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**UNIT 1.1 – PRINCIPLES AND SOURCES OF ENGLISH LAW**  
**1. THE ENGLISH LEGAL SYSTEM AND ITS CONTEXT**

# **1.1 LEGAL SYSTEMS AROUND THE WORLD**

**PREPARED BY: REHAN**

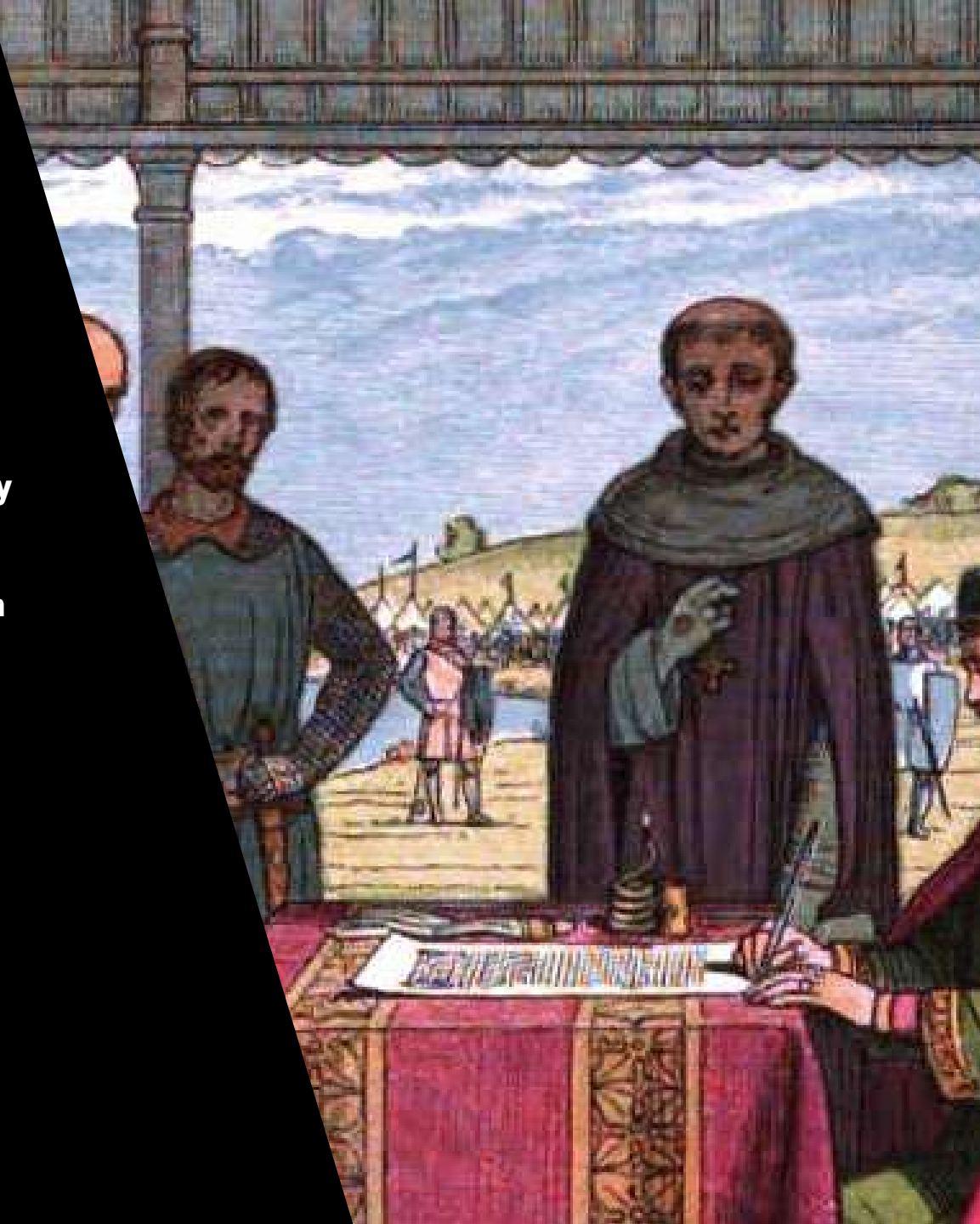
# INTRODUCTION

- **Law affects our lives – most people have little understanding though**
- **Main awareness comes from media headlines – newspapers, television, radio, internet, and social media**
- **When ‘law’ is mentioned – most think only of criminal law, lawyers and courts that deal with this type of cases**
- **Reality = law covers an enormous range of everyday life situations**
- **Legal system of England & Wales = have variety of courts, personnel and methods of dealing different types of cases**



## Codified Civil Legal System

- **Codified legal system = where laws of a country are written down in a code or codes**
- **Code contains all the law in an area – e.g. tax law**
- **They're arranged to avoid inconsistencies & contain only legislative enactments**
- **Judges have little/no discretion in making their decision**
- **Little/or no precedent in law**
- **Many European countries have codified legal systems – e.g. France, Germany, Spain & Portugal**
- **Countries with codified system – generally have written constitution & constitutional court as highest appeal court**
- **This court does not make new law but interpret constitution & code**

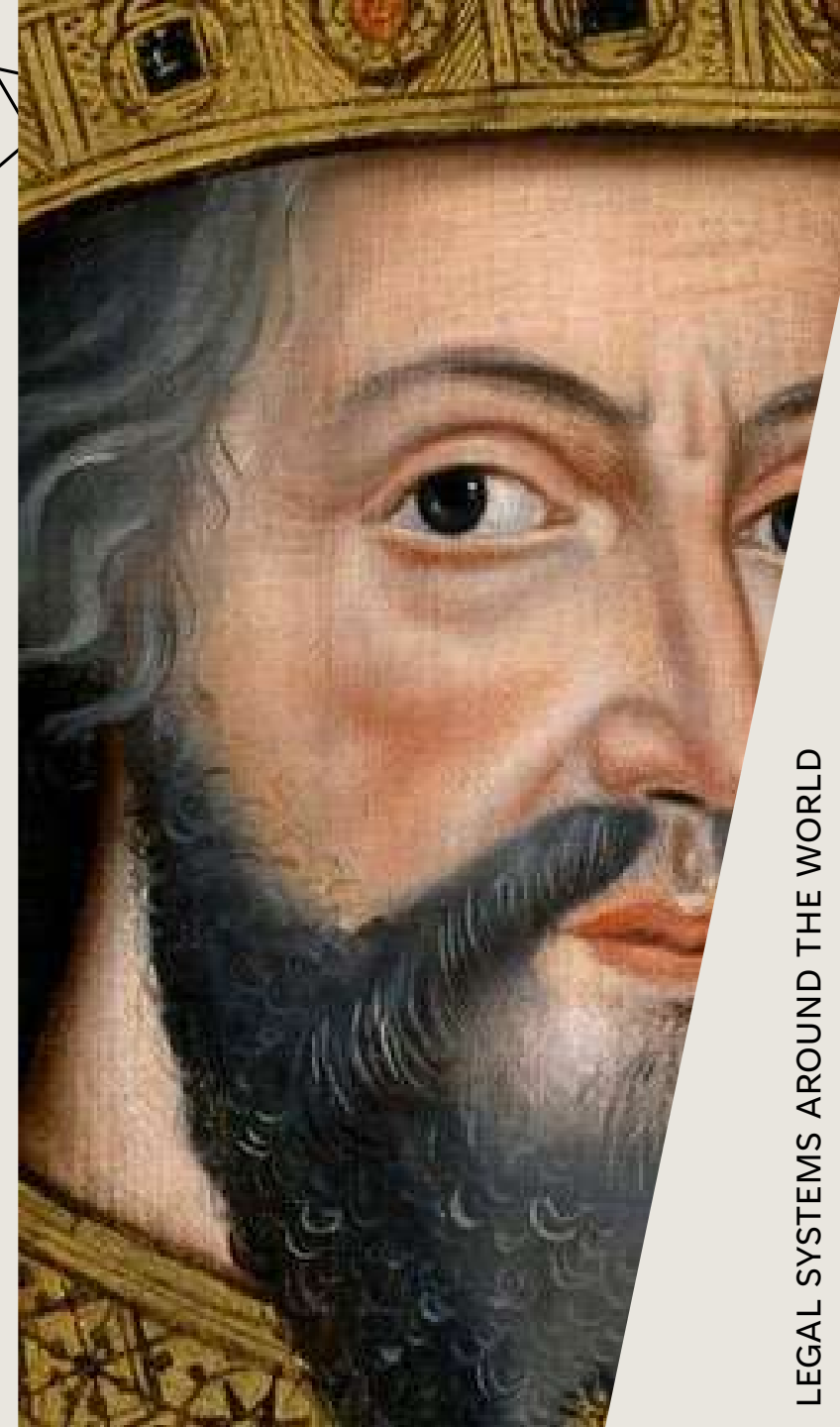


# Common Law

- In Anglo-Saxon times = local courts decided disputes
- After Norman Conquest 1066 = a more organized system of courts emerged. Why?
- Kings realized this:

