DIGITAL LEGAL KNOWLEDGE TEXTBOOK FOR INTERNATIONAL STUDENTS

ORSOLYA FALUS

A kötet megjelenését a EFOP-3.6.1-16-2016-00003 K+F+I folyamatok hosszú távú megerősítése a Dunaújvárosi Egyetemen projekt támogatta.

"The publication of the volume was supported by the EFOP-3.6.1-16-2016-00003 "Long-term Confirmation of R & D & I Processes at the University of Dunaújváros" project.

UNIVERSITY OF DUNAÚJVÁROS
www.duf.hu
D·U·F PRESS
István Németh Head of Publishing Department

Publisher Dr. habil István András

Peer-reviewed by: Prof. Dr. hab. Marian Małecki

Language control editor: Gabriella Mária Kiss

Published by István Németh
Edited by Artúr Nemeskéry
Cover design/layout Attila Duma

Printed by HTSART Printing House

ISBN 978-615-6142-12-2

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Faculty of Law and Administration

Dunaújváros, 2021

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PREFACE

Dr. habil. Orsolya Falus is an associate professor, head of Department of Management and Business Sciences at the University of Dunaújváros, Hungary. She gained PhD and habilitated at the Doctoral School of the the Faculty of Law in the University of Pécs established at 1367. She is a well known researcher of the history and theory of business law, and a devoted lecturer, teaching international students of all majors in the University of Dunaújváros.

The Digital Legal Knowledge Textbook for International Students is a gap-filling university textbook for foreign university students studying in Hungary. The author, who herself found that there is no suitable textbook on the market for the subject of legal basics for non-law foreign students, assessed the needs of the young people she taught with good sense. The mature result of many years of educational practice is this book, which combines legal culture with current European and international legislation, introducing students to the context of legal thinking in the different branches of law.

The author also obtained a high school teacher's degree at the University of Pécs. Thanks to her pedagogical training and practice, she also made it clear that the educated age group is no longer willing to take a printed book in their hands, but rather is willing to absorb new knowledge through their digital skills. The richly illustrated text is suitable to meet the visual needs of the target age group, and the internet links help students to immerse themselves in the original legislative texts and in the sources of the scientific fields. However, the book, written in a light, youthful style, is actually a scientific work based on a strict logical system. Although the author breaks with the dry style typical of applied jurisprudence for the benefit of the students, she relentlessly insists on a high professional standard.

The book also assigns interesting cases to each chapter, and presents international, European Union and national regulations, as well as Anglo-Saxon case law and European civil law, in one system. By answering check questions at the end of the chapters, students can be sure that they have mastered the curriculum properly. The last chapter offers colorful law cases related to contract law, in order for the students to test their ability to solve law cases themselves with their theoretical knowledge which was drawn from the textbook.

In sum, *The Digital Legal Knowledge Textbook for International Students* is a comprehensive and a path breaking standard introduction to legal studies for international students of all majors. It is truly a 21st century textbook that, in response to the challenges of the age, provides university students with usable knowledge of a high professional standard.

Krakow, December 30, 2020

Prof. Dr. hab. Marian Małecki (sgd.)
Jagiellonian University, Krakow
Faculty of Law and Administration
Peer-revieweer/Lector of the book

UNIT 1: INTRODUCTION

Look at the photo:

The Hungarian College team in Plovdiv in 2012 [1]

That's a college eight. These are eight rowers. They're practiced athletes, and they're making that very thin boat go fast through the water.

What would happen if one of them thought they weren't going fast enough, and so he speeded up? And another one maybe needed to scratch his ear, and so he let go of his oars for a moment?

1 http://www.hunrowing.hu/hirek/negyedik-a-ferfi-ifjusagi-negyparevezos-ujabb-ket-csapatunk-kerult-dontobe (Accessed: 26-10-2020)

The whole thing would break down, and the boat might even tip over as opposed to a single scull:

Juan Carlos Cabrera of Mexico competes during the Men's Single Sculls Heat 1 on Day 1 of the Rio 2016 Olympic Games at the Lagoa Stadium on August 6, 2016 in Rio de Janeiro, Brazil [2]

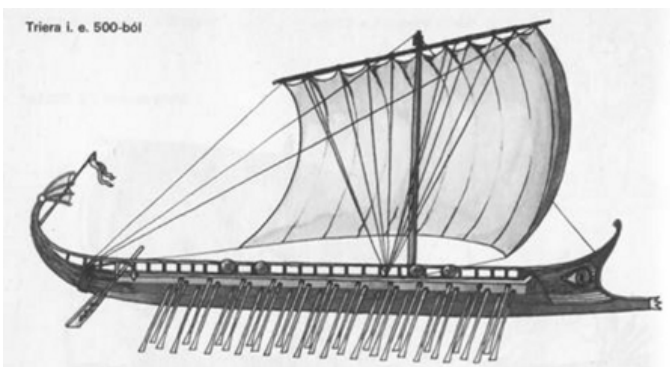
That man can slow down, speed up, and it is not a problem. What is the difference? The college eight can go much faster, and it does that through coordination. Those eight rowers, however, have to be coordinated: they have got to be going at the same speed. How can they achieve that?

There are different ways to get it. Here is one way that they used to get it back in the Greek and Roman times, when they would have hundreds of galley slaves:

2 https://www.olympic.org/rowing/single-sculls-1x-men (Accessed: 26-10-2020)

Slaves on a galley [3]

Like in a trireme:



Trireme [4]

3 https://beyondentertainmentblogdotcom.wordpress.com/2015/10/ (Accessed: 27-10-2020)

4 Trireme: Three-legged, ancient Greek galley with three rows of oars, initially rowing, then sail-rowing. It is assumed that the triremes began to emerge in the mid-seventh century BC. It is possible to indicate chronologically and constructively that the Greek trireme was the predecessor of the Roman ships. It could have 38-41 m in length and 3-5 m in width, immersion to 1.9 m, displacement 70-90 tons, speed: up to 9 knots by rowers; 12 knots with the help of sails; 6 knots - travel speed, with crew split into two watch. The bow was protected by a heavy, usually brown-faced taran, the main weapon of the trier. Its crew was made up of 170 rowers, 13 sailors, a helmsman, a commander and four of his assistants, and a musician who played the drum or a flute in the rhythm of the rowers. There were usually about 10 hoplites and 4-5 archers. The rowing was as follows: upper row - 31, center row - 27 and bottom - 27, so 85 on each side. Source: https://educalingo.com/en/dic-pl/triera (Accessed: 27-10-2020)

Unfortunately, there was a man beating the drum to give the rhythm and someone else with a whip…

But fortunately, this course is not about such sad stories. Our story here is much more like the college eight than it is in the ancient galley. We are now talking about coordinating the activities of maybe just one or two people, or a few people. The people who are going to contract with one another.

Our course is about coordinating the activity between free men and women. Nobody has got a whip to anybody here. And later on, we will see what would happen if somebody says: "I didn't really mean it, because they had a whip to me!"

1.1. COORDINATION

And how do you get coordination? You get coordination through communication.

Communication can be really impossible by that hortator who is beating the drum. But it can be by subtle clues, and that is what we are talking about: the voluntary coordination.

Coordination depends on a number of things. There has to be communication, agreement, and understanding. Different people who are playing in a rock band have to understand what it is they are trying to do. Sometimes they can all be as successful as they have been coordinating for decades, such as the English rock band Rolling Stones, which was formed in 1962 in London.

The Rolling Stones performing at Summerfest in Milwaukee in 2015, from left to right: Charlie Watts, Ronnie Wood, Mick Jagger, and Keith Richards (Photo: Jim Pietryga) [5]

It means not only that you have to understand what the other people you are coordinating with want. You also have to want to coordinate with them. You have to try to coordinate with them.

1.2. TRUST

It means that you have to trust.

What is trust? A crucial notion that is going to underlie everything concerning law. We need understanding, and agreement, which is a precursor of course to contract, and also we need trust.

