, he must know about it. This is not quite as obvious as it sounds, because, if a person does something in ignorance of the offer, he can neither reap the benefit nor be bound by any obligations. To revert to our example concerning "offers to the world at large", if Fido had had his owner's address on his collar, and the finder returned the dog without knowing about the offer of a reward, he would not be entitled to it.

The motive for accepting is not relevant but the offeree must be aware of the offer

Termination of Offer

An offer, once made, does not remain open for acceptance indefinitely. It can terminate for a number of reasons and, once terminated, it is no longer capable of being accepted. An offer terminates in **four** ways:

! **If It Is Withdrawn**

Unless an offer specifically states that it is irrevocable, or that it will remain open for a definite stated time, it can be withdrawn at any time before it has been accepted – provided, that is, that the revocation has been communicated to the offeree.

That is the general rule. However, difficulties can arise. For instance, if the acceptance of an offer involves the doing of some act (acceptance by conduct), can the offer be withdrawn when the act has been partially completed? According to the

strict rule, the answer should be "yes" – but, fortunately common sense has prevailed. if one man offers another £100 if he will go to York, can the offer be withdrawn when the traveller is halfway there? Much judicial ink has been used to explain this but the generally accepted solution is that the acceptance is complete once the offeree has commenced the performance, but the offeror is not bound to pay until it has been completed.

! **On the Death of Either Party Before Acceptance**

The death of the offeree always terminates an offer. His personal representative cannot accept on his behalf. There is some doubt as to whether an offer can be accepted if the offeree is not aware of the death of the offeror. One view states that the death of the offeror automatically terminates the offer, and that knowledge of it is immaterial. The better view is, probably, that it is terminated only if the offeree is aware of the fact, unless the personality of the offeror is an essential ingredient of the matter. **If It Is Rejected**

This is fairly obvious. A point to note is that the act of rejection destroys the offer, and the offeree cannot change his mind, and later accept.

Rejection does not have to be expressed: it can be implied. It is sufficient if the offeror can reasonably infer from the offeree's conduct that he does not intend to accept.

! **If It Lapses**

An offer will lapse and thereafter be incapable of acceptance, in **three** events:

(i) In the first place, if the offer specifically stated that it would cease, or had to be accepted, by **a** certain date.

(ii) Second, if it stated that it was conditional upon some circumstances other than time.

(iii) In the third place, an offer lapses if it is not accepted within a "reasonable" time. It would, plainly, be quite wrong if every offer remained open for ever and a day, unless the offeror remembered to withdraw it. Hence this rule – but what constitutes a "reasonable" time depends on the facts of the particular case. An offer to buy perishable fruit or vegetables will lapse after quite a short period, one to sell a house or a motor car will remain open much longer.

Acceptance

The cardinal rule to remember is that the acceptance of an offer must be absolute and unqualified. Offer and acceptance must correspond in every particular.

If a purported acceptance alters or qualifies the offer in any way, it constitutes a rejection of the offer, followed by a counter-offer. The counter-offer is then open to acceptance or rejection in the same way as the original offer.

If an offer is made in alternative terms, the acceptance must make it quite clear which alternative is being accepted.

! If an offer is accepted but the acceptance introduces additional terms not contained in the offer,

this also constitutes a rejection .

! An acceptance does not have to be express it can be inferred from conduct. An offer to buy

goods is accepted by supplying them .

! As in the case of an offer, an acceptance must be **communicated** to the offeror, otherwise it is not effective.

Tenders

This topic has to be specially considered regarding acceptance of an offer. Suppose a local authority invites tenders for the supply of specified goods to be delivered over a given period. A trader puts in a tender showing that he is prepared to supply

at a given price; this is clearly an offer. But there may be difficulty in deciding whether subsequent action by the corporation is an acceptance. There are two possibilities, depending on the wording of the corporation's original invitation.

If the corporation states that it requires a specified quantity of the goods during a particular period, then, on "acceptance" of the tender, the trader is bound to deliver.