*Rule of the country easier if they controlled the legal system*

- First Norman King, William the Conqueror did this:
  - Set up Curia Regis (King's Court)
  - Appointed own judges
- So, nobles who had disputes encouraged to have king (or his judges) decide the matter
- Curia Regis – acted as central court
- But Judges sent to major towns to decide cases and dispense justice in king's name





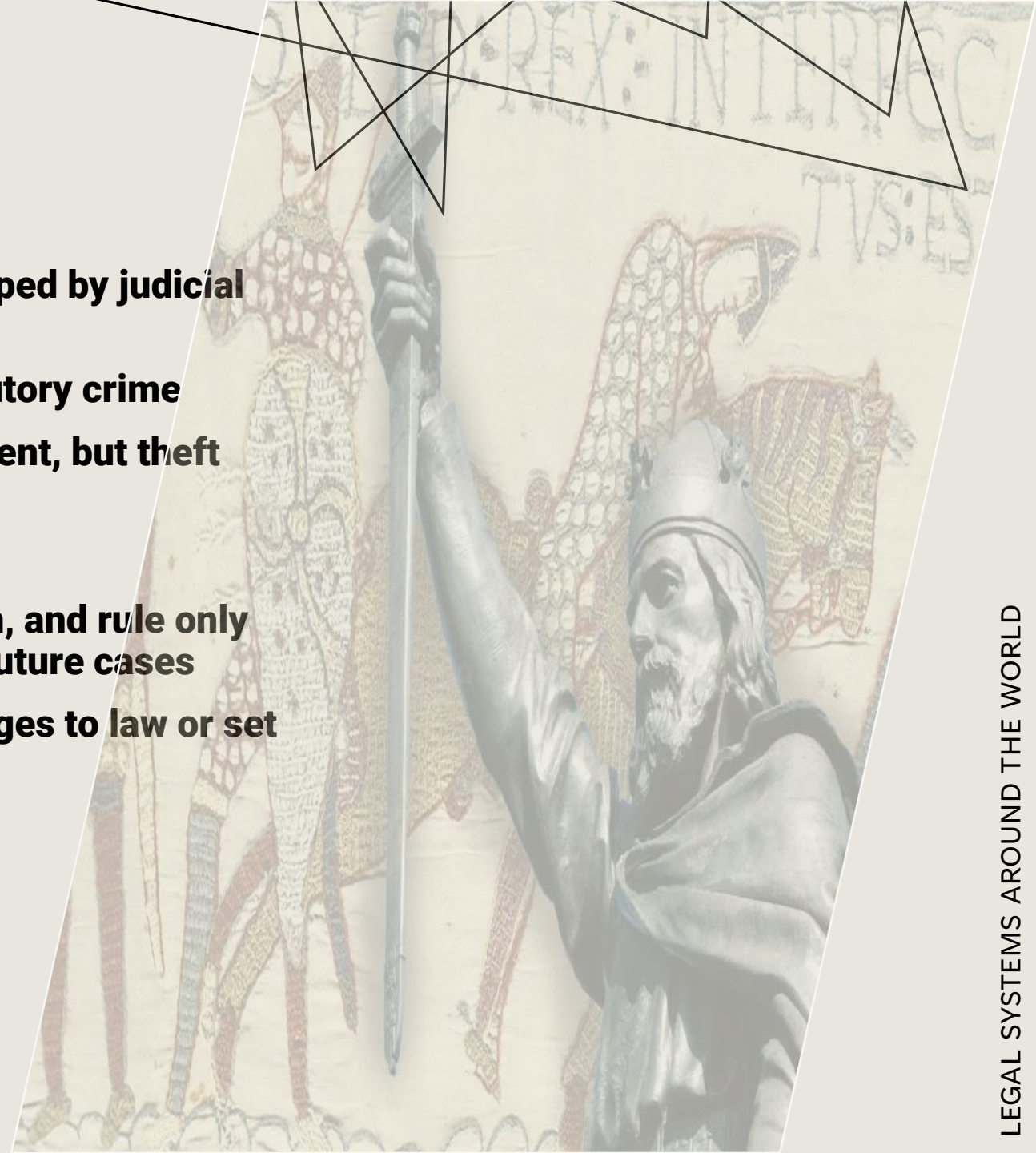
## Common Law – Contd.

- **During Henry II reign (1154-89); tours by judges became regular**
- **Country divided into 'circuits' [areas] for judges to visit**
- **Initially: judges used local customs or old Anglo-Saxon laws to decide cases**
- **But... it is believed over time judges on their return to Westminster, London discussed laws or customs used & decisions made with each other**
- **Gradually... judges selected best customs & these were used by all the judges**
- **This made the law more uniform or 'common'**
- **Common Law = basis of contemporary English Law**
  - **Unwritten law developed from customs and judicial decisions**



## Common Law – Contd.

- **‘Common Law’ still used to distinguish laws developed by judicial decisions from laws created by statute**
- **E.g. Murder = a common law crime but theft = statutory crime**
- **Means: Murder never defined in any Act of Parliament, but theft defined in Theft Act 1968**
- **Judges can still create law today**
- **But... only when a relevant case comes before them, and rule only on the point in that case – which becomes law for future cases**
- **Judicial decisions cannot make wide-ranging changes to law or set penalties**
- **This is possible by statute law**