5 https://iorr.org/tour15/ (Accessed: 27-10-2020)

One of the most famous examples of understanding is illustrated by Pieter Bruegel the Elder in his painting of the (Great) Tower of Babel in 1563:

The (Great) Tower of Babel (Painter: Pieter Bruegel the Elder) [6]

I am sure you all know the story of the Tower of Babel. You can read it in the Bible in Genesis 11:1–9. It is an origin myth meant to explain why the world's peoples speak different languages. According to the story, a united human race in the generations following the Great Flood, speaking a single language and migrating eastward, comes to the land of Shinar. There they agree to build a city and a tower tall enough to reach heaven. And that seemed just a bit too much. But how were they stopped from doing that?

It wasn't by a thunderbolt. It wasn't by somebody coming up with whips and guns. No. God, observing their city and tower, confounds their speech so that they can no longer understand each other, and scatters them around the world. So they couldn't understand each other and when the understanding stopped, so did the coordination and so did the building project, and there you see it is half-finished in the painting.

The rowers, builders, dancers, musicians, they all coordinate moment to moment. They act together harmoniously. And trade can be like that, too.

6 Kunsthistorisches Museum, Vienna; Pieter Brueghel the Elder, Public domain, via Wikimedia Commons

1.3. COORDINATION IN TRADE

Imagine two friends. Suppose that I am a really great sandal-maker. You just have to stretch your imaginations a little bit…

Sandal Maker at work in Capri Italy (Copyright: Brenda Kean) [7]

I have five pairs of sandals, and you, my friend, have a pair of boots. We have an understanding. I want the boots, you want the sandals for your family. We can trade.

This is a quite limited form of cooperation or collaboration. It is rightly called "primitive". But human beings are planners, and they plan by thought, not just, as bears acquiring body fat as winter approaches, by instinct. Humans can tell what they have in mind, and why they do it. Let us go back to the sandal example and make it a bit more complex.

7 https://www.123rf.com/photo_25900732_sandal-maker-at-work-in-capri-italy.html (Accessed: 27-10-2020)

Suppose you do not have the boots yet. You only make your wonderful boots for the cold weather. You, however, want my sandals now for your whole family. It is June.

I am willing to swap my five pairs of sandals, which I have just made, for one pair of boots. But you want the sandals now, and don't want to have to wait until October when you will have finished making the boots which we will trade for. They take a really long time to make, after all. They're of very high quality.

What a pity if you lose a whole summer at the beach because you don't have the boots on hand yet to make the primitive swap.

In fact, you say you are even willing to throw in a couple of pairs of heavy socks with the boots if I just give you the sandals now. By your having to wait until we can make the swap in real-time, we both experience what economists call a "deadweight loss".

A deadweight loss is the loss of economic activity due to excessive taxation. For example, suppose a person on welfare is offered a job that pays more than he/she receives in welfare benefits. If taxes are too high, however, the person may find that his/her aftertax income is in fact lower than what he/she was receiving on welfare. The person might then rationally decide to stay on welfare. The deadweight loss is both the cost of keeping that person on welfare and the loss incurred from the economy at large from losing that person's production. It is also called the excess burden of taxation.[8] In our case, you lose a whole season at the beach, and I lose the two pairs of socks.

What we need to do is cooperate, to coordinate our activities, like the rowers in the eights, but this time, not simultaneously, but over time, quite a long stretch of time, my work in the winter for your work in the summer. I have to believe that, come winter, the boots will be there and you will let me have them.

Now, it is not enough for you to say you might have them for me then. You have to give me some assurance and I have to believe you. I have to trust you.

Trust is one of the things that makes our world go around. It allows planning, and planning is coordination over time. It allows human activity to get off the ground.

8 Deadweight loss. (n.d.) Farlex Financial Dictionary. (2009). https://financial-dictionary.thefreedictionary.com/Dead+weight+loss (Accessed: 27-11-2020)

But how do we structure that trust? I am not going to just turn the sandals over to you as a gift and hope that, comes winter, you will be similarly generous. At the very least, you have to know I need the boots. But even that is not enough. You have to make some kind of commitment.

You have to invoke trust, not just a hope that you will be generous or kind. Come winter, you think of me and want me to be warm and dry. The way people make that commitment, the way they make the world go round, is to promise.

If you do not notice that I need boots in winter or if you notice and do not care, even if I remind you, but in June, I gave you all those sandals. None of that is enough to allow me to say, but I trusted you to give me the boots. But if you promised, then I am justified in saying, but I trusted you. So promising is this great human invention.

We climb up to a higher level of interaction, and it puts sandals on your family's feet in summer, and boots and socks on my feet in winter, because it leads us to trust each other.

And trust allows us to coordinate our activities, not just like the rowers in the college eight, but over time. We can plan, because we can know what to expect from each other, not just from moment to moment, as with the primitive trade, but over the long stretches of time.

From moment to moment, it is understanding that allows us to work together.

What allows us to coordinate our activities over long periods of time is trust. Promises and commitments are the agents of trust.

Promises are, in turn, of course, made up of speech, and understanding they assume speech, and understanding I promise is one of the things we say to each other to make things happen.

Trust gives us promising, and promising creates value.

We can cash in on the future and coordinate over time. Promising gives us money, which allows us to coordinate with people we don't even know. Money is promises to and from people in the past and in the future—people we do not know and will never meet.

Let's say you want my sandals, but I don't need your boots. You don't even make boots. You raise beef, and I'm a vegetarian. But I will gladly take your money, except, as often happens in life and in business, you don't just not have boots, you don't have money. But you think you will have money by wintertime, when you have made and sold your boots, or raised and slaughtered your beef, or whatever.

Another deadweight loss, if we cannot deal now-- if we cannot deal just because you have no money just now.

Except we can build on what we already know. Instead of promising me boots in winter, you promise me money in winter-- and maybe a bit more money than if you paid me right now, in June. If I believe your promise, and you keep it, we are both happier. A deadweight loss has been avoided.

It's called credit. Credit comes from the Latin word for "believe, trust."

Contracts allow us to avoid so many deadweight losses and to have a more effective society.

Contracts are, with some exceptions we will come to, **promises. Contracts are promises the government will stand behind.**

CHECKING QUESTIONS:

1. How do You get coordination?
2. What is trust?
3. What is a promise?
4. Give an example to the deadweight loss?
5. What is the difference between a promise and a contract?

Many of the world's greatest philosophers have theorized about the nature and meaning of law.

Associations in relation to the concept of law [9]

It is, however, not as easy to answer. Researchers of jurisprudence, as the study of legal philosophy, ask questions like these: What is law?; Is bad law still law?; Is custom law?; Is law what it says in the statute books, or what really happens in practice?

Philosophers have debated the essential nature of law for centuries, yet there is no single commonly accepted definition. Let us see some of the answers:

9 https://www.legalline.ca/news/what-is-law/ (Accessed: 17-11-2020)

A) "Law is Power" Theory

According to this view, the validity of a law does not depend on whether it is socially good or bad. It is apparent, for example, that tyrannies, monarchies, and democracies have produced socially beneficial laws. They, however, have also produced laws that were unjust and "wrongful"!

What these different forms of government have in common is that each is based on power and that possessing the power to enforce its laws is central to each government's existence. This philosophy can be criticized for abuses of power, and tyranny, and for producing bad law.

B) Natural Law Theory

Natural law philosophers argued that law is that which reflects, or is based on, the built-in „sense of right and wrong" that exists within every person at birth.

Natural law theory is a label that has been applied to theories of ethics, politics, civil law, and religious morality. Some writers use this term with a broad sense that any theory that contains positive moral claims can be considered as natural law. This is the conception of moral realism. [10] Most of the scholars, however, rather use it narrowly so that no moral theory that is not grounded in a very specific form of Aristotelian teleology could count as a natural law view.

Based on the history of the Christian Church in Europe, law theorists start analysing this phenomenon from Thomas Aquinas's natural law doctrine.