If the corporation advertises that it may require specified goods up to a maximum amount, deliveries to be made if and when required, the effect of acceptance is quite different. The trader has made a standing offer. There is no acceptance by the corporation in the legal sense: this will only take place when a requisition for a definite quantity of goods is made. Each requisition by the offeree, i.e. the corporation, is a separate act of acceptance which creates a separate contract .

Incomplete Agreement

It sometimes happens that the parties to a contract will agree in principle only, leaving many details unresolved, or they will agree only certain things, or omit other necessary matters. These are called "incomplete agreements".

In extreme cases, the court will hold the whole contract void for uncertainty. However, it is reluctant to do this, and it will uphold a contract if at all possible.

CAPACITY TO CONTRACT

In general, anybody over the age of 18, who, at the time, is sober and mentally unimpaired, is capable of contracting.

This also applies to corporations which can contract in exactly the same way as living persons – but, of course, they must do it through the agency of a human being. A corporation can contract under its corporate seal or by parol.

However, certain categories of person have no capacity (or only limited capacity) to contract.

Minors

A minor is a person under the age of 21ears. He becomes adult at the beginning of his 18th birthday – i.e. at one minute past midnight.

Most contracts with a minor are "voidable" at his option. That is to say, he – **but not the other party** – has the right not to be bound by the contract. Such contracts are as described below.

! **Binding on the minor**, unless he repudiates them during his minority, or within a reasonable time after reaching his majority.

This category covers the majority of contracts into which a minor enters, except those mentioned below.

So, it is at the minor's option whether he wishes to be bound by his contract or not.

A minor became liable to a firm of brokers for £547. After he reached his majority (then 21)

the firm sued, and he compromised by giving two bills of exchange for £50. One of the bills was endorsed to Mr Smith, who took it in ignorance of the circumstances.

Mentally-disordered Persons

Except for contracts for necessaries, contracts are not binding on such persons, unless they specifically ratify them during a **lucid period**.

Drunken Persons

Exactly the same applies to a drunken person. To be bound, he must ratify the contract when he sobers up.

Part five

Classifications of Property and Conceptions of Ownership in Civil and Common Law

INTRODUCTION

Trite, though it may be, that the common law has no specific concept of ownership as is found in the civil law . The nature of this distinction, and its consequences for the classification of property, have not been explored to any great extent by jurists. The law of property was noted as being the most neglected of all the private law areas open to common law-civil law comparison. Those comparisons of the law of property that have been made, have focused on particular institutions, primarily the trust.

Even the few comparisons of ownership, are contrasts between ownership as an institution in the civil law, and various institutions in the common law; and that, primarily from the perspective of the common lawyer. There is little, if any, comparison, focusing on the relative notions of proprietorship, with a view to enabling a better grasp of the differences in the classification of property, and with the purpose of facilitating an improved understanding of the law of property generally, in the two traditions. Yet, this kind of study, like all studies using the comparative method, is quite valuable. The benefits are twofold : it enables a better understanding of one's own system, and provides a wider range of solutions to problems common to the two traditions. These benefits are particularly desirable in the area of the law of property. The classification of property in a legal tradition both reflects and generates a particular approach to allocating the powers and benefits of property generally, and of land in particular. In other words, it creates a mind-set, which is manifested in the kinds and deployment of institutions recognised in the tradition, and influences the options that are perceived for responding to the demands of our changing societies. An understanding of a different approach to the similar problem faced by a society governed by the rules of another tradition, therefore has the distinct advantage of avoiding narrow-mindedness in the search for possible solutions.

Not only is it valuable, this kind of study is also necessary. Understanding the differences in the classification of property and in the modes of thought, is indispensable for successful navigation in environments where these two major traditions of the western world are encountered. Comparisons between individual institutions are of limited use in this respect. As was pointed out by one author commenting on the differences between English law and French law, "[i]t is not just that the individual concepts are different, but that the whole conceptual landscape can be significantly different so that the problem you are studying does not arise conceptually in the same way".