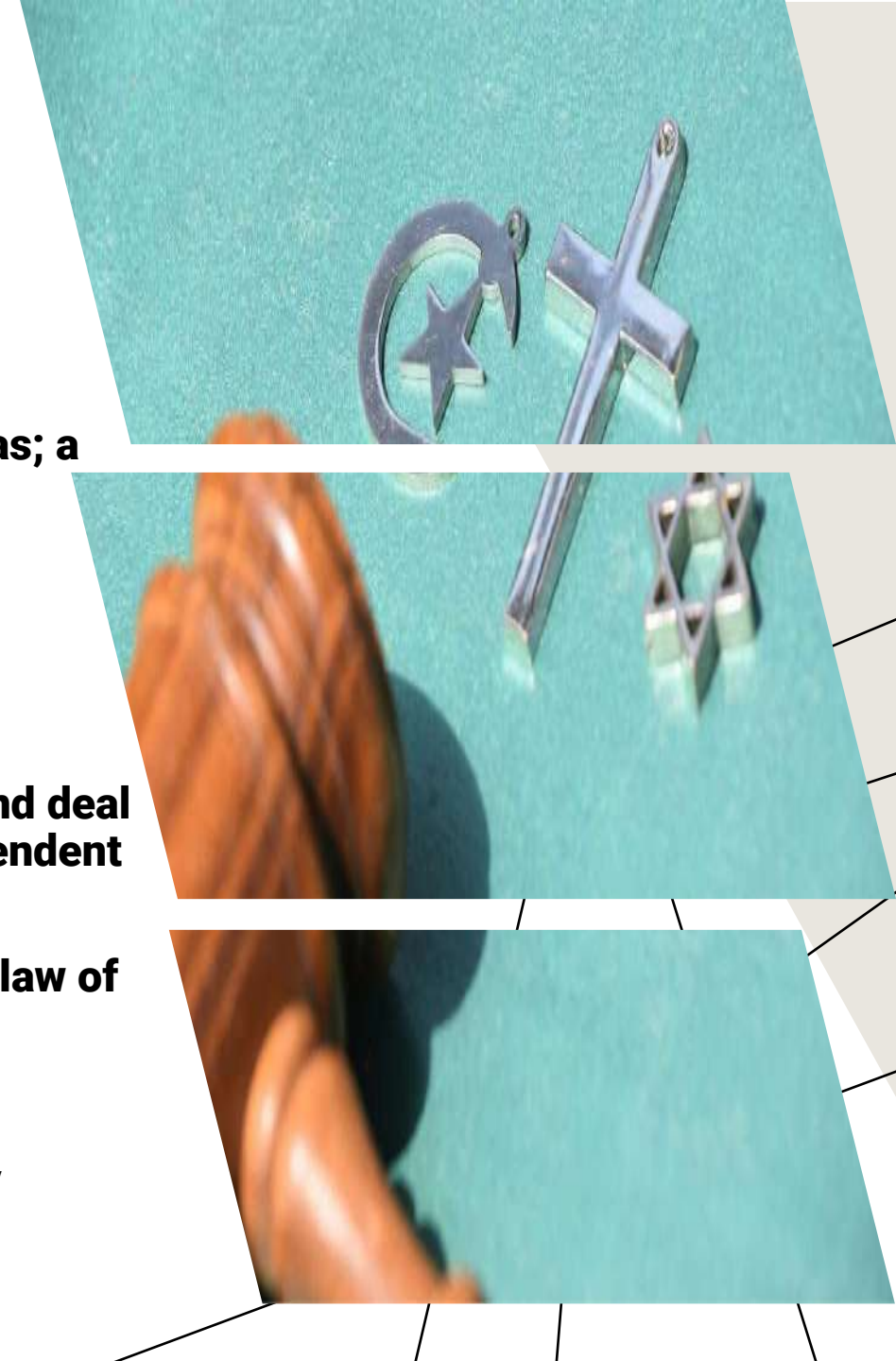
# Customary Law

- **Custom = a rule of behavior developed in a community without deliberation invention**
- **Customs believed to be important because they effectively formed basis of English Common Law**
- **After Norman Conquest, judges appointed by King traveled all over; made decisions, and relied on common customs existing at the time**
- **Lord Justice Coke (not the drink!), in 17<sup>th</sup> century described customs as 'one of the main triangles of the laws of England'**
- **Unusual = new custom to be considered by courts today**
- **Even Rarer = this custom get recognition by courts as valid custom**
- **But there have been exceptions**
- **See:**
  - **Egerton v Harding (1974) – customary duty to fence land against cattle straying from the common**
  - **New Windsor Corporation v Mellor (1974) – custom gave local people right to use land for lawful sports**



# Religious Law

- Comes from sacred texts of a religion
- Covers most parts of personal and contract law
- Generally based on Sharia or Judaic law
- Can apply in countries where another legal system is in place [such as; a codified or common law system]
- Religious laws are eternal and unchanging
- Govern a person's behaviors, beliefs
- Issues and disputes settled by priests or other religious officials
- Non-religious laws, in comparison, can be changed by legislature, and deal with person's actions towards another & disputes resolved by independent judiciary
- Sharia Law compliance important for Muslim faith – and is infallible law of God
- Sharia Law deals with: crime, politics, family, trade, economics
- And... covers personal issues like hygiene, diet, prayer and everyday etiquette





# Mixed Legal Systems

- **Most legal systems based on:**
  - **Civil Code**
  - **Common Law**
  - **Statute Law**
  - **Religious Law**
  - **Or a combination of these**
- **Some countries [like South Africa & Cyprus] have mixed legal systems, because:**
  - **Have mix of common law and civil-code rules**
  - **Contributions of common law and civil code to whole law of country are substantial and recognizable**
  - **Private law; likely dominated by civil-code elements, public law; likely by common law elements**
- **Private Law covers personal matters: like tort & contract**
- **Public Law covers criminal law**

## Mixed Legal Systems – Contd.

- **Many mixed-legal-system countries:**
  - **Have been former colonies of non-British European countries [like Spain or France]**
  - **And were later taken over by Britain which imposed common law system on top of the code**
- **For Example:**
  - **Malta: laws initially based on Roman law, but developed into a French Napoleonic Code with influences from Italian civil law and English Common Law (especially = public law)**
  - **The Channel Island of Jersey: mixture of Norman customary law, English Common Law and modern French Civil Law**

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UNIT 1.1 – PRINCIPLES AND SOURCES OF ENGLISH LAW  
1. THE ENGLISH LEGAL SYSTEM AND ITS CONTEXT

## **1.2 ADVERSARIAL AND INQUISITORIAL SYSTEMS**



# ADVERSARIAL SYSTEM

- **Used in countries with common law jurisdictions**
- **Advocates for both sides represent their parties' case or interest**
- **Each party builds case by producing evidence and witnesses**
- **Attempts to discredit the opposition**
- **Case presented to impartial judge or jury – who decide the outcome after hearing both sides**



## **ADVERSARIAL SYSTEM – CONTD.**

- **Can be argued this system protects rights of individuals and presumption of innocence of accused in criminal cases**
- **Accused, has a right to:**
  - **Remain Silent**
  - **Obtain a lawyer (in serious cases), and;**
  - **Remain innocent until proven guilty**
- **Before criminal trial – investigation run by police**
- **Police has to follow certain procedural rules**



## **ADVERSARIAL SYSTEM – CONTD.**

- **System not necessarily designed to arrive at 'the truth' in case**
- **In civil cases; this system allows both parties to consider the strength of each other's case**
- **And come to pretrial settlement**
- **Or use other methods of dispute resolution [ADR = which you will learn later]**

