The Common Law system was originated since Norman Conquest in England from A.D. 1066 (Southern Song Dynasty in China). A unified system of law was formed for all men within the King of England jurisdiction. The word Common has three meanings:
1. Common to all men (Ancient class structure included: Noblemen, Priest, Knights, Common Men and Slaves);
2. Unified jurisdiction replacing local customary rules and law for each local community in England; and
3. Shared law used by all the current common law countries in the world.

Characteristics of the Common Law

1. Equality of Arms
   Each side is given equal size of weapon or opportunity - otherwise if it is not heard from both sides, it is not reaching to the whole truth.
   (Common law – emphasize the involvement and participation of the people).


A Million Dollar Analogy:
I have a case to decide, if there are statutes then use them to decide, if none, then go to here, there and dig out things to decide. Later when the courts have a similar case, they will come to use this as well.
I want to use one million to buy a yacht, if I have got it in the bank, just press the cash out. If I don’t, I will come to ask you to collect it. Slowly I will get one million.

Pros and Cons of Judge-made laws

Austin: protestant proponent. Command of the sovereign. Judges are not sovereign. Jeremy Bentham, a great reformer. He believed in the completeness of the law. Every piece of law must be legislated to make it complete. When the judge discovers that the law is incomplete, they will make it up. When judges made up law, it will corrupt law.

Bentham: does not like this? Bentham is an enemy of judge-made law. Bentham is an enemy of the doctrine of precedents.

Dworskin: said law is not a push of a button, not so straightforward. You have a discretion. His doctrine is: law is more important than fact, in reality, law is not so important than fact.
3. **Due process of law** DPL, law of the land; rule of law; legal judgment. Miranda Rights.

4. **Avoiding Miscarriage of Justice** – a negative dimension of DPL. Justice is practiced differently in different countries. Miranda Rights protection – DPL rights

Justice should be done.
Justice should appear to be done.

5. **Locus Standi** – the place of standing in law.

**Judicial Precedents**

Major (1985, p. 18) quoted that the importance of precedent was emphasized by Lord Gardiner L.C. in a statement made on behalf of all the Lords of Appeal in Ordinary in 1966. He said that:

*Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for the orderly development of legal rules.*

Is there any scope for the doctrine of precedents to be reformed? Do we have to be a prisoner of our own qualities or pronouncements? Precedents are well known for their certainty, predictability and conformity, should we always be bound by these so called good qualities? Some argued that these fine qualities in fact are impediments in the growth of the Common Law.

A court makes a decision on an issue between a plaintiff (PTF) and a defendant (DFT). There are three separate elements involved:

1. The facts of the case as proved by the parties;
2. The principle of law applied by the court to those facts;
3. The resulting decision in favour of one of them.

The decision of the court is binding on the parties to the action. Further the principle of the decision may become binding on other parties in future cases.

The principle becomes the common law.

The principle is called the **ratio decidendi**, which is the reason for deciding, without it, the decision might have been different. It is a necessary step in the reasoning process. The ratio decidendi is capable of binding later judges.
The lawyer must be able to state the ratio of a case accurately and in the form best suited to the argument.

Wesley-Smith (1998) uses a famous example of the Donoghue v Stevenson (1932) to illustrate this principle. A person drinks a bottle of ginger beer contaminated, through the carelessness of the manufacturer, by the remains of a snail and thereupon suffers mental and physical distress; the court holds that the manufacturer must pay damages to the consumer.

This case has got two rules emanating, the narrow rule and the wide rule and both are ratio decidendi.

The narrow rule is: Mr Stevenson, a Scot, sells ginger beer in an apaque bottle to one Minchella, a proprietor of a café at Paisley, who then sells it to a customer who pours it out for a friend, a woman called Ms Donoghue, suffers from shock and gastro-enteritis as a result of a decomposed snail in the bottle, Mr Stevenson is liable to Ms Donoghue for his negligence. In the future, this can apply to Mr Patterson or Mr Edison when a similar occurrence takes place and the defendant will still be liable. However, the wide rule is far reaching:

The wide rule is:
Wesley-Smith goes on to note that a person must take reasonable care to avoid acts or omissions which can be reasonably foreseen to be likely to injure his or her neighbours. (The neighbour principle: a person’s neighbour being people who are so closely and directly affected by his or her act that they ought reasonably to have been in his or her contemplation.)