10 Sayre-McCord, Geoffrey (1988): *Essays on Moral Realism*. Ithaca: Cornell University Press, p.106.

Thomas Aquinas [11]

For Aquinas, there are two key features of natural law, of which he structures his discussion of this legal phenomenon at Question 94 of the Prima Secundae of the *Summa Theologiae*.[12] The first is that, when the focus is placed on God's role as the giver of the natural law, the natural law is just one aspect of divine providence; and so the theory of natural law is from that perspective just one part among others of the theory of divine providence. The second is that, when the focus placed on the humans' role as recipients of the natural law, natural law constitutes the principles of practical rationality, the principles by which a human action is to be judged as reasonable or unreasonable; and so the theory of natural law is from that perspective the preeminent part of the theory of practical rationality. This argument has two central objectives. Firstly, it aims to identify the defining features of natural law through a moral theory. Secondly, it aims to identify some of the main theoretical options that natural law theorists face in formulating a precise view within the constraints set by these defining features and some of the difficulties for each of these options. In Article 4, Aquinas argues: "Consequently, we must say that the natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge."

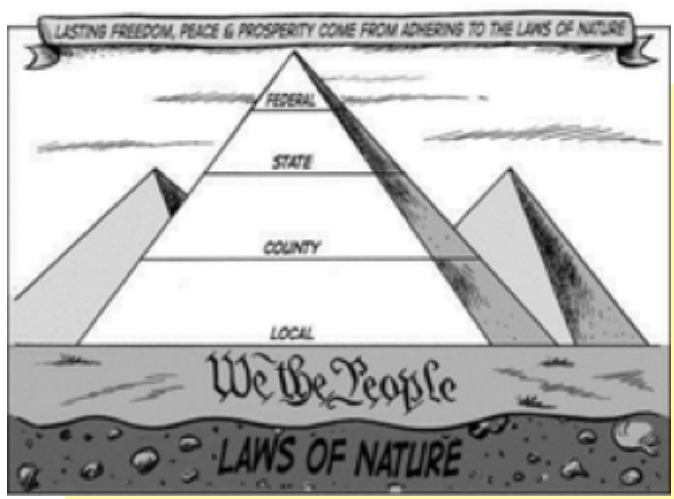
Law is a "moral barometer" in this theory, which operates through the functioning of conscience, gives each person the capacity to discover moral truth independently. Some believed that this sense was God-given; others believed it was an essential part of human nature.

11 https://stas.org/en/news-events/news/why-st-thomas-aquinas (Accessed: 17-11-2020)
12 Aquinas, Thomas: Treatise on Law (Summa Theologica, Questions 90–97), ed. Stanley Parry. Chicago: Henry Regnery Company, 1969), p. 18.

Natural law philosophers argued that moral goodness is independent of institutional views of goodness or evil. Thus, no government can make a morally evil law good or a morally good law evil. Even though during apartheid the all-white South African government may have had the power to enact discriminatory statutes, such statutes were not truly "law" because they were morally hateful. This natural law philosophy was very influential in seventeenth- and eighteenth-century Europe.

Natural law thinking has greatly influenced American law as well. American civil rights advocates currently use the same time-tested natural law arguments that were used thirty and forty years ago to oppose racial discrimination. They argue that discriminatory statutes should not be respected as law because they are unfair.

Constitutional provisions that require the government to treat all persons fairly and impartially (the due process and „Equal Protection Clauses") are other examples.



Aquinas Natural Law Theory [13]

13 https://www.tes.com/en-us/teaching-resource/aquinas-natural-law-theory-wjec-as-11150876 (Accessed: 17-11-2020)

Examples:

a) It is "right" that people who intend no harm but who carelessly cause injury to other people should have to pay compensation for the damages.

b) Similarly, if two people voluntarily enter into a contract, it is "right" that the parties comply with its terms or pay damages for the breach.

c) Finally, it is "right" to punish persons who commit crimes for those acts.

When, however, there is no consensus in society about what is morally right and wrong, natural law loses its effectiveness as a basis for law.

Current examples: abortion, physician-assisted suicide, capital punishment

C) Historical Jurisprudence Theory

Historical jurisprudence theory evolved in response to the natural law philosophy. Aristocrats were attracted to this school because it provided a justification for preserving the status quo and the preferential treatment of powerful elites that was deeply rooted in cultural tradition.

The historical philosophy of law integrated the notion that law is the will of the sovereign (ruler, monarch) with the idea of the "spirit of the people." That is, law is only valid to the extent that the will of the sovereign is compatible with long-standing social practices, customs, and values.

The historical school insisted that only practices that have withstood the test of time could be thought of as law. Further, these philosophers believed that law changes slowly and invisibly as human conduct changes.

A major advantage of historical jurisprudence theory is that it promotes stability in law. In fact, much law is largely grounded in judicially approved custom. A major problem with historical jurisprudence is determining at what point a practice has become a custom: how long must a practice have been followed, and how widely must it be accepted before it is recognized as customary?

D) Utilitarian Law Theory

The utilitarian school of law concentrated on the social usefulness of legislation rather than on metaphysical notions of goodness and justice. Utilitarians thought that government was responsible for enacting laws that promote the general public's happiness.

They believed that the desire to maximize pleasure and minimize pain is what motivates people and that legislatures were responsible for inducing people to act in socially desirable ways.

Example: the pain imposed by a criminal sentence leads to the avoidance of future criminal actions

Additionally, they thought that law should focus on providing people with security and equality of opportunity. They maintained that property rights should be protected because the security of property is crucial to attaining happiness. People should perform their contracts because increased commercial activity and economic growth produce socially beneficial increases in employment.

Utilitarians also favored the simplification of legal procedures. They opposed checks and balances, legal technicalities, and complex procedures. They believed that these "formalities" increased the costs and length of the judicial process and made the justice system ineffective and unresponsive to the needs of large numbers of average people.

Modern utilitarians would favor small claims courts, with their simplified pleading requirements, informality, low cost, and optional use of lawyers.

A major problem with utilitarianism, however, is that not everyone agrees about what is pleasurable and what is painful.

However, most scholars agree that law is an enforceable body of rules that governs the conduct of individuals in society with each other and with the society as a whole; and rules provide guidelines and boundaries within which an individual operates and specifies boundaries that are not to be crossed and provides penalty for violations /if any/. On the other hand, it also provides certain rights, protection, and freedom to each individual.

E) Modern Functions of Law

If you look at any civilised country, you will find some common features:

(1) Law is a means of preserving the social order

(2) It provides penalties for violation of such order

(3) It provides a model code for conduct, at least to the extent that what conduct is considered illegal (e.g. ticketless travel, drunken driving, child marriage etc.)

(4) It is also provides for rights of individuals in society (is right to property right to education, right to marry, right to speech etc.)

(5) It acts as a compromiser i.e. takes into account the different segments/sections of society and their views and provides for a common set of enforceable laws.

Law is not monolithic: that is consisting of a commonly accepted and unchanging set of rules, but it changes over time. People in society can agree on the need for law, but differ on what it should be or how it is to be implemented. This conflict of ideas is due to the different belief, races, culture, custom that section of society hold. Which in turn leads to different structure and implementation of law differently in different countries.

Law is the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties.

CHECKING QUESTIONS:

1. What is the problem with the "Law is Power" Theory?
2. Based on the Natural Law Theory, how do you judge the issue of abortion, the death penalty, and euthanasia?
3. What is the major advantage of the Historican Jurisprudence Theory?
4. What is the essence of the Utilitarian Law Theory?
5. What are the modern functions of law?

UNIT 3: SOURCES OF LAW

The term "source of law" may sometimes refer to the sovereign or to the seat of power from which the law derives its validity.

One must know as to what are the sources of law and on which of the sources one can rely upon for justice. It is very important to understand that the law of every land is derived from the sources so one has to know what are the sources of law before getting into any concept of law.