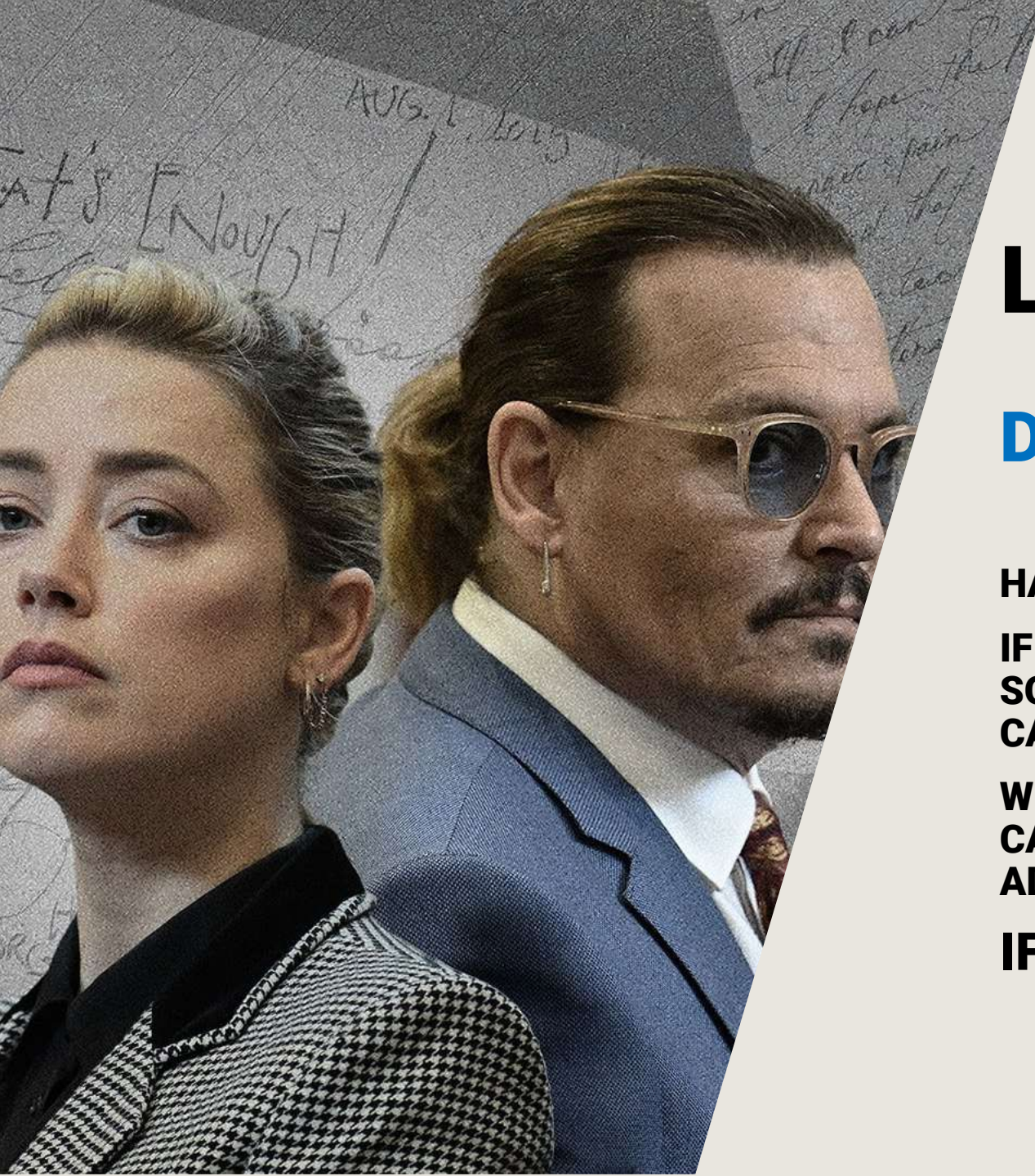




# CRITIQUES OF ADVERSARIAL SYSTEM

- **Contest:** Some critics argue this system leads to contest between the parties with an objective to win AT ALL COSTS – as a result, there may be injustice
- **Injustice:** could lead to injustice in such a system if, for example;
  - Procedural mishaps could result in the acquittal of a suspect who has very likely committed a crime
  - An innocent defendant is handicapped by an unskilled lawyer
  - Or if the defendant is unable to afford a lawyer to defend them





# LET'S DISCUSS

## Depp v. Heard (2022)

**HAVE YOU GUYS HEARD OF THIS CASE?**

**IF SO, HAVE YOU GUYS SEEN ANY VIDEO COVERAGE, SOCIAL MEDIA CLIPS, OR VIDEO SNIPPETS OF THIS CASE?**

**WHAT DO YOU THINK? CAN IT BE SAID, THAT THIS CASE FELL WITHIN THE DESCRIPTION OF AN ADVERSARIAL SYSTEM?**

**IF SO WHY?**



# INQUISITORIAL SYSTEM

- Often applies to countries with codified system of law
- An initial investigation is often led by an examining magistrate
- The examining magistrate's report is presented to trial court
- Judge acts as a fact finder
- Officers of the court – advocates – help judge decide the truth
- Rather than to take one side over the other – like that of an adversarial system
- Judge takes a more active role and questions witnesses





## INQUISITORIAL SYSTEM – CONTD.

- **System emphasizes = impartiality & truth-finding**
- **Instead of “winning” in court**
- **Reduces advantage of wealth of one of the parties in a dispute**
- **Reduces emotion and possible bias**
- **Makes sure no one receives special treatment, and;**
- **Everyone is asked the same questions by the court**



## CRITIQUES OF INQUISITORIAL SYSTEM

- Due to the need for thorough investigation, case may be lengthy
- Often impossible for unrepresented, or untrained defendants to defend themselves, and;
- There is generally no right to remain silent
- May not be fully independent – since the minds of the judge and advocates may be predetermined before the hearing begins
- Outcome could be decided by just one person – The Judge!





# LET'S DISCUSS

## The Trial of Joan of Arc

**HAVE YOU GUYS HEARD OF JOAN OF ARC?**

**IF SO, HAVE YOU GUYS SEEN ANYTHING RELATED TO JOAN OF ARC AND HER TRIALS?**

**WHAT DO YOU THINK? WAS HER TRIALS WITHIN THE PARAMETERS OF AN INQUISITORIAL SYSTEM?**

**IF SO WHY?**



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**UNIT 1.1 – PRINCIPLES AND SOURCES OF ENGLISH LAW**  
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# **1.3 THE RULE OF LAW AND ITS APPLICATION**

**PREPARED BY: REHAN**

# THE RULE OF LAW

- **'Rule of law' = symbolic idea**
- **No precise meaning or definition of the concept**
- **But... main principle is = all people are subject to and accountable to law that is fairly applied and enforced.**
- **So... what does the above sentence mean?**
- **Process for enactment, administration and enforcement of law in a country must be fair**
- **Rule of law = also a safeguard against DICTATORSHIP!!!**
- **It also supports Democracy = because government and its officials are accountable under law**



# THE RULE OF LAW – CONTD.

- **Authority distributed in a manner where, no single government organ can exercise power in an unchecked way**
- **E.g. Police may only arrest someone if they have authority for it by a statutory rule like the Police and Criminal Evidence (PACE) Act 1984**
- **Tony Honore [academic lawyer] explains the following;**
  - **Rule of law exists when government's powers are limited by law**
  - **Citizens have core of rights the government is bound to uphold**
- **These rights include:**
  - **No person shall be sanctioned except in accordance with the law – relevant to both civil and criminal matters**
  - **There is equality before law**
  - **There must be no discrimination on any grounds**
  - **There must be fairness and clarity of the law**

# DICEY'S VIEW ON RULE OF LAW

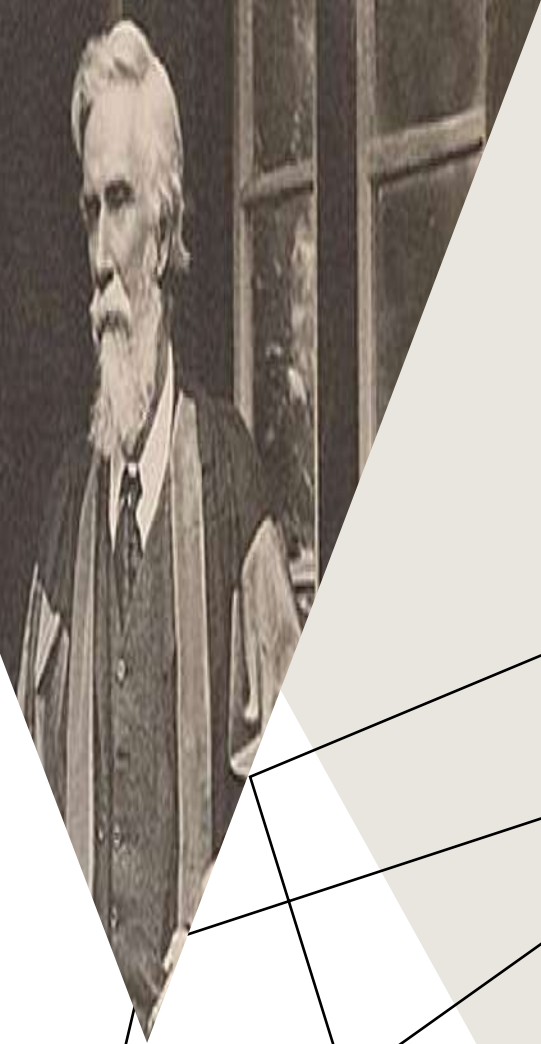
- **Professor A.V. Dicey gave the best known explanation of rule of law in 19<sup>th</sup> century**
- **He thought rule of law was an important feature that distinguished English law from law in other European countries**
- **Dicey stated 3 elements created the rule of law, they are;**
  - **Absence of arbitrary power on the part of the state**
  - **Equality before law**
  - **Supremacy of ordinary law**