The principle of obiter dicta
When a judge makes a statement of a legal principle which is not strictly applicable to the facts before him, the statement is said to be obiter, that is, by the way.

The NASA of the U.S. has sent a satellite navigating around the planet Mars. The name of this satellite is called Obiter and it sends pictures of Mars back home every month.

Wesley-Smith (1998) defines obiter dicta as references to non-material facts, general observations on the state of the law, compliments to or criticisms of the lawyers who appeared, literary embellishment, and so on. Legal commentary which is obiter may express a correct view of the law and it may be highly persuasive, but judges in subsequent cases cannot be obliged to accept it as correct.

Obiter dicta are not part of the precedent.

But the persuasive force of any particular dictum will depend largely on the reputation of the judge.
Richards (2007) gives an example of obiter in *Entores v Miles Far East Corporation [1955]*. The judge has to decide on the country at which the acceptance was made and therefore the type of law to be applied, which could have an opposite result. The judge says that acceptance has to be not only communicated to but also received by the offeror.

The judge uses this principle by describing a situation where A shouts an offer to B across a river A does not hear the reply because of the noise of an aircraft flying overhead.

In such a situation there is no contract.

The judge further states that an offeror cannot deny receipt of the acceptance if ‘it is his own fault that he did not get it’, for example, ‘if the listener on the telephone does not catch the words of acceptance but does not ask to repeat.’

The statements made by the judges are fictitious and are for reference and therefore by the way. They are not going to bind future judges.

In the court hierarchy system, the higher court exists because of the lower courts, alternatively, the lower court exists because of higher courts. The higher courts created precedents for the lower courts to follow whereas the lower courts can refer the case to the higher court in the appeal process, where law is reviewed.

**Due Process of Law**

Rule of law = due process of law = law of the land = legal judgment

1. How (Procedural) the law is going to be applied?
2. Is law applied fairly to all?
3. Is the burden of proof reasonable?
4. What is the information about the allegations?
5. Presumption of innocence.
7. Right to defend oneself.
8. Seek legal aid.

The following are must evidences to demonstrate rule of law

   a) Medical treatment  
   b) Legal aid  
   c) Meal and food  
   d) Becomes a guest of the state in prison  
   e) Gives me the right  
   f) Gives me the dignified treatment  
   g) Gives respect  
   h) Gives fair treatment

If any one of these is not done, then it is miscarriage of justice.
Locus Standi

Locus standi is the place of standing in law, standing to sue, title to sue and right to be heard.
Rights – legally recognized interests.
You must have direct and substantive interests. The following determines Locus Standi:
1. context;
2. jurisdiction
3. subject matter
Substantive (e.g. a competent law student) and procedural (e.g. a strong support of library resources) to form the Due process of law.

Are you a witness?
Are you a stranger?
What level of involvement?
Why one person was arrested and other becomes angry?
People not related, but they have some involvement in the proceedings about the case, in a civilized society.
The principle of Locus Standi is a gate-keeping role. One of the key factors invoking the wheels of justice is the question of standing.
Amicus curie – friends to the good.

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Manifestations of Justice

When a crime is committed, got to investigate a crime, if it was due to an incompetent and inefficient investigation, then justice is lost.

For example, the assassination of Lady Bhutto was investigated by Scotland Yard operators. But the vital evidence has been lost.

Essentials are:
1. absence of basic guarantees
2. right to a fair and public trial
3. right to be present at a trial
4. right to an impartial jury
5. right to be heard in his own offence
6. laws must be written, so that a reasonable person can understand what is a criminal behaviour

If justice is not done, you will feel bad, sad and have tension. Administration of justice is very important. A tiny thing, a small step affects the justice, criminal administration system, legal system.