These environments in which the two traditions are encountered are numerous. In the mixed or bi-juridical jurisdictions like Québec, Louisiana and St. Lucia, the legislator and jurist (authors and practitioners) alike, must possess this knowledge. Otherwise, instead of being enriched by cross-fertilisation, the legal system will be deformed by a mix-up of inconsistent principles. There is also the case of the federal legislator in unions comprising a plurality of traditions, for example Canada and the United States; of judges in Courts hearing matters from common law and civil law jurisdictions, or disputes involving a conflict of laws; of doctrinal authors, and practitioners, working. in these environments. An adequate grasp of the fundamentals of the classification in the law of property of these two traditions, makes it possible for such persons to avoid falling victim to the many potential pitfalls. They will be able to discern the subtle distinctions between the classifications of the various powers over land that each tradition recognises. For example, between the realty/personalty dichotomy in the common law, and the real rights/personal rights dichotomy in the civil law; between realty in the common law, and immovables in the civil law, and similarly, between personalty in the former,

and movables in the latter; between real rights — in relation to land at any rate — in the civil law, and the common law concept of hereditaments.

The risk of erring is that much higher because the institutions in the traditions, though decidedly different, occupy the same position on the landscape; that is to say, they fullfil similar functions and often lead to the same practical result. This is the case in respect of, for example, the hypothec in the civil law, and the mortgage in common law, both of which facilitate the use of land as security for obligations; the lease in the civil law, and leasehold interest in the common law, both of which are mechanisms used to procure a periodical rent from land, in exchange for the enjoyment of it; the "Trust" in the civil law and the common law, which enable the separation of the administration of the land from the enjoyment of the benefits. Such similarity in nomenclature makes jurists even more susceptible to error.

There are several instances in which both legislatures and jurists, in Canada and beyond, have succumbed to the illusion of similarity in substance, suggested by the similarity in function or nomenclature.

A leading Canadian text on real property in the common law contains this paragraph : "The common law distinction between real and personal property differs from the civil law distinction between immovables and movables. The two sets of terms are largely, but not entirely, coterminous in meaning. The differences are of concern in the conflict of laws. Basically, the term "immovables" comprises land and anything affixed thereto or part thereof. Real property may be similarly defined. However, there is this main difference that real property does not include leaseholds. This is due to an accident of history".8 The problem here is that one may conclude that the lease in the civil law is an immovable, but it is not.

The Québec legislature has introduced legislation concerning land in matters of public law modelled on that of England or common law Canada which do not conform to civil law principles. One writer notes.

The legislature of St. Lucia is also guilty of legislation which ignores basic civilian principles. The Land Registration Acts for example, give a token recognition of the civil law lease. It includes in the definition section, the meaning contained in the civil code. However most of the articles in the main body of the principal Act treat the lease as the common law leasehold interest .

Yet another example is the decision of the Privy Council, in the heavily criticised Matamajaw case, that the right to fish was an object of ownership, separate from the land itself and other rights therein. This was the result of a misunderstanding of the classification of property in the civil law. First, it was thought, wrongly, that a personal servitude was not a real right. Their lordships therefore concluded that the right to fish was a real right and thus not a personal servitude. Second, they were of the view that a real right in land was necessarily a right of ownership, and that a part of the prerogatives of ownership, in this case the right to fish, could be split off and itself be the object of ownership. In effect, the judges equated the right to fish to the profit à prendre of the common law, which is classified as a hereditament and therefore the object of ownership. In so doing they distorted the civil law by importing the common law notion of plurality of owners on one parcel of land.

The consequences of such errors, which are all too numerous, is that the efficacy of the law is undermined by the uncertainty thus introduced. Problems of theory become practical problems when the confusion in the classification of property makes it difficult to determine what rules are applicable in a given situation. The contemporary relevance of the classification of property and rights therein is

manifested in the revolutionary changes taking place in the civil law in regard to the incorporation of an institution analogous to the common law trust. As has been acknowledged in the case of Québec, the elaboration of the civilian trust concept will require inspiration from the common law. In view of the potentially large role that this concept can play, even supplanting existing civil law institutions, the importance of being able to discern those principles of the common law that are incompatible with the civil law is clear.