# PROBLEM WITH DICEY'S VIEWS

- **His view conflicts with the fundamental principle of PARLIAMENTARY SUPREMACY**
- **Parliamentary Supremacy states that an Act of Parliament can overrule any other law, and**
- **There is no other body that has the right to override or set aside an Act of Parliament**
- **As per Dicey's view; there should be no arbitrary power on the part of state**
- **But under parliamentary supremacy, Parliament can make any law it wishes – which can also include granting arbitrary powers to ministers**



## **PROBLEM WITH DICEY'S VIEWS – CONTD.**

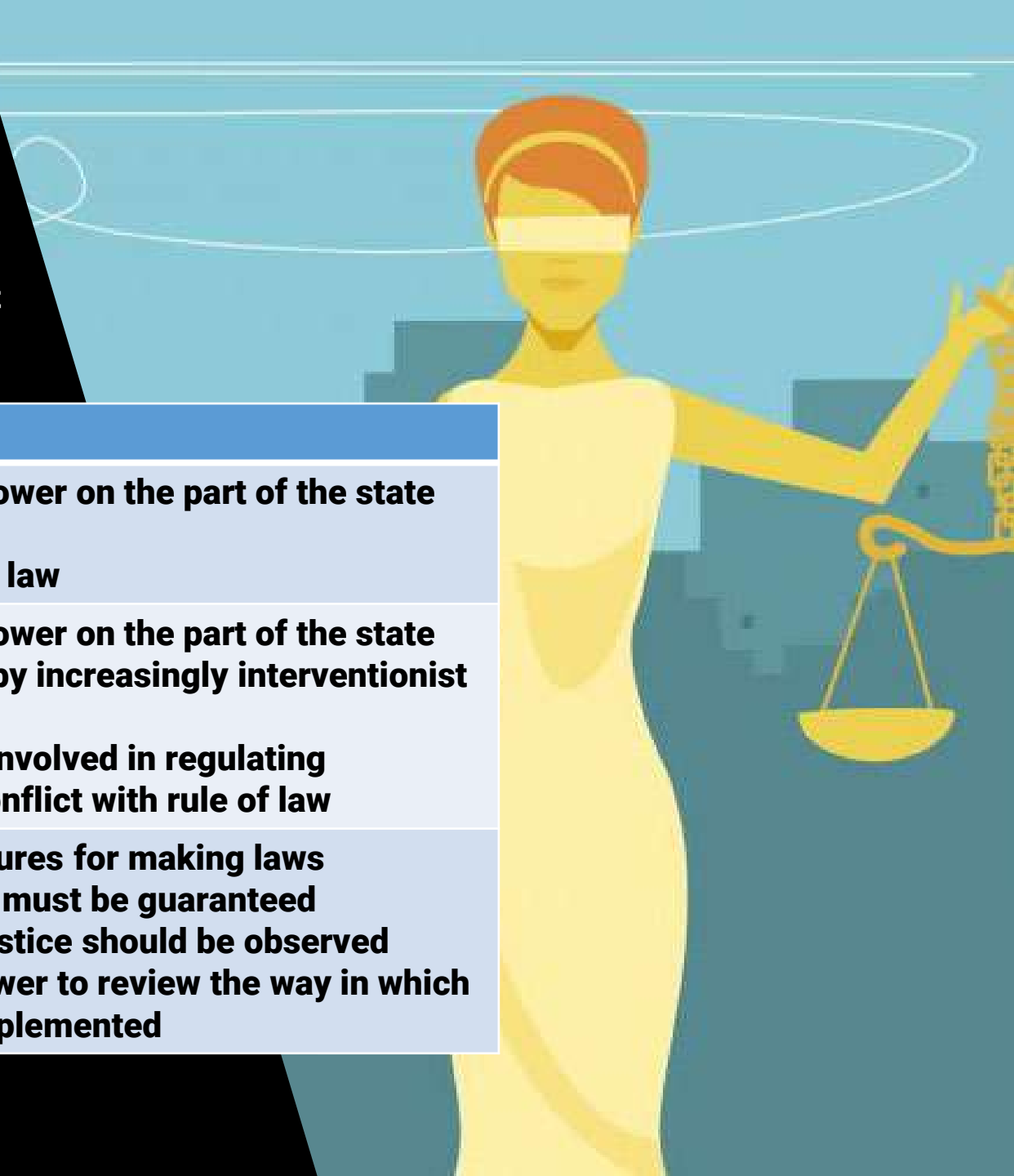
- **Laws passed by parliament cannot be challenged through judicial review**
- **In some countries – legislative body is subject to the rule of law**
- **So laws passed by parliament can be challenged in courts**
- **Equality before law – refers to formal quality, which;**
  - **Disregards differences between people in terms of wealth, power & connections**
- **Real equality achieved = in the presence of mechanisms addressing these differences**
- **Dicey's view – based on abstract ideas [makes it difficult to real-life situations]**



## OTHER ACADEMIC VIEWS

- **F.A. von Hayek** – 20<sup>th</sup> century academic economist
- **Joseph Raz** – 20<sup>th</sup> century academic

Key Facts	
Dicey	<ul style="list-style-type: none"><li>• <b>Absence of arbitrary power on the part of the state</b></li><li>• <b>Equality before law</b></li><li>• <b>Supremacy of ordinary law</b></li></ul>
von Hayek	<ul style="list-style-type: none"><li>• <b>Absence of arbitrary power on the part of the state</b></li><li>• <b>Rule of law weakened by increasingly interventionist state</b></li><li>• <b>Modern state directly involved in regulating economic activity in conflict with rule of law</b></li></ul>
Raz	<ul style="list-style-type: none"><li>• <b>Clear rules and procedures for making laws</b></li><li>• <b>Judicial independence must be guaranteed</b></li><li>• <b>Principles of natural justice should be observed</b></li><li>• <b>Courts should have power to review the way in which other principles are implemented</b></li></ul>





## **OTHER ACADEMIC VIEWS**

- **There are changes in 21<sup>st</sup> century supporting Raz's principles**
- **Major example – Constitutional Reform Act 2005 which recognized rule of law and importance of independence of judiciary**
- **S.1 of Constitutional Reform Act 2005 provides safeguards**
- **These safeguards show importance attached to rule of law**



# THE RULE OF LAW AND LAW MAKING

- **Rule of law – important in law making**
- **Law making process – must be open and fair**
- **Acts of Parliament (Statutes) – must pass both Houses of Parliament**
- **Government of the day – usually has majority in the House of Commons**
- **So, most laws proposed by governments get passed at House of Commons**
- **But... debates are still possible for contentious issues, which leads to changes/revisions**



## THE RULE OF LAW AND LAW MAKING – CONTD.

- **House of Lords – exercise a check on law-making process**
- **All new laws – have to be agreed by it [check]**
- **House of Lords consistently has denied changes in the law in relation to allowing serious criminal trials without jury**
- **Government ministers – make law by statutory instruments**
- **Parliament consideration for these regulations not necessary for it to come to force – so, there are several checks on this method**





## THE RULE OF LAW AND LAW MAKING – CONTD.

- **Statutory Instruments Act 1946 - grants power to ministers to make statutory instruments**
- **Parliament has power to scrutinize and check the instruments**
- **Statutory instruments – challenged at courts through judicial review**
- **This ensures minister has not gone beyond powers granted by parliament**



# THE RULE OF LAW AND THE LEGAL SYSTEM

- Rule of law – also covers how legal system works
- Every defendant in criminal cases must have a fair trial – a very important point of rule of law!
- Trial by jury – seen as important in maintaining fairness and protecting citizens' rights
- No person can be imprisoned without trial
- Where rule of law is disregarded – government can detain its opponents without trial
- Rule of law – also important in civil justice system
- System should be;
  - Free from discrimination
  - Free from corruption
  - Not be improperly influenced by public officials
  - Accessible & affordable – this is up for debate, because: major cuts to public funding of cases while cost of taking civil cases to court increased
- But... increase in alternative ways to resolve civil disputes [ADR!] – which are cheaper