Common Law is in a constant state of evolution
Modernization as a necessity
1. Localization of the Common Law during the colonial period: Cultural Relativism
2. Decolonization leading to the emergence of the Commonwealth of Nations (53 independent states): Political Pluralism
3. Micro management: Convenient for one but not for others
4. Establishment of independent judiciaries: Judicial Activism
5. Impact of science development on society: Law relating to cloning, HIV AIDS, scientific research regulations.

Evolution of Laws in Hong Kong
1. Basic Law as an instrument of modernization; the Basic Law has modernized the Common Law
2. The origin of the Basic Law itself indicates modernization in the contemporary legal methods.
3. The Law Reform Commission of Hong Kong, which was established in January 1980.
4. The commission has published 47 reports.
5. The recommendations in 26 of these reports have been implemented, either in whole or in part.
6. References under the consideration of the commission: privacy, domicile, hearsay in criminal proceedings, privity of contract, conditional fees, criteria for service as a juror and substitute decision-making and advance directives in relation to medical treatment.
7. Similar commissions exist in several other Common Law countries outside of Hong Kong
8. Alternative Dispute Resolutions (ADR): consultation and mediation as an alternative to judicial settlement.
9. Application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to Hong Kong since 1 July 1997 by virtue of the fact that the PRC is a signatory to the New York Convention and has applied it to Hong Kong.

Social Interest Litigation can be put into use:
1. As a revolution against Common Law conservatism.
2. Common law is not homogeneous, e.g. reform in Hong Kong does not match systems in other common law jurisdictions.
3. Expansion of the scope of judicial review JR (as a safety valve). Common Law allows you to question. How to correct the wrong of a good person? We cannot assume you make no mistakes! Doctrine of JR in place – a healthy system. Check and balances, should system go wrong. The good thing is you know that you have courts, but you need not go to the court. Have a judge in existence, but you need not go to a judge. JR inspired you not to do anything wrong! Like a security guard is a watch dog for thieves.
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**Equity Law = Rules of Equity**

Common law became less and less able to provide a just rule or remedy for all cases. A suitor unable to find a registered writ drawn to suit his claim would have no remedy in Common Law, but he may petition the King himself – the Fountain of Justice. Such petitions were determined according to conscience – the King’s conscience.

When the application for a rule of common law produced an unfair result or where a common law remedy was not appropriate, the Court of Chancery might give relief to its petitioners according to equity and good conscience.

Equity became a body of law based on precedent and came to have its own procedures, its own substantive rules and its own remedies.

**The legal situation today in Hong Kong**

Whenever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter – rules of equity will prevail.

Article 8 of the Basic Law states that all laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

**Maxims (=standards, rules) of Equity (Curzon, 1994)**

1. Equity acts on the conscience – equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention (Grant v Edwards [1986]);
2. Equity acts in personam – not in rem;
3. Equity follows the law – unless there is a good reason for deviating from the law, equity will follow it;
4. Where there are two equal equities the law prevails – priority goes to the legal owner;
5. Where there are two equal equities the first in time prevails;
6. Equitable remedies are discretionary – all courts can grant injunction or specific performance;
7. Delay defeats equity – by negligence or unreasonable delay in the assertion or enforcing of a right will defeat equity;
8. Equality is equity – may favour the counting the shares in tenancy in common;
9. He who seeks equity must do equity;
10. He who comes to equity must come with clean hands;
11. Equity will not permit a statute to be used as cloak for fraud;
12. Equity does not suffer a wrong to be without a remedy;
13. Equity looks to the substance and intent rather than to the form;
14. Equity looks on that as done which ought to be done – a contract to perform an act will be treated as if the act has been performed, all rights will follow automatically without doubts.

Legislation interpretation

(i) The literal rule

The intention of the Legislative Council is to be found in the ordinary and natural meaning of the words in the statute.

(ii) The golden rule (Time is gold)

The court may modify the language so far as is necessary to avoid the inconvenience.

(iii) The mischief rule

It is an ancient rule that a judge may look at the mischief in order to discover the intention of the Legislative Council.
When the words are ambiguous or uncertain, the ordinance may be construed according to its purpose or policy.

What was the common law before the Ordinance?
What was the mischief and defect for which the common law did not provide?
What remedy LegCo has resolved upon?
What was the true reason of the remedy?

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