In light of the foregoing, the aim of this paper is to provide a basis from which the law of property in the two traditions can be better understood. It is not intended to attempt a summary of the principles in both traditions. As is clear from the above, it is the view of this author that the differences in the kind of rights that exist in each tradition, and their classification, is a direct result of the contrasting conceptions of ownership. Thus the approach taken to achieve the aim is to explain the relative conceptions of ownership. In that way, one will have — what is as good as, or perhaps better than, the principles themselves : a map that will assist in their discovery .

Ownership is the institution employed in civil law to describe man's interaction with all things, whether land or other objects. In traditional theory it denotes the totality of powers that can be exercised over, and benefits that can be derived from, property. The right is therefore described as absolute, and ipso facto, unitary. Using this as a core concept, the civil law endeavours to explain the reality of different combinations of powers and rights in land. This it does successfully — for the most part at any rate, providing a framework on which is built the whole of the law of property. Through this unifying concept, and the framework of rights generated by it, the law of property is made simple, easily assimilated by the student and easily applied by jurists. Moreover this institution enables the principles of the law of

property to be organised in such a way that it is suited to codification.

However there are disadvantages. The theory built on the framework of this institution has weak points. Certain rights in land, pertaining to old (e.g. lease and hypothec) as well as recently evolved ways of using property (e.g. trust), cannot be made to fit snugly in the framework. In addition, new forms of property which have developed in modern society (intellectual property) present a challenge. Thus the unifying concept, which is so useful, can prove to be restrictive. It is, criticised for not being as flexible as one would desire to respond to innovations in man's use of property, and the development of new sources of wealth.
In contrast, a concept of ownership is not part of the common law of real property. The pursuit for "the owner" is an entirely civilian preoccupation. There is at present no unifying concept which is, or can be, used, to systematise the complicated structure of technical rules which constitutes the common law of real property.13 Man's interaction with the land is described using a variety of concepts. The predominant one is that of "estate". But there are others, for example, "hereditaments", and "interests

Having no specific, technical meaning for "ownership", the word is used indiscriminately to refer to several different powers over, or benefits in, the land. It is most often used to describe the person who has what is called the "fee simple absolute in possession". This interest constitutes the greatest powers and benefits over the land that is possible in the common law today. In reality it differs little from the civil law owner. That is to say the two have similar powers over the land. "Owner" is also used in reference to the holder of any "estate", the person with an "equitable interest", or the person who has "seisin"

.

These concepts, being intimately related to the endurable character of land, are restricted to the explanation of the interaction with land; it is not extended to objects. This highlights one consequence of the difference in conception of ownership : while the basic rules governing property apply equally to objects and to land in the civil law, the common law has one set of rules for objects and another for land. Civil law refers to a droit des biens, and the common law, to a "law of real property”

Different rules for land and for other objects is one factor contributing to the complexity of the common law of real property, although less so now than previously. The primary factor however, is the manner of its development. The common law has developed through a pragmatic approach : the manipulation of its principles to solve immediate concrete problems, and legislative intervention where it was considered necessary to avoid abuse, or to correct a problem created by this manipulation. The present law of real property is thus a collection of all the institutions which have survived the piecemeal alterations since the 12th century.

In Part I, ownership will be looked at in detail. It will be seen that although the conceptions of ownership are not at all similar, the structure of rights which they map out coincide, for the most part. That is to say, with the exception of certain interests in the common law (future interests) which have no counterpart in the civil law, the powers exercisable over land are the same. The nature of the institutions through which these rights are given effect are not, however.
In Part II, some particular institutions will be examined to demonstrate how the conception of ownership works to determine the nature and classification of institutions that exist in the tradition. The institutions chosen for this focus are the lease, the mortgage/hypothec and the trust. These institutions were chosen because

(i) they are important from the point of view that they are used most frequently in practice; (ii) errors are constantly made in respect of them, and (iii) their nature and classification using the framework generated by the conception of ownership in each tradition is not without difficulty, so that the "map" outlined in Part I is insufficient for a proper understanding of them.