3.1. SOURCES OF LAW:

(1) History

(2) Traditions

(3) Culture

(4) Past Practices

(5) Customs

(6) Contribution by eminent scholars

(7) Legal decisions

(8) Legislation

(9) Religious Texts

(10) Science

3.2. CATEGORIES OF LAW

With these sources three broad categories of law evolved over ma period of time:

1- Common Law

2- Civil Law (Statutory Law)

3- Religious Law (Sharia in Islam, Canon Law in Roman Christian Church)

3.2.1. Common Law

The common law is named so as it was "common" to all the king's courts across England. It originated in the practices of the courts of the English kings in the centuries following the Norman Conquest in 1066. [14]

King William the Conqueror depicted in the Bayeux Tapestry with his half brothers [15]

14 Langbein, John H.; Lerner, Renée Lettow; Smith, Bruce P. (2009): *History of the Common Law: The Development of Anglo-American Legal Institutions.* New York: Aspen Publishers, p. 4.

15 https://historylearning.com/medieval-england/laws-of-william-the-conqueror/ (Accessed: 17-11-2020)

The British Empire later spread the English legal system to its far-flung colonies, many of which retain the common law system today. These "common law systems" are legal systems that give great weight to judicial precedent, and to the style of reasoning inherited from the English legal system. It means law based on past practices, traditions and precedence. Precedence means what has happened in the past judgements in similar cases.

These judgements are referred to and they form the basis of new decisions given by the courts. This law operates on the premise that it is not possible to codify change and the courts often look to past judgements.

The ancient law of England based upon societal customs and recognized and enforced by the judgments and decrees of the courts. The general body of statutes and case law that governed England and the American colonies prior to the American Revolution.

The principles and rules of action, embodied in case law rather than legislative enactments, applicable to the government and protection of persons and property that derive their authority from the community customs and traditions that evolved over the centuries as interpreted by judicial tribunals.

A designation used to denote the opposite of statutory, equitable, or civil, for example, a common-law action.

The common-law system prevails in England, the United States, and other countries colonized by England. It is distinct from the civil-law system, which predominates in Europe and areas colonized by France and Spain. The common-law system is used in all the states of the United States except Louisiana, where French Civil Law combined with English Criminal Law to form a hybrid system. The common-law system is also used in Canada, except in the Province of Quebec, where the French civil-law system prevails.

Anglo-American common law traces its roots to the medieval idea that the law as handed down from the king's courts represented the common custom of the people. It evolved chiefly from three English Crown courts of the twelfth and thirteenth centuries: the Exchequer, the King's Bench, and the Common Pleas.

These courts eventually assumed jurisdiction over disputes previously decided by local or manorial courts, such as baronial, admiral's (maritime), guild, and forest courts, whose jurisdiction was limited to specific geographic or subject matter areas. Equity courts, which were instituted to provide relief to

litigants in cases where common-law relief was unavailable, also merged with common-law courts. This consolidation of jurisdiction over most legal disputes into several courts was the framework for the modern Anglo-American judicial system. Early common-law procedure was governed by a complex system of Pleading, under which only the offences specified in authorized writs could be litigated. Complainants were required to satisfy all the specifications of a writ before they were allowed access to a common-law court. This system was replaced in England and in the United States during the mid-1800s. A streamlined, simplified form of pleading, known as Code Pleading or notice pleading, was instituted. Code pleading requires only a plain, factual statement of the dispute by the parties and leaves the determination of issues to the court.

Common-law judges [16]

Common-law courts base their decisions on prior judicial pronouncements rather than on legislative enactments. Where a statute governs the dispute, judicial interpretation of that statute determines how the law applies. Common-law judges rely on their predecessors' decisions of actual controversies, rather than on abstract codes or texts, to guide them in applying the law. Common-law judges find the grounds for their decisions in law reports, which contain decisions of past controversies. Under the doctrine of Stare Decisis, common-law judges are obliged to adhere to previously decided cases, or precedents, where the facts are substantially the same. A court's decision is binding authority for similar cases decided by the same court or by lower courts within the same jurisdiction. The decision is not binding on courts of higher rank within that jurisdiction or in other jurisdictions, but it may be considered as persuasive authority.

16 https://blog.ipleaders.in/development-of-common-law-in-england/ (Accessed: 17-11-2020)

Because common-law decisions deal with everyday situations as they occur, social changes, inventions, and discoveries make it necessary for judges sometimes to look outside reported decisions for guidance in a case of first impression (previously undetermined legal issue). The common-law system allows judges to look to other jurisdictions or to draw upon past or present judicial experience for analogies to help in making a decision. This flexibility allows common law to deal with changes that lead to unanticipated controversies. At the same time, stare decisis provides certainty, uniformity, and predictability and makes for a stable legal environment.

Under a common-law system, disputes are settled through an adversarial exchange of arguments and evidence. Both parties present their cases before a neutral fact-finder, either a judge or a jury. The judge or jury evaluates the evidence, applies the appropriate law to the facts, and renders a judgment in favor of one of the parties. Following the decision, either party may appeal the decision to a higher court. Appellate courts in a common-law system may review only findings of law, not determinations of fact.

Under common law, all citizens, including the highest-ranking officials of the government, are subject to the same set of laws, and the exercise of government power is limited by those laws. The judiciary may review legislation, but only to determine whether it conforms to constitutional requirements. [17]

3.2.2. Civil Law \Statutory Law

Civil law is a legal system originating in Continental Europe and adopted in much of the world. The civil law system is intellectualized within the framework of Roman law, and with core principles codified into a referable system, which serves as the primary source of law.

It, however, can even be traced back to times of Hammurabi even before the birth of Christ. Code of Hammurabi and the Roman Code of the era of Julius Caesar are testimony to the codification of laws.

The Code of Hammurabi is a well-preserved Babylonian law code of ancient Mesopotamia, dating back to about 1754 BC (Middle Chronology). It is one of the oldest writings of significant length in the world. The sixth Babylonian king, Hammurabi, enacted the code, and partial copies exist on a seven and a half foot stone stele and various clay tablets. The code consists of 282 laws, with scaled punishments, adjusting "an eye for an eye, a tooth for a tooth" (lex talionis).

17 Kellogg, Frederic R. (2003): Holmes, Common Law Theory, and Judicial Restraint. *John Marshall Law Review. 36.* (winter). Pp. 457–505.

The Code issues justice following the three classes of Babylonian society: property owners, free men, and slaves. For example, if a doctor killed a rich patient, he would have his hands cut off, but if he killed a slave, only financial restitution was required.

A diorite with an inscription of Hammurabi's code of laws. Susa, Babylonia, 18th century BCE [18]

The classical Roman law (c. AD 1–250), and in particular Justinian law (6th century AD), as the major inspiration of Civil law, classical Roman law and further expanded and developed in the late Middle Ages under the influence of canon law. The Justinian Code's doctrines provided a sophisticated model for contracts, rules of procedure, family law, wills, and a strong monarchical constitutional system. Roman law was received differently in different countries. In some, it went into force wholesale by legislative act. It became a positive law, whereas in others it was diffused into society by increasingly influential legal experts and scholars. [19]

18 https://www.ancient.eu/image/6930/hammurabis-law-code/ (Accessed: 17-11-2020)
19 Pennington, Kenneth Pennington (1996): Roman and Secular Law in the Middle Ages: In: Mantello, F. A. C.–Rigg, A. G. Rigg (Eds.): *Medieval Latin: An Introduction and Bibliographical Guide.* Washington, D.C.: Catholic University Press of America, Pp. 254–266.

Civil law systems, also called continental or Romano-Germanic legal systems, are found on all continents and cover about 60% of the world. They are based on concepts, categories, and rules derived from Roman law, with some influence of canon law, sometimes largely supplemented or modified by local custom or culture. The civil law tradition, though secularized over the centuries and placing more focus on individual freedom, promotes cooperation between human beings.

In their technical, narrow sense, the words civil law describe the law that pertains to persons, things, and relationships that develop among them, excluding not only criminal law but also commercial law, labor law, etc. Codification took place in most civil law countries, with the French Code civil and the German BGB being the most influential civil codes. The recent codification can be traced to the Napoleanic Code or the French code of 1804 A.D.