# THE RULE OF LAW AND SUBSTANTIVE LAW

- **Every area of substantive law – rules recognize that people have key rights and laws are not oppressive**

## SUBSTANTIVE CRIMINAL LAW

- **Sets out definitions of criminal offences**
- **Serve several purposes, such as:**
  - **To protect people**
  - **To protect people's property**
  - **To prevent disruptive behaviour**
  - **To protect public order**
- **The regulatory offences – aimed at issues like; preventing pollution and food sold in shops is fit for human consumption & wide range of driving offences to ensure road safety**
- **For offences – law has to be clear**
- **Prosecution has to prove defendant committed an offence**
- **All offences – have a stated maximum penalty [courts cannot impose anything higher]**





# THE RULE OF LAW AND SUBSTANTIVE LAW – CONTD.

## SUBSTANTIVE CIVIL LAW OF TORT

- **Sets out rights & responsibilities people owe to each other**
- **Generally aimed at:**
  - **Protecting people**
  - **Protecting their property, and**
  - **Give right to claim compensation for damages [caused by breaches of law]**
- **Unlike criminal law – the person affected by tort makes the claim**
- **Public funding for making claims in tort through courts no longer available**
- **Meaning: although everyone may have a right to make a claim, financial issues can make it difficult to pursue a claim**
- **Conditional fee agreements used in such cases**



# THE RULE OF LAW AND SUBSTANTIVE LAW – CONTD.

## SUBSTANTIVE LAW OF CONTRACT

- Lays down rules on:
  - When contract is formed
  - What events make contract void or voidable
  - What amounts to breach of contract
- Contract law – recognizes people are free to make agreements
- But... also recognizes consumers may have little choice when making contracts with businesses
- And, no equality between the parties
- Some rights given to consumers to bring about greater equality



# THE RULE OF LAW AND SUBSTANTIVE LAW – CONTD.

## SUBSTANTIVE LAW OF HUMAN RIGHTS

- Supports the rule of law [in many ways!]
- E.g. all rights must be applied without discrimination
- European Convention on Human Rights (ECHR) – incorporated into UK by **Human Rights Act 1998 (HRA)**
- ECHR sets out right to liberty
- This right taken away only in accordance with law – such as imprisoning a convict found guilty of murder
- Convention also sets out right to a fair trial

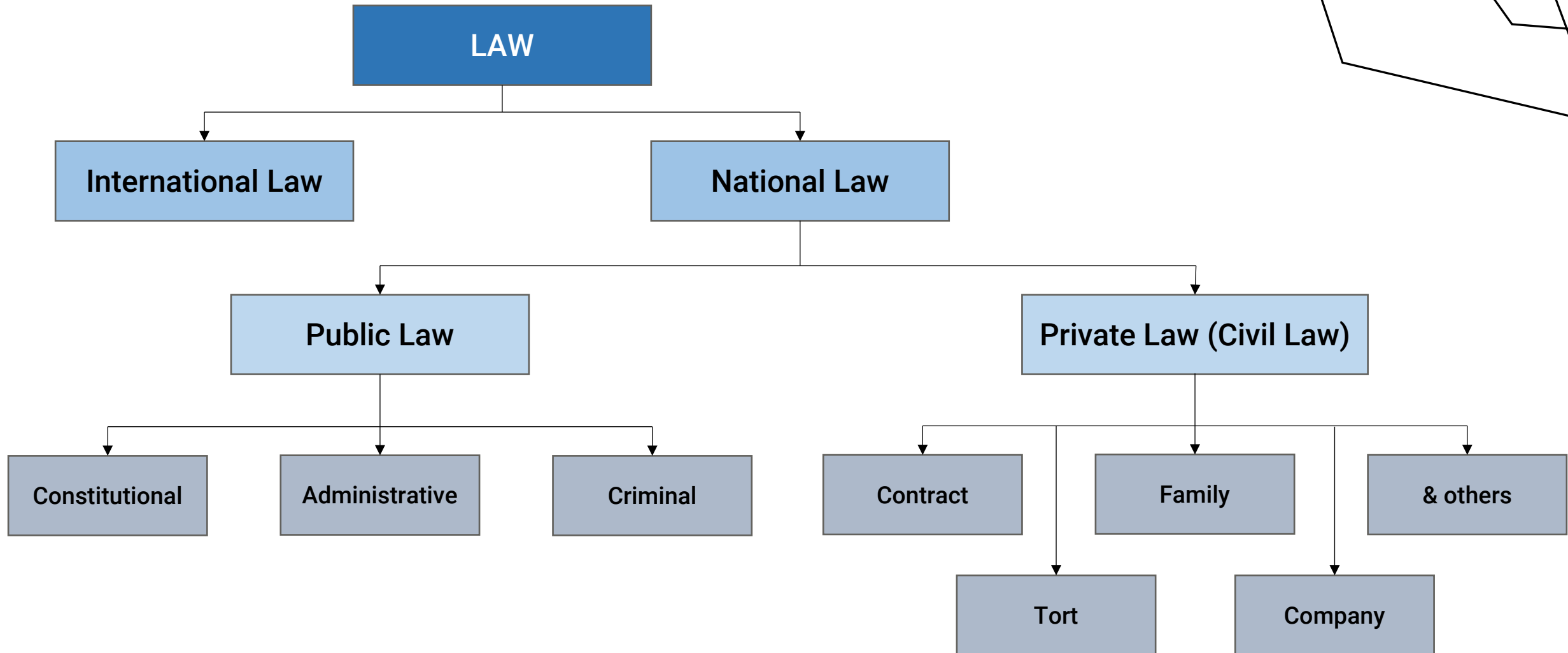


# DISTINCTIONS BETWEEN CIVIL & CRIMINAL LAW

	Civil Law	Criminal Law
<b>Purpose</b>	To uphold rights of individuals	Maintain law and order; to protect society
<b>Person starting the case</b>	The individual whose rights have been affected	(Usually) the state through Crown Prosecution Service
<b>Legal name for the person starting the case</b>	Claimant	Prosecutor
<b>Courts</b>	County Court or High Court	Magistrates' Court or Crown Court
<b>Standard of proof</b>	The balance of probability	Beyond reasonable doubt
<b>Person/s making the decision</b>	Judge	Magistrates or Jury
<b>Decision</b>	Liable or not liable	Guilty or not guilty
<b>Powers of the court</b>	(Usually) award of damages, also possible: Injunction, specific performance of contract, rescission or rectification	Prison, fine, community order, discharge etc.



# DIFFERENT CATEGORIES OF LAW



# RELATIONSHIP BETWEEN LAW & MORALITY

- **Morality = 'a particular system of values and principles of conduct, especially one held by a specified person or society' – Oxford English Dictionary definition**
- **Can be personal or collective morality**
- **Normative – meaning, morality specifies what to be done and delineates acceptable and unacceptable behaviour**
- **Religious beliefs largely influence morality**
- **Ethical code that touches virtually every areas of human lives**
- **Morality is not all black and white**

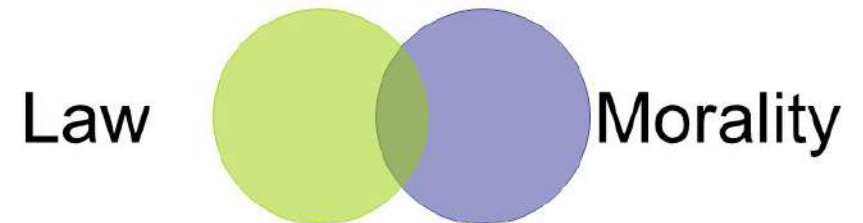


*"I do not believe that there is a neat way of marking off moral issues from all others; some people, at some time, may regard things as matters of moral right and moral wrong, which at another time or in another place are thought to be matters of taste, or of no importance at all."*