I. DISTINCTIONS BETWEEN THE CONCEPTIONS OF OWNERSHIP

Rights in relation to land in the English law of property developed in an ad hoc manner. There did not exist a notion of "rights", so much as a notion of "interests in land". These "interests" in land were created as and when the need arose, largely through the use of the concept of "estates". This concept of estates is in one sense then, the common law counterpart of the civilian ownership. Both of them, having developed at the turning point of English and French law in the late medieval period, have established the way in which the powers exercisable over land are perceived, in short, the mind-set of the common and civil lawyer respectively.

Today the holder of the estate known as the "fee simple absolute in possession" is hardly distinguishable from the civil law owner from the point of view of the rights that they can exercise over their land. They can both "sell" it (or allow it to pass to their heirs by their act or the operation of the law), give others the right to take part of its benefits, or use it as security for obligations. To effectively distinguish between estates and ownership, one needs rather, to understand the concepts from a historical perspective : how the concept came to be established and the modifications giving rise to their contemporary perception (A). It is only against this background that their nature and characteristics can be truly appreciated (B); and the juridical difference between acts with a similar practical result be perceived, for example the lease, mortgage/hypothec and the trust.

A. EVOLUTION OF OWNERSHIP The law of property in England and France took different paths from the period of the decline of feudalism in these countries. Since England pretty much retained the feudal structure to construct its law of property, it is necessary to start with the appropriation of property as it existed under the feudal system. We will then see how the decline of this system affected English law and how its romanisation transformed French law.

1. The feudal system . The concept used to designate the appropriation of land in both France and England was "seisin" {saisine). This concept developed as part of the customary law of France during the late medieval period (10th and 12th centuries) when the feudal system governed the social order.

It was transplanted in England when the Normans introduced the feudal system in that country after the Norman Conquest in 1066

Landholding in the feudal system was inextricably bound with the status of persons, that is to say their position in the feudal hierarchy. Land was held from a person of superior status — "seignior" in France, "lord" in England — in favour of whom the tenants were obligated to perform certain services, or pay certain taxes and fees in relation to possession of the land. This fact was captured in the adage "nulle terre sans seigneur". The king owned all the land. He gave grants of it to his lords, and kept some in respect of which he acted as lord. In exchange, the lords were required to perform a particular kind of service, for example providing the king with an army. The lords themselves did the same, securing different services, so that there was a whole pyramid, with the king at the top, and the tenants at the bottom. Persons in between were tenants in relation to those above and lord in relation to those below.

The relationship between the lord and the man was described as tenure.

The other important aspect of the feudal system is the fact that the tenant was not entitled to the land outright. He was regarded as holding it. This "holding" signified the power to enjoy the uses or returns of the land. It is this entitlement to enjoy the uses of the land held in tenure that is referred to as seisin. Thus a person with seisin described in a Norman compilation of customary rules of the mid-13th century as, "Celui qui la possède, la moissonne, la laboure, en perçoit les fruits et les produits".

Seisin was also applicable to other rights related to the land which entitled their holder to "returns" or uses of the land. For example the right of the seigniors or lords to taxes and fees as mentioned above. There were many other rights for example the right to use the land for a specific purpose : the right to pass. There were thus as many persons seised in respect of a parcel of land, as there were uses of the land. Feudal landholding is for this reason regarded as a multi-owner system. As seisin could only apply to property which was enduring and from which one could get returns periodically, it was not applicable to movables. Thus there was a difference between the appropriation of these movables "cateux"md land, "heritage", or in English, "chattels" and "hereditament.

B. THE NATURE AND CHARACTERISTICS Of OWNERSHIP

The foregoing shows that idea of ownership in the common law, insofar as it exists, is based on the multi-proprietorship system that was feudalism. Whereas that in France, and Québec and St. Lucia which were based on it, is the adoption of the Roman concept of dominium. With this background it is now possible to embark on a contrast of the nature and characteristics of each notion.