Napoleon I, crowned by the Allegory of Time, writes the Code Civil" Jean-Baptiste Mauzaisse, 1833. [20]

Most of continental Europe including France, Germany, Italy, Spain, Portugal etc., and their erstwhile colonies in Latin America, Africa and Asia follows the civil law system. Hungary's law system is also based on it.

20 https://www.ancientpages.com/2020/05/16/napoleonic-code-why-was-one-of-the-most-influential-legal-codes-flawed/ (Accessed: 17-11-2020)

There are countries where the common law and the code law are living together, as in Camerun, where the French part uses code law, whereas the British part is regulated by common law.

3.2.3. *Religious Laws*

Religious laws are based and derived from religious texts and their interpretations by religious leaders.

Symbols of the 3 great Abrahamic religions [21]

Different religious systems hold sacred law in a greater or lesser degree of importance to their belief systems, with some being explicitly antinomian whereas others are nomistic or "legalistic" in nature. In particular, religions such as Judaism, Islam and the Bahá'í Faith teach the need for revealed positive law for both state and society, whereas other religions such as Christianity generally reject the idea that this is necessary or desirable and instead emphasise the eternal moral precepts of divine law over the civil, ceremonial or judicial aspects, which may have been annulled as in theologies of grace over law. Examples of religiously derived legal codes include Jewish Halakha, Islamic Sharia, Christian Canon Law, and Hindu law. [22]

21 http://www.baltimoreravensteamauthentic.com/freedom-of-religion.html (Accessed: 17-11-2020)

22 de Blois, Matthijs (2010): Religious law versus secular lawThe example of the get refusal in Dutch, English and Israeli law. *Utrecht Law Review 6.* (2.) DOI: 10.18352/ulr.126 (Accessed: 17-11-2020)

3.3. COMMON CATEGORIES OF LAW

3.3.1. Criminal Law vs Civil Law

Criminal law: deals with the wrongs done to the society. (Such as ticketless travel, murder, kidnapping, arson, rioting etc.).

Civil Law: deals with wrong deeds done by individuals in society.

Usually, the distinction is the basis of penalty; if fines are paid to the state or/and imprisonment then it is a criminal case, or if payments are made to the affected party, then it is a case of Civil Law. (E.g.: divorce, property disputes, harassment etc.). Usually, most violation, tend to be the violations of both laws.

3.3.2. Substantive Law vs Procedural Law

Substantive law: consists of written statutory rules passed by legislature that govern how people behave. These rules, or laws, define crimes and set forth punishment. They also define our rights and responsibilities as citizens. There are elements of substantive law in both criminal and civil law.

Procedural law: is concerned with the implementation of law. Such as to how the court notices are to be served, how should the trial be conducted, how to present the evidence, how the judgement is to be enforced etc.

3.3.3. Public Law vs Private Law

The simple difference between public and private law is in those that each affects:

Public law affects society as a whole, while

Private law affects individuals, families, businesses and small groups.

CHECKING QUESTIONS:

1. What are the sources of law?
2. What do Common-law courts base their decisions on?
3. Which legal systems are the antecedents of Civil Law?
4. List the best known religious laws!
5. What are the common categories of law?

UNIT 4: HUMAN RIGHTS

4.1. HUMAN RIGHTS

Human rights are rights we have simply because we exist as human beings, as they are not granted by any state. These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status. They range from the most fundamental - the right to life - to those that make life worth living, such as the rights to food, education, work, health, and liberty.

As a provisional starting point, human rights may be defined as

– rights
– that every person has
– by virtue of merely existing and
– that aim to secure for such a person certain benefits that are of fundamental importance to any human being.

Traditionally, human rights were conceived as rights of individuals against their governments. They were part of the national law of states and were safeguarded in national constitutions. The scope of human rights was determined by national judges, who had to decide in particular cases on whether a state had violated a human right.

UN Photo/Marco Dormino. Detainees with mental disabilities at Bamako's Central Detention Centre, Mali [23]

International human rights law lays down the obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

Examples of treaties with a world-wide scope are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both 1966). The Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in 1948, is very important. Properly speaking it is not a treaty as it was not created by an agreement between states.

4.2. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

One of the great achievements of the United Nations is the creation of a comprehensive body of human rights law—a universal and internationally protected code to which all nations can subscribe and all people aspire. The United Nations has defined a broad range of internationally accepted rights, including civil, cultural, economic, political and social rights. It has also established mechanisms to promote and protect these rights and to assist states in carrying out their responsibilities.

23 https://www.un.org/en/sections/issues-depth/human-rights/ (Accessed: 02-12-2020)

The foundations of this body of law are the Charter of the United Nations and the Universal Declaration of Human Rights, adopted by the General Assembly in 1945 and 1948, respectively. Since then, the United Nations has gradually expanded human rights law to encompass specific standards for women, children, persons with disabilities, minorities and other vulnerable groups, who now possess rights that protect them from discrimination that had long been common in many societies.

UDHR was translated to more than 500 languages [24]

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 by General Assembly resolution 217 A (III) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected. Since its adoption in 1948, the UDHR has been translated into more than 500 languages - the most translated document in the world - and has inspired the constitutions of many newly independent States and many new democracies. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols (on the complaints procedure and on the death penalty) and the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol, form the so-called International Bill of Human Rights.

24 https://www.un.org/en/sections/issues-depth/human-rights/ (Accessed: 02-12-2020)

4.3. THE EUROPEAN CONVENTION OF HUMAN RIGHTS

In Europe, the European Convention on Human Rights (1953) has also been an influential source. The European Convention on Human Rights is the first Council of Europe's convention and the cornerstone of all its activities. It was adopted in 1950 and entered into force in 1953. Its ratification is a prerequisite for joining the Organisation.

Convention [25]

The European Court of Human Rights oversees the implementation of the Convention in the 47 Council of Europe member states. Individuals can bring complaints of human rights violations to the Strasbourg Court once all possibilities of appeal have been exhausted in the member state concerned. [26]

The Convention protects the right to:

– life, freedom and security;
– respect for private and family life;
– freedom of expression;
– freedom of thought, conscience and religion;
– vote in and stand for election;
– a fair trial in civil and criminal matters; and
– property and peaceful enjoyment of possessions.

25 https://www.coe.int/en/web/human-rights-convention (Accessed: 22-11-2020)
26 https://www.coe.int/en/web/human-rights-convention (Accessed: 22-11-2020)

The Convention prohibits:
– the death penalty
– torture or inhuman or degrading treatment or punishment
– slavery and forced labour
– arbitrary and unlawful detention
– discrimination in the enjoyment of the rights and freedoms secured by the Convention
– deportation of a state's own nationals or denying them entry and the collective deportation of foreigners.

Because human rights were proclaimed and protected by international treaties, they no longer belonged exclusively to the domain of national law. States can theoretically withdraw from treaties, however, in practice, this is often not a viable option.

States that have committed themselves to the protection of human rights have undertaken commitments towards their citizens who are, to a large extent, outside their control. This phenomenon is even enforced if the application and interpretation of the treaties are assigned to judicial bodies that are beyond the power of national states.

An example of such a body is the European Court of Human Rights, which can deliver rulings that interpret the application of the European Convention on Human Rights, and this is binding on states.

The European Court of Human Rights also known as the "Strasbourg Court" [27]

27 https://www.coe.int/en/web/freedom-expression/-/-seminar-human-rights-challenges-in-the-digital-age-judicial-perspectives-28-june-2019-strasbourg-european-court-of-human-rights (Accessed: 22-11-2020)

So while states can still determine to which human rights they bind themselves by means of treaties, the scope of these rights is often determined by independent courts. In this way, states have lost control over part of the law that is binding on their territories and which also binds them.