# RELATIONSHIP BETWEEN LAW & MORALITY - CONTD

- **Moral attitudes change over time**
- **It was easy to see as a common morality when societies were;**
  - **Insular**
  - **Structured**
  - **Exposed to different beliefs and values**
- **Customs of a society formed basis of code of conduct reflecting any specific society**
- **UK is multicultural – so has wide range of views**
- **Emile Durkheim (Sociologist) identified range of factors contributing to breakdown of common morality:**
  - **Increasing specialization of labour**
  - **Growing ethnic diversity within society**
  - **Fading influence of religious belief**

Law vs. Morality



# LAW AND JUSTICE

- **Justice = means fairness, equality or even-handedness among other synonyms**
- **Justice could be; procedural, corrective and substantive**

Types of Justice	Description
Procedural Justice	Making and implementing decisions according to fair processes
Corrective Justice	Known as restorative justice sometimes; when law restores the imbalance that occurred between two people, or between an individual and state
Substantive Justice	The content of law itself must be just



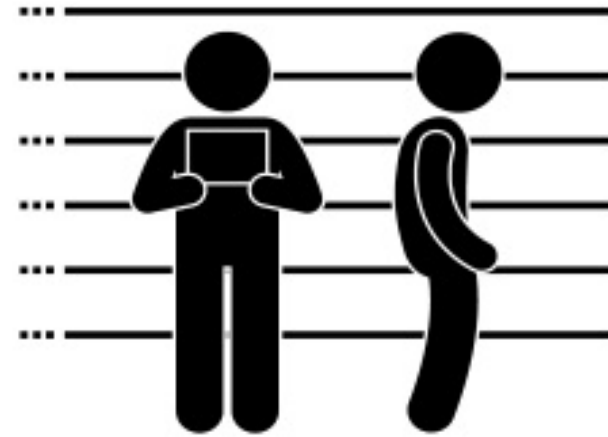


# PROCEDURAL JUSTICE

- **Is about fairness in the way:**
  - **Decisions are made, and**
  - **Processes used to resolve disputes**
- **Its less about the outcome – whether a person is found guilty or not**
- **More about how fair and transparent the procedures in dealing with law, police, or courts**

## KEY PRINCIPLES

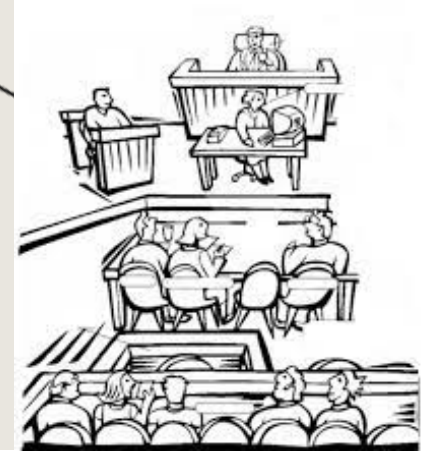
- **Fairness**
- **Transparency**
- **Impartiality**
- **Voice**



# PROCEDURAL JUSTICE – CONTD.

## IMPORTANCE IN THE LEGAL SYSTEM

- **Fairness is a central concept in law in the UK**
  - People need to feel that legal decisions are made through fair processes – if not, they will lose trust in the justice system
- **Human Rights Act (HRA) 1998 – enforces procedural fairness**
- **HRA ensures you have a right to a fair trial, which includes:**
  - **Being told what you are being accused of**
  - **Having time to prepare a defence**
  - **Being judged by an impartial court**



# EXAMPLES OF PROCEDURAL JUSTICE

- **CRIMINAL PROCEDURE RULES (CrimPR):**
  - These rules set out how courts handle criminal cases
  - Focus on ensuring cases are dealt with justly
  - Ensures that both prosecution and defence get equal opportunities to present their evidence
- **POLICE AND CRIMINAL EVIDENCE ACT (PACE) 1984**
  - Ensures fair procedures when police investigate a crime
  - Sets out how police can stop and search individuals, interview suspects & handle evidence
  - Ensures the process is fair and does not violate someone's rights
- **JUDICIAL REVIEW**
  - If someone believes public authority made an unfair decision – they can ask courts to review decision
  - Courts check if correct procedures were followed
  - Key part of procedural justice – because it ensures decisions are made fairly and lawfully

# CORRECTIVE JUSTICE – SANCTIONS AND DAMAGES

- Judges/magistrates take consideration of **number of factors** when passing sentence
- Factors could include **aim** of sentencing – **why** is the offender receiving the sentencing?  
What is the justice system **expecting** out of the offender through the sentencing?
- Courts may also consider – **aggravating and mitigating factors** in relation to the offence and the offender
- Courts will also follow sentencing guidelines





# CORRECTIVE JUSTICE – SANCTIONS AND DAMAGES – CONTD.

## CIVIL LAW

- In negligence – compensation aims to restore claimant to pre-tort position [in so far as money can achieve]
- If claimant had contributory negligence, their reward will reduce
- See: **Jebson v Ministry of Defence (2000)**
  - 75% of claimant's award deducted from his contributory negligence
  - Reduction was proportionate, indicates claimant largely responsible for his own harm



# CORRECTIVE JUSTICE – SANCTIONS AND DAMAGES – CONTD.

## CONTRACT LAW

- **Assessment of damages' basis = loss of bargain**
- **Claimant is placed in a position they would have been in had the contract been performed**
- **But, only losses reasonably within contemplation of parties may be recovered [See: **Victoria Laundry Ltd v Newman Industries Ltd (1949)**]**
- **'Concept of proportionality': damages awarded according to merits of the claim – not automatically in relation to the harm suffered**



# CORRECTIVE JUSTICE – SANCTIONS AND DAMAGES – CONTD.

## CRIMINAL LAW

- Trial by jury – lets jury members use their view of justice
- Instead of strict adherence to rules of law and evidence presented to them
- See: **R v Ponting (1985)**
- Rules of evidence adopted in criminal trials – seek balancing the interests of parties to the action
- So, evidence of previous convictions not generally admissible unless facts are strikingly similar to those in the instant case
- Even illegally obtained evidence may be admissible – See: **Jeffrey v Black (1978)**





# CORRECTIVE JUSTICE – SANCTIONS AND DAMAGES – CONTD.

## CRIMINAL LAW – CONTD.

- **Counter-Terrorism and Border Security Act 2019** – strengthened the powers of the police, including use of stop and search
- Injustices arise – when people serve prison terms for crimes they did not commit
- Famous cases include:
  - **Birmingham Six**
  - **Guildford Four**
- Publicity of these cases led to establishment of Criminal Cases Review Commission (CCRC) in 1997

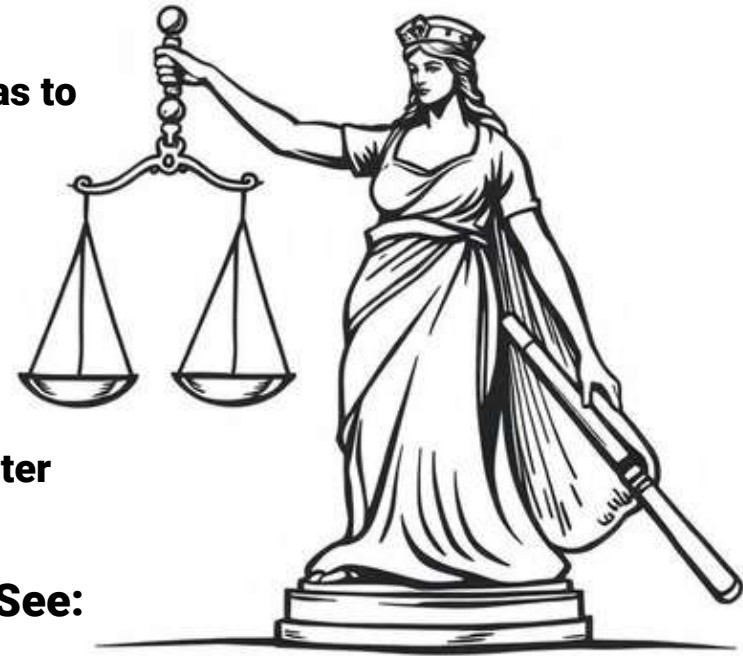




# JUSTICE AND SUBSTANTIVE LAW

## CRIMINAL LAW

- **Principle of proportionality** – governs sentencing practice of judges & magistrates
- **The more serious the offence = the harsher the sanction imposed**
- **Murder convicts = face mandatory life sentence**
  - **Sentencing judge then impose tariff [the minimum term a murderer has to serve]**
- **Setting of tariff does not allow proportionality – can lead to harsh decisions**
- **See: *R v Cocker (1989)***
  - **Defendant used pillow to choke terminally ill wife to death upon her request**
  - **Judge denied partial defence that would reduce murder to manslaughter**
  - **Life sentence may be disproportionate punishment**
- **Judge may impose a reduced tariff period, as measure of justice. See: *R v Inglis (2010)***
- **Mavis Eccleston case – (perhaps) justice is better served by allowing judges/magistrates pass most appropriate sentence, instead of a mandatory fixed sentence**