1- The nature. The nature of the common law and civil law ownership differs by virtue of (a) the existence of an obligation, (b) the notion of property and (c) the object of the right.

a) The existence of an obligation

Perhaps the key to understanding the difference in the classification structure of the two traditions is that while ownership in the common law comprises property and obligation, that of the civil law consists of property only. As stated above, the English maintained the feudal framework of landholding even though they modified it somewhat. The modifications merely deemphasized the obligations, and restricted the types that could be imposed. They did not do away with them altogether. One writer comments on the effect of the principal legislation importing changes, in this way : "the fundamental principles of the law of ownership of land remain the same as before the legislation of 1925. Land is still the object of feudal tenure; the Sovereign remains the lord paramount of all the land within the realm; every parcel of land is still held of some lord [...] and the greatest interest which any subject can have in land is still an estate in fee simple and no more". Another states, "Our law has preferred to suppress one by one the practical consequences of tenure rather than to strike at the root of the theory of tenure itself. It remains possible, therefore, that in rare cases not covered by the statutory reforms recourse may have to be had to the feudal principles which still underlie our land law"

Thus, as was the case in the feudal regime, there is an obligation to the lord that is superimposed on the holding of the land. It is an incident of landholding, not an accessory contractual obligation. Although the incidents or obligations no longer have any practical importance, the recognition of the existence of this obligation is

essential to the understanding of the concept of estate, and in order to distinguish ownership under the common law and the civil law.

The civil law concept of ownership, inspired by sentiments exactly opposite to that underlying the English law, involved the liberation from those obligations. The property/obligation dichotomy, characteristic of feudal landholding, was transformed into pure property. The return of the feudal obligations is prevented from reoccurring in Québec by article of the "Seigniories's Aci"which prohibits perpetual rents on land, and the imposition of any obligation to pay a money or perform a service or any other kind of dues similar to those of the feudal period. This prohibition on perpetual rents, as completed by a subsequent Act, was incorporated in articles 389-394 of the C.C.L.C. 1866. A similar prohibition is contained in articles 347-350 of the C.C.S.L.

B) The notion of property . The property aspect of the common law ownership, and the pure property in the civil law are not themselves identical notions. This is an important distinction since it determines what is considered a proprietary right, and subject to the law of property, as opposed to a mere personal right in each tradition. earlier, one is not regarded as owning the land itself, but an estate in it. The right is against or pertaining to the land, which signifies that this right is enforceable against all persons. The English realty/personality distinction is therefore made, not as in the civil law, on whether the right creates a direct link (jus in re) or not (jus in personam and jus ad rem), but on the basis of whether it is enforceable against the whole world (jus in rem or realty) or not (jus in personam or personality). It is true that a real right is also enforceable erga omnes, but this is merely a consequence of its real nature, not, as in the case of realty, the essence of it. To determine whether a right is proprietary therefore, the common lawyer considers whether it can be enforced

against the whole world or not. Thus, as will be seen later, what was once considered personal rights evolved into proprietary rights when they were made enforceable against practically the whole world.

The lease, discussed below, provides a striking example of how these two approaches can lead to different results in classification.

c) The object of property

The common law ownership, tenure in free and common socage for an estate in fee simple absolute in possession, is an estate. It is categorised as a hereditament, in particular a corporeal hereditament. Hereditaments also comprise rights, for example easements and profits, which, though not estates, are considered rights of property. They are called incorporeal hereditaments, to distinguish them from estates in land.51 They are hereditaments or rights of property because the holder is considered as having seisin, and is therefore entitled to recovery in specie, not just damages.

As indicated in the previous section, owner is used in the common law to describe not just the person entitled to an estate in land, but also of all other hereditaments. The object of ownership is therefore always incorporeal.

In the previous section it was seen that ownership in the civil law was a real right, a right in the thing itself. It links the person to the thing directly, in contrast to the personal right which links the person with another. A material object is a necessary implication of the civilian ownership. Ownership of an incorporeal thing is not, strictly speaking, accurate in the context of civil law. A distinction is made between the owner of things, and the holder of rights.