This loss of control goes even further when it is assumed that states can also be bound by human rights to which they did not consent in the first place. This is the case if human rights are part of what is known as the "ius cogens", a set of peremptory norms of international law that are accepted and recognized by the international community of states as norms from which no derogation is permitted. Prohibitions on torture and genocide and fundamental rules of humanitarian law have been recognized as human rights that are described as ius cogens. A norm is said to be peremptory if it is binding and cannot be set aside by another norm. This means that peremptory norms prevail if there is a conflict of norms. As these examples illustrate, the field of human rights has freed itself, to some extent, from the control of national states and states are, in modern times, bound by legal norms that they cannot control.

CLASSIFICATION OF HUMAN RIGHTS

4.4. INDIVIDUAL (CIVIL) RIGHTS

life, liberty, and security of the person; privacy and freedom of movement; ownership of property; freedom of thought, conscience, and religious belief and practice; prohibition of slavery, torture, and cruel or degrading punishment.

4.5. RULE OF LAW

equal recognition before the law and equal protection of the law; effective legal remedy for violation of rights; impartial hearing and trial; presumption of innocence; and prohibition of arbitrary arrest.

4.6. RIGHTS OF POLITICAL EXPRESSION

freedom of expression, assembly, and association; the right to take part in government; and periodic and meaningful elections with universal and equal suffrage.

4.7. ECONOMIC AND SOCIAL RIGHTS

an adequate standard of living; free choice of employment; protection against unemployment; "just and favorable remuneration"; the right to form and join trade unions; "reasonable limitation of working hours"; free elementary education; social security; and the "highest attainable standard of physical and mental health."

4.8. RIGHTS OF COMMUNITIES

self-determination and protection of minority cultures.

CHECKING QUESTIONS:

1. What are the human rights?
2. Give examples of international treaties protecting human rights!
3. What is UDHR?
4. What is “ius cogens”?
5. What kinds of human rights do You know?

IT 5: CONSTITUTIONAL LAW

– THE FUNDAMENTAL LAW (CONSTITUTION) OF HUNGARY

5.1. STATE

As we have seen earlier public law consists of those fields of law which are concerned with the state itself and those where the state or a minister or a public body confronts the individual in its capacity of a sovereign.

The state can be described as a legal person made up of three elements:

a) people (citizenry),
b) national territory and
c) sovereign public authority.

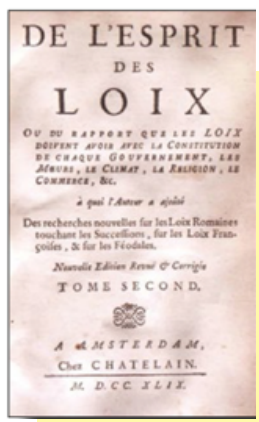
The forms of government explain where the sovereign power lies. In the traditional monarchy it lied with the king; in the modern democratic republics it is with the citizens. In the modern constitutional state the state's authority is split up.

The classic theory of Montesquieu [28] distinguishes

A) the legislative power,

B) the executive power and

C) the judicial power.


DE L'ESPRIT
DES
LOIX
Ou du rapport que les Loix doivent avoir avec la Constitution de chaque Gouvernement, les Mœurs, le Climat, la Religion, le Commerce, &c.
A quoi l'Auteur a ajoûté
Des recherches nouvelles sur les Loix Romaines touchant les Successions, sur les Loix Françoises, & sur les Féodales.
Nouvelle Edition Revuë & Corrigée
TOME SECOND.
A AMSTERDAM,
Chez CHATELAIN.
M. D.CC. XLIX.

Cover of book "L'Esprit des Lois" by Montesquieu 1749 publisher : Chatelain [29]

28 A political theory and a pioneering work in comparative law „The Spirit of Laws" (in French: L'Esprit des lois) published in 1748 by Charles de Secondat, Baron de Montesquieu (1689-1755) concerning political liberty and the best means of preserving it. More: Montesquieu: The Spirit of the Laws. Eds. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone. Cambridge Texts in the History of Political Thought. Cambridge: Cambridge UP, 1989.

29 https://commons.wikimedia.org/wiki/File:Esprit_Loix_1749.JPG (Accessed: 02-12-2020)

As a legal entity, the state acts through its organs. The supreme organs correspond to the powers:

Parliament - legislative power;

Government - executive power;

Supreme Courts - judicial power.

In a federal as opposed to a central state these all or some powers may be divided between the federal state and the provinces and the provinces may take part in the federal state's execution of its powers and vice versa.

If the society is fairly wealthy and is divided into rival groups, law can be used to see that the interests of each person and group are taken into account when laws are made. Therefore government has to be limited by law. "Checks and balances" are called for. If there are to be effective checks and balances a written constitution is essential. The most important checks and balances are those that divide up state power. The separation of powers divides state power according to function (as already mentioned above: legislature, executive, judge).

5.2. SOVEREIGNTY

Sovereignty can be external or internal or both.

5.2.1. External sovereignty as "independence" in international law

A state that is recognized as independent is a sovereign member of the international community. Of course states, even the most powerful, are not free to do exactly as they choose. They lack the resources to do some things, and international law prevents them from doing others. Eg: A state is not allowed to use force against other states except in self-defence or with the authority of the Security Council of the United Nations.

External sovereignty is the existence of a state according to international politics – the recognition of its existence, and therefore rights to territorial self-rule, by other countries. The UN is the formal channel through which states are recognised, as it represents the (near-) entirety of the international community. However, UN recognition is the recognition by individual states – Kosovo, for example, is recognised by 111 UN members, but not Serbia.

Another limit on a state`s freedom of action is that it is legally bound by the treaties it makes. Eg: The members of the European Union have a treaty with one another by which much of their economic life is governed by the Union. The European Union has its own system of law and its own court, the European Court of Justice. The European Court of Justice takes the view that, if the law of the Union conflicts with the law of a member state, such as Italy or Hungary, the law of the Union prevails. Despite this, the members of the United Union remain sovereign states.

While, however, most other member states have acquiesced, accepting a reconstruction of their national sovereignty, the United Kingdom decided to leave the European Union. One of the main arguments in favor of "BREXIT" was that the EU threatens British sovereignty, as over the past few decades, a series of EU treaties have shifted a growing amount of power from individual member states to the central EU bureaucracy in Brussels. On subjects where the EU has been granted authority, like competition policy, agriculture, and copyright and patent law, EU rules seemed to override national laws.

BREXIT [30]

30 https://brexitcentral.com/how-the-british-conception-of-sovereignty-makes-eu-membership-untenable/ (Accessed: 03-12-2020)

Even a sovereign state, though legally independent, may in practice be influenced or even dominated by another state. The government of Lesotho, which is entirely surrounded by South Africa, is forced to pay attention to the views of the South African government, whether it likes them or not. However, it is not legally bound to do what the South African government tells it to. It can and does negotiate treaties with South Africa, for instance about its water resources.

Lesotho Map [31]

5.2.2. Internal sovereignty as "legislative sovereignty"

It means the right of the legislature of a state to make any law it pleases. Max Weber said that the state is a "human community that (successfully) claims the monopoly of the legitimate use of violence within a given territory." That is a – somewhat brutal – definition of internal sovereignty, the power of the government and constitutional system over people within an autonomous territory. [32] To be a state, however, it is necessary to have external sovereignty as well – that is to say, it must be recognised as a state by other states.

31 https://geology.com/world/lesotho-satellite-image.shtml Accessed: 03-12-2020)
32 Maximilian Karl Emil Weber (1864-1920) was a German historian, sociologist, lawyer, and political economist, who is regarded today as one of the most important theorists on the development of modern Western society. More: Dusza, Karl: Max Weber's Conception of the State. International Journal of Politics, Culture, and Society. Vol. 3, No. 1 (Autumn, 1989), pp. 71-105.

Internal sovereignty is a necessary, but not sufficient, condition for statehood. There must be a territory, and a fixed population, in order to have a government. That government must be the sole governing body, and there must be no higher authority within the state. The UK's sovereignty is vested in Parliament: this has the power to make and unmake laws, which the judicial system upholds. However, there are currently states which lack internal sovereignty. Libya is a good example: there are three governments, many militias, one external invading force (Da'esh) and great lawlessness. (This political vacuum is setting Libya up for another military dictatorship.)