# JUSTICE AND SUBSTANTIVE LAW

## CONTRACT LAW

### Formation of Contract

- Can a contract form between commercial parties when they are still in negotiation? – See: **Reville Independent LLC v Anotech International (UK) Ltd (2016)**
- Court was keen to ascertain and be attentive on reasonable expectations of honest, sensible business people – while examining rules on offer and acceptance by conduct

### Exclusion Clauses

- Parties to contract = may limit liability using exclusion clauses
- Caveat emptor (let the buyer beware) rule work against weaker bargaining party's interests, or
- Where there is a pre-printed standard form of contract
- **Unfair Contract Terms Act 1977** – restricts use of exclusion clauses
- Cannot exclude liability for: death, personal injury from their negligence
- Exclusion clauses – subject to test of reasonableness
- Act prevent strong bargaining parties from taking unfair advantage – and provide fairer balance
- Protection of consumers through legislation – **Consumer Rights Act 2015** sets out rights & remedies

# JUSTICE AND SUBSTANTIVE LAW

## CONTRACT LAW

### Penalty Clauses

- Justice of penalty clauses = depend on how far a person can force another to comply with what they have promised
- European & International law allow courts to modify excessive penalties in contract terms
- Penalty clause in UK law = either valid or invalid.
- Supreme Court decision widened previously applied tests in relation to enforceability of penalty clauses in **Cavendish Square Holding BV v Talal El Makdessi (2015) & ParkingEye Ltd v Beavis (2015)**

Lord Hodge Stated:

“The correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party’s interest in the performance of the contract.”

- Parliament intervenes to amend the law where judiciary cannot
- In past; you cannot sue unless you were a party to the contract
- **Jackson v Holidays (1975)** changed this
  - Claimant succeeded seeking damages for him & family after package holiday failed to match advertised description
  - Contract formed with claimant, not his family
- This happened due to law of agency and doctrine of undisclosed principal
- **Contract (Rights of Third Parties) Act 1999** – allowed third parties to make claims where contract expressly provided for this
- Or where contract purported to confer a benefit on them
- These provisions aim to avoid obvious injustices – such as **Tweddle v Atkinson (1861)**
- And subterfuges necessary to obtain a just result – see **Beswick v Beswick (1967)**

# THE ROLE OF LAW IN SOCIETY

- **Rule of law = cannot exist without transparent legal system**
- **Law attempts to control society through regulation, which requires:**
  - **Clear set of laws – free and easily accessible to all**
  - **Strong enforcement structures**
  - **Independent judiciary – protecting citizens against arbitrary use of power by state, individuals or others**





# THE ROLE OF LAW IN SOCIETY – CONTD.

- Lord Birmingham identified core principle of rule of law (in 2010)
- He set out rule of law through 8 principles, which society, the state & judiciary must embrace:
  1. State must abide by domestic & international law
  2. People only punished for crimes set out in law
  3. Questions on infringement of rights subject to application of law, not discretion
  4. Law should be accessible, clear, precise & open to public scrutiny
  5. All people should be treated equally
  6. There must be respect for human rights
  7. Courts accessible & affordable, and cases heard without excessive delay
  8. The means must provide for resolving, without prohibitive cost or inordinate delay – *bona fide* disputes which the parties themselves are unable to resolve

# THE ROLE OF LAW IN SOCIETY – CONTD.

- The **8 principles** result in roles for law in society;
  - Protect people from harm
  - Ensure a common good
  - Settle arguments & disputes
- Roles result in regulating & controlling society
- Make a balance between competing interests within society
- Balance between different sectors of society – aimed at achieving social control [either informal or formal]
- Informal social control occurs through:
  - Family
  - Peers/peer groups
  - Local communities
  - Societal groups



# THE ROLE OF LAW IN SOCIETY – CONTD.

- **Formal social control occurs – through social agencies which has the role of maintaining order**
- **This in the criminal justice system, which includes:**
  - **Police Force**
  - **Judiciary**
  - **Probation & Prison Services**
  - **Law Makers**
    - **Parliament – through Acts of Parliament, delegated legislature, and**
    - **Judiciary, in interpretation & application of law**
- **Civil Justice System – more of the same; so dispute settlement is through mechanism the society trusts**





# THE IMPORTANCE OF FAULT IN CIVIL & CRIMINAL LAW

- Principle of causation = relevant in both civil and criminal law
- As per this principle: for there to be liability, defendant must have caused loss, damage or injury that is the subject of a claim
- Civil Law – concerned with weighing interests of two parties to an action & providing most suitable remedy where;
  - Appropriate, one part, the law of tort, is concerned with civil wrongs
  - Liability only imposed if party is at fault – in most tort areas
- Damages award in negligence = compensatory & intended to restore claimant to pre-accident position as far as money is concerned
- Defendant's fault is linked to extent of harm caused
- Where claimant, to an extent, has fault in harm caused – contributory negligence applied – splits fault between parties
- Exemplary damages awarded occasionally
- Fault is considered so extreme as it goes beyond what normally is awarded – shows importance of fault
- See: **Treadaway v Chief Constable of West Midlands (1994)**
- Decision not to prosecute police for any offence of assault against Treadaway was reviewed
- But police remained protected & there was no proper reflection of fault of parties
- Principle of vicarious liability can occur without family – in both civil & criminal law
- See: **Harrow London Borough Council v Shah (1999)**
- Principle of vicarious liability – similar effect in civil law



# THE IMPORTANCE OF FAULT IN CIVIL & CRIMINAL LAW – CONTD.

- **Consumer Rights Act 2015** – includes fairness test with respect to enforceability of terms & to consumer notices in contracts
- Act defines 'unfair' = terms which put consumers at a disadvantage;
  - By limiting their rights
  - Disproportionately increasing their obligation in comparison with traders' rights & obligation
- Balance made without reference to fault
- Seems to be made on basis of shifting liability – arguably to excess, onto traders to the benefit of consumers

## Shifting liability?

Refers to transfer of responsibility for a product's failure from the seller to manufacturer.

Especially in cases involving complex goods or multiple parties involved in supply.



## **EXTENDED READING:**

### **Origin of Common Law:**

<https://www.youtube.com/watch?v=qaYnQFLhXk0>

[https://users.ssc.wisc.edu/~rkeyser/?page\\_id=625](https://users.ssc.wisc.edu/~rkeyser/?page_id=625)

### **Origin & Codification:**

<https://consoc.org.uk/the-constitution-explained/the-uk-constitution/>

### **Adversarial & Inquisitorial Systems:**

<https://thelawassociation.nz/which-is-better-adversarial-or-inquisitorial/>

<https://www.lawteacher.net/free-law-essays/criminal-law/adversarial-and-inquisitorial-systems-of-justice.php>

### **Rule of Law**

<https://www.lawteacher.net/free-law-essays/constitutional-law/dicey-rule-of-law-8355.php>

**& THAT'S A**