It should be pointed out however, that it has been argued that ownership should be used to refer to the exercise of power not only over physical things,

but also over things which are the product of the intellect. In other words, that the object of ownership may be incorporeal. This view is part of a theory that all rights, including the right of ownership, is best explained as a relationship between persons. The present classification into real and personal rights is criticised as being defective in that it fails to deal adequately with mixed rights (like leases) and incor poreal things that are sources of value (like intellectual property). These criticisms notwithstanding the summa divisio of real and personal rights remain important in the civil law, and was recently reaffirmed by its adoption in the new Québec Code.

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The characteristics Owing to the particular nature of ownership in the common law and the civil law, it displays

contrasting characteristics in each tradition which are useful to distinguish the two notions. **a) The extent of the right** "Ownership" in civil law is, by nature, absolute. Absolute here is used to mean the total appropriation of the thing, and the consequent absence of an intermediary between the owner and the land. In so doing the civil law eschews a distinction between the appropriation of land and that of other objects. Ownership entitles one directly to "plena in re potestas" — full power — in the land. This full power has been summarised by one writer as being the right to the full economic and social benefit that the land affords. In traditional theory, as indicated earlier, it comprises usus,fructus, and abusus. Usus denotes the right of the owner to use the thing personally according to its destination. Fructus denotes the right to take the fruits of the land, and to keep them or consume them. Fruits is used here in its legal sense, meaning the periodic returns from the land which do not decrease its substance. They are of three types : natural, industrial, and civil. "Consume" is here used in the legal sense meaning material consumption, or legal consumption. Abusus refers to the right to perform material acts of destruction and legal acts of disposition in relation to the land. Material acts of destruction refers to, for example, demolishing, or burning. Legal acts of disposition refers to alienation of the land, or the creation of real rights, whether principal or accessory. These rights are taken to imply certain lesser powers, for example the power to renovate, and the power to perform acts of administration.

However, the qualification made earlier concerning the restrictions on the enjoyment of the rights of the owner is reiterated. Ownership is therefore

a general right. The owner can, in theory, do everything. Restrictions must be imposed in order to limit his powers.

One of the consequences of this absolute appropriation is that the right continues to exist as long as the object exists. For this reason, ownership in civil law is also regarded being perpetual. Ownership in common law does not represent such an absolute concept. The proprietor of land in England, in contrast to the owner of an object, is not considered as appropriating the land absolutely. As is clear from the foregoing, land is held in tenure and for a period, which though uncertain, is limited. It is not appropriated.

It is acknowledged that this is a distinction with little practical difference at present. Changes in the law have caused the tenant in fee simple absolute in possession to have an array of powers over the land, and to be subject to statutory restrictions, similar to that of the owner in civil law. Nevertheless, the notion of ownership, tenure of an estate, is, by its nature, not absolute.

b) The level of abstraction : There is no concept of an abstract ownership in the common law. It is relative. This is the result of the notion of seisin discussed earlier. The common law did not know an abstract right of ownership. As stated earlier, the person held entitled to exercise the rights associated with ownership was the person seised, regardless of whether seisin is wrongful or rightful. In a dispute concerning title the remedies available did not enable the determination of the issue in an abstract manner. All that was decided was which of the disputing parties had a better right to immediate possession. It was not relevant that there was a third party, not party to the suit, who really had tenure.64 Thus in practice,

ownership is not the tenure of an estate in land, but the relative concept of the better right of possession.

The civil law, in contrast, conceived by intellectuals and fashioned by doctrine, is abstract. It is the central institution of the civil law of property and of paramount importance in its systemisation. From this concept in which all possible rights and powers over land reside, which is therefore valid against the whole world (erga omnes), the civil law elaborates its whole theory of the allocation of rights in land. Its central importance is reflected in the quest of Québec jurists to locate ownership in the context of the trust, as it existed under the former Québec Civil Code, in order to integrate it into the existing civilian property structure. The Québec Trust is discussed later.