5.3. CONSTITUTIONAL LAW

Constitutional law defines the principal organs of government and determines their relationship to one another and to the individual. In a federation the federal state and the provinces have separate constitutional laws. Within the constitutional law we distinguish between the general constitutional principles (in Germany: fundamental norms) and the constitutional law proper. Eg: Austria the constitutional principles are:

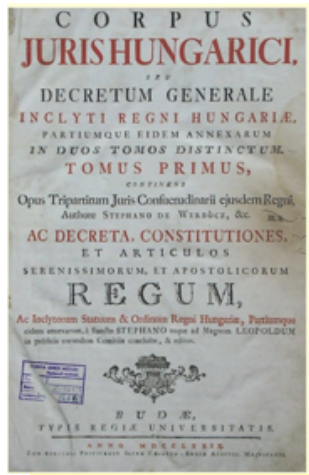
- the democratic principle: all state power derives from the people;
- the republican principle: the head of state is elected for a specified period, politically and legally answerable and may be removed from office under certain conditions;
- the federal principle: the powers of the state are divided among the federal state and the provinces;
- the principle of the rule of law: law predominates over, and excludes, the arbitrary exercise of governmental power; and
- the liberal principle: the individual is guaranteed a legal sphere withdrawn from state influence.

5.4. THE FUNDAMENTAL LAW (CONSTITUTION) OF HUNGARY

5.4.1. History of the Hungarian Fundamental Law

For centuries, the Hungarian constitution was unwritten, based upon customary law. There was no civil code either; lawyers worked with the "Corpus Iuris Hungarici". It has been Hungary's most important, however, unofficial collection of customary law for centuries, collected and published by István Werbőczy. [33]

33 István Werbőczy or Stephen Werbőcz (1458-1541) was a Hungarian legal theorist and statesman, Palatine of Hungary, author of the Hungarian Customary Law, who first became known as a legal scholar and theologian of such eminence that he was appointed to accompany Emperor Charles V to Worms, to take up the cudgels against Martin Luther.


CORPUS
JURIS HUNGARICI,
SEU
DECRETUM GENERALE
INCLYTI REGNI HUNGARIÆ,
PARTIUMQUE EIDEM ANNEXARUM
IN DUOS TOMOS DISTINCTUM.
TOMUS PRIMUS,
CONTINENS
Opus Tripartitum Juris Consuetudinarii ejusdem Regni,
Authore STEPHANO DE WERBŐCZ, &c.
AC DECRETA, CONSTITUTIONES,
ET ARTICULOS
SERENISSIMORUM, ET APOSTOLICORUM
REGUM,
BUDÆ,
TYPIS REGIÆ UNIVERSITATIS.

Cover of István Werbőczy's Corpus Iuris Hungarici [34]

Among the laws that acquired constitutional force were a series of liberal statutes enacted during the 1848 Revolution; Statute XII of 1867 (enacting the Ausgleich); and further guarantees for constitutionalism, such as Statute IV of 1869, separating the executive and the judiciary; or the post-1870 statutes regulating local self-government and state administration. Despite the lack of a written constitution, several constitutional laws were passed during the interwar period of the Kingdom of Hungary: Statute I of 1920 confirmed the monarchical form of government (the king's powers being exercised by regent Miklós Horthy and his ministers); Statute XLVII dethroned the Habsburg-Lorraine dynasty.

After World War II, in 20th August 1949, with the Hungarian Working People's Party in complete control of the country, a constitution based on the "Stalin" 1936 Soviet Constitution was adopted: while the constitution guaranteed certain fundamental rights, their scope was limited by provisions stating they had to be exercised in harmony with the interests of the socialist society.

In 1989, as the Communist regime crumbled, the legislature approved a thorough constitutional revision: the Constitution was heavily amended on 23 October 1989 (from “Peoples’ Republic” to “Republic”).

34 http://www.nlvk.hu/rik/leir/71.html, Közkincs, https://commons.wikimedia.org/w/index.php?curid=73298817

The Fundamental Law of Hungary[35] (in Hungarian: Magyarország Alaptörvénye), the country's constitution, was adopted on 18 April 2011, promulgated (proclaimed, annunciated) a week later on 25 April 2011 and entered into force on 1 January 2012. It is Hungary's first constitution adopted within a democratic framework and following free elections. The proper constitutional law provides for the election and the powers of the head of state, the composition and the functions of parliament, the machinery of legislation, the composition of the supreme executive organs and the nature of the executive powers, the fundamental freedoms and the judicial control of the constitutional organs and the public administration.

The Fundamental Law of Hungary [36]

CHECKING QUESTIONS:

1. What is the classic theory of Montesquieu concerning political liberty of a state?
2. What does external sovereignty mean?
3. What is the point of external sovereignty?
4. What does constitutional law regulate?
5. What are the most important stages in the development of the Hungarian Constitution?

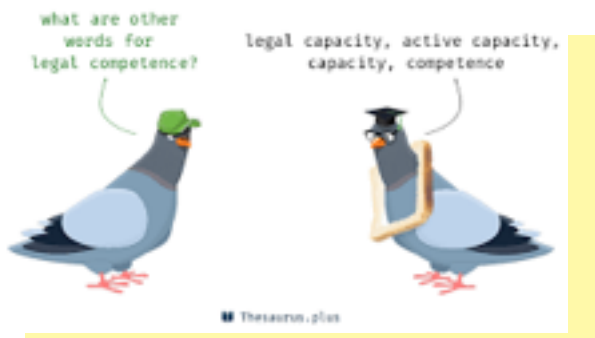
35 The Fundamental Law in English is available: https://njt.hu/translated/doc/TheFundamentalLawofHungary_20190101_FIN.pdf (Accessed: 03-12-2020)

36 http://abouthungary.hu/fundamental-law/qa-on-the-upcoming-amendment-to-hungarys-fundamental-law/ (Accessed: 03-12-2020)

UNIT 6: LEGAL COMPETENCY

– LEGAL CAPACITY AND FORMS OF REPRESENTATION

Capacity is the ability to understand the nature and effect of one's acts. Capacity is a fluid concept; an individual may have the requisite capacity in one moment and lack capacity in another. The determination to be made is whether an individual has the ability to understand the nature and effect of his/her acts in a specific moment of time.



Competence and capacity - synonyms [37]

The level of capacity needed to execute legal documents, such as a durable power of attorney, contract or will, differs upon the type of transaction, while the capacity to consent to a medical procedure is determined by the criteria of informed consent.

Legal capacity is what a human being can do within the framework of the legal system. It is a construct which has no objective reality but is a relation every legal system creates between its subjects and itself. Legal capacity gives the right to access the civil and juridical system and the legal independence to speak on one's own behalf.

37 https://thesaurus.plus/thesaurus/legal_competence (Accessed: 04-12-2020)

Legal capacity is also one of the elements of a valid contract. Capacity here thus means that a person is legally able to enter into a contract. There are several things that make a person legally able to do so, including age and state of mind.

6.1. LEGAL CAPACITY TO ENTER INTO A CONTRACT

When two people enter into a contract, six elements must be met. Those elements include:

1) There should be an agreement between the parties (offer and acceptance).

2) Intention to create legal relationship.

3) Lawful consideration (must be legal and should not be fraudulent or opposed to public policy)

4) Lawful object (the subject matter should not be illegal e.g. kidnapping or organ trafficking).

5) Capacity to contract (the parties must be are 18 years, of sound mind and should not be disqualified by law to enter into a contract).

6) Free contract (the parties must give their consent freely and it should not be obtained through force, duress or by fraud and misrepresentation)

Legal capacity means a person's legal ability to enter into a contract. It is of course different in the case of a natural person (man, woman) and in the case of legal entities. To best explain who can enter into a contract, let's use some examples of who is forbidden to enter into a contract:

6.1.1. In case of a natural person

a) Being under the age of maturity

For one, a person must be of the age of maturity, and the law sees this as age 18 or older. However, there are times when a minor can enter into a contract. This is true if the contract is for housing, food or things

necessary to sustain life or it is a small value transaction. Eg: If a young boy of 8 gets money from his mother to buy ice cream.