(c **The number of owners** . Another feature distinguishing the common law and civil law idea of proprietorship is the number of proprietors that can exist concurrently in relation to the same parcel of land. This is the most obvious and most frequently cited consequence of the concept of the civilian ownership and common law theory of estates.

(d Bearing in mind that the owner is a tenant for an estate, it is seen that several tenancies can exist on the land concurrently, through the process of subinfeudation and the creation of settlements.

Subinfeudation, it will be remembered, is where a tenant grants an estate to another, who in turn grants a tenancy to yet another. There is in theory no limit to the number of tenancies that can be created in this way. The result of subinfeudation is an estate in possession, and a series of estates in reversion, each one of lesser duration than the one out of which it is carved. As indicated

above, although in theory the tenures that existed in 1290 still exist today, there is little or no evidence of these tenures today. In practice they do not play an active role in transactions relating to property. In theory, the presumption that nulle terre sans seignior, and that by which the Crown is held to be the lord of the land in absence of proof of any other, have the effect that all persons are deemed to hold from the Crown.

A settlement is the creation of a succession of estates in a single deed or will. Thus land granted to A for life, remainder to B and his heirs was settled land, in which A had a life estate and B a fee simple in remainder. Both of them were owners. In contrast to subinfeudation therefore, this created an estate in posses sion and a series of estates in remainder. Settlements gives rise to a feature, characteristic of the common law, and not seen in the civil law : latent ownership. During A's tenure, B's interests are latent.

Such succession of interests can no longer exist at law. Before 1926, when there were three different freehold estates which could exist in possession, in remainder, or in reversion, all of them could be created in any combination. Since 1926, by virtue of section 1 of the Law of Property Act 1925, there is only one legal estate, the fee simple absolute in possession. Fee simple absolute in possession is not a limited estate, and so no interest can be created after it. However, settlements can still be created. The estates will merely "take effect as equitable interests”

The fragmentation of title into equitable and legal ownership, discussed above, also creates a plurality of owners in the land. So too does the split of the benefits of the land into hereditaments, each being treated as a separate object of ownership.

The hallmark of ownership in the French civil law in contrast, is its exclusive character. This characteristic is a direct consequence of its absolute nature. Since "ownership" means absolute appropriation, there can be only one "owner" in respect of each thing. This does not mean that only one person can have rights in the property. "Ownership" can be split, that is to say, several persons may share the right of ownership. Also, the "owner" may give parts of his total bundle of rights to other persons. However in both instances (discussed more fully later) there is still one right of ownership in respect of a parcel of land. **d) The relation with other rights in the property structure** This section examines the structure or map of rights resulting from each conception of proprietorship. In the doctrine of estates ownership does not exist as a right separate and apart from other rights in land. All are equally interests in land. They are the component parts of the total powers that exist in relation to the appropriation of the land, each treated as an independent entity, an object of separate ownership. From the previous sections it can be seen that, as pointed out by one writer, this is the result of the fragmentation of title accompanying the notion of tenures, which created a mental atmosphere favourable to the division of ownership on other lines also.

The land law is therefore without a centre. It comprises many technical rules about estates, legal and equitable, and about the incorporeal hereditaments.69 Although the principles have evolved over the years they still have at their core, the historical concepts from which they were derived. They therefore cannot be understood without regard to their history, which still forms an integral part of English land law. These corporeal and

incorporeal hereditaments are contrasted with personalty from which the land law was separated. The distinction was made because a different set of principles applied to each. For example, future interests could only be created in realty at law, realty had to be conveyed by deed, and it devolved on the heir instead of the next-of-kin. The civil law notion of an absolute ownership necessarily means that there is no other right like it. Other rights in land are placed in two groups : they are either modes of ownership (for example co-ownership and superficie) or dismemberments of it (for example use, usufruct, emphyteusis and servitudes). In contrast to ownership and its modes which are the jus in re, each dismemberment is jus in re aliena — a right in the land owned by another. The question is often raised whether the enumeration of rights in the Code is limitative, in other words that there can be no other real rights than those mentioned in the Code.