Is it possible? [38]

b) Mental illness

It is also necessary for the parties to be free of mental illness, like schizophrenia or other conditions that challenge a person's mental state. There is a standard that courts use to determine whether a person truly understands the promises made in a contract. One test the court may perform is a cognitive test, and this determines whether meaning was understood by the party in the areas of reasoning and understanding language. A motivational test may also be used. This test determines whether a party suffers from delusions or mania. This is an important factor because this may skew a person's ability to understand the scope of the contract.

Example: Murray suffers from bipolar disorder. When he is on medication, he is able to think and understand day-to-day events. However, when he is not medicated, his thinking becomes derailed. One fine day, Murray entered into a contract to purchase a home. The home was well beyond what he could afford. However, he did have a small nest egg (small money) in the local bank. Murray called the bank to request that the funds be transferred to the seller. A loan was taken out for the balance. Murray's family may be able to void this contract because of his state of mind. Of course, there will be testing and documentation needed to prove his mental state. If proven that Murray lacks mental capacity, the deal will dissolve.

38 https://asklegal.my/p/child-minor-sign-contract-malaysia-act-capacity-employment-marriage (Accessed: 04-12-2020)

c) Drunkenness or drug abuse

Although individuals may have consumed a sufficient quantity of intoxicant or drug to reduce or eliminate their ability to understand exactly what they are doing, such conditions are self-induced and so the law does not generally allow any defense or excuse to be raised to any actions taken while incapacitated. The most generous states do permit individuals to repudiate agreements as soon as sober, but the conditions to exercising this right are strict.

Example: In the late 19th century, Mr. Thackrah, a Utah resident and owner of $80,000 worth of mining stock, went on a three-month bender. Mr. T's fondness for alcohol was well known, and a local bank hired Mr. Haas to contract with the inebriated Thackrah. Haas did the deal, getting Thackrah to agree to accept $1,200 for his mining stock. When he sobered up (a month later), Thackrah learned that Haas had turned over the mining shares to a local bank (apparently the real culprits in the scheme). Thackrah sued Haas. The case went all the way to the U.S. Supreme Court, which ruled that the agreement was void because the bank and Hass knew that Thackrah had no idea what he was doing when he entered the contract. The bank had to return the shares to Thackrah, less the $1,200 he had already been paid.

d) Bankruptcy

When you are in a dire financial situation, sometimes there is no other choice but to file for bankruptcy. Bankruptcy is meant to give you a fresh start and teach you a lesson about financial literacy to ensure you are better with finances going forward. If individuals find themselves in such a situation, they lose their status as credit-worthy and become bankrupt. States differ on the means whereby their outstanding liabilities can be treated as discharged and on the precise extent of the limits that are placed on their capacities during this time but, after discharge, they are returned to full capacity.

In the United States, some states have spendthrift laws under which an irresponsible spender may be deemed to lack capacity to enter into contracts. In Europe, these are termed “prodigality” laws and both sets of laws may be denied extraterritorial effect under public policy as imposing a potentially penal status on the individuals affected.

Bankruptcy [39]

6.1.2. In case of a legal entity

First, the notion of "legal entity" should be explained here. A legal entity (or legal personality) can be an association, corporation, partnership, trust, or any kind of firms, that has legal standing in the eyes of law.

A legal entity has legal capacity to enter into agreements or contracts, assume obligations, incur and pay debts, sue and be sued in its own right, and to be held responsible for its actions.

The legal entity is created by registration in the register.

In case of a legal entity, its legal capacity is missing if it is insolvent (bankruptcy). When a business entity becomes insolvent (bankrupt), an administrator, receiver, or other similar legal functionaries may be appointed to determine whether the entity shall continue to trade or be sold so that the creditors may receive all or a proportion of the money owing to them. During this time, the capacity of the entity is limited so that its liabilities are not increased unreasonably and to the detriment of the existing creditors.

39 https://loanscanada.ca/debt/the-cost-of-filing-for-bankruptcy-a-second-time-in-canada/ (Accessed: 04-12-2020)

6.2. REPRESENTATION

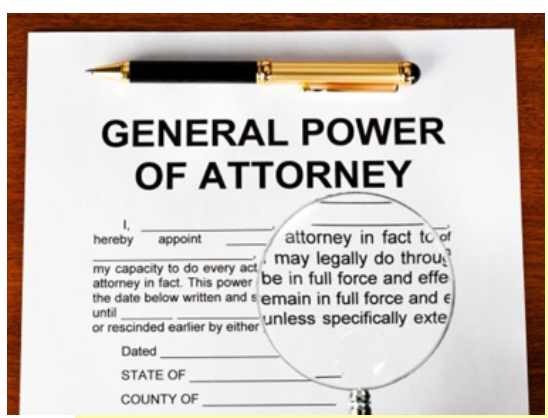
Representation is the action or fact of one person standing for another so as to have the rights and obligations of the person represented.

Forms of representation:

A) Legal: the right of the representative is based on law (= "ex lege") Eg: parents' right to represent their young children under 18.

B) Institutional: the right of the representative is based on the articles of incorporation
Eg: the right of the CEO to represent the company.

C) Contractual: the right of the representative is based on a contract Eg: power of attorney; authorization. The power of attorney can be given to any person, whom you want to act on your behalf in your absence. You authorize him to take decisions or carry out business on your behalf. While you are away on a vacation, you can grant the power of attorney to someone you trust, so that he can keep your business running smoothly.



Power of Attorney [40]

40 https://medium.com/@thefingerprinter01/affidavit-and-power-of-attorney-made-simple-90735c7a00bf (Accessed: 04-12-2020)

In case of corporations, the extent of a legal entity's capacity depends on the law of the place of incorporation and the enabling provisions included in the constitutive documents of incorporation. The general rule is that anything not included in the corporation's capacity, whether expressly or by implication, is "ultra vires", i.e. "beyond the power of authority" of the corporation, and so may be unenforceable by the corporation, but the rights and interests of innocent third parties dealing with the corporations are usually protected. Corporations are represented by their managing directors (if LLC) or CEO (chief executive officer in case of joint stock company).

In case of partnerships, there is a clear division between the approach of states. One group of states treats general and limited partnerships as aggregate. In terms of capacity, this means that they are no more than the sum of the natural persons who conduct the business. The other group of states, like Hungary from 2014, allows partnerships to have a separate legal personality which changes the capacity of the "firm" and those who conduct its business and makes such partnerships more like corporations. Partnerships are represented by their managers. In case of limited partnerships, only the general partners can be appointed to be managers.

CHECKING QUESTIONS:

1. What does legal capacity mean?
2. What is the connection between legal capacity and competency?
3. In case of natural persons who is forbidden to enter into a contract?
4. What forms of representation do You know?
5. What does a power of attorney entitle You to?

We know by now, that a legal entity (or legal personality) is a group of other persons: natural or legal. It can be an association, a corporation, a partnership, or any kind of firms, that has legal standing in the eyes of law.

A legal entity has legal capacity to enter into agreements or contracts, assume obligations, incur and pay debts, sue and be sued in its own right, and to be held responsible for its actions. The legal entity is created by registration in the register and terminated when it is deleted off it. In business law legal entities are called companies, which are registered in the company register.

States are also legal entities, and in the international legal system, various organizations possess legal personality. These include intergovernmental organizations (the United Nations, the Council of Europe) and some other international organizations (including the Sovereign Military Order of Malta, a religious order).

Even the European Union has legal personality since the Lisbon Treaty entered into force on 1 December 2009. That the EU has legal personality is a prerequisite for the EU to join the European Convention on Human Rights (ECHR).

Churches, in some legal systems, have also legal personality.

Not all organizations, however, have legal personality. For example, the board of directors of a corporation, legislature, or governmental agencies typically have no legal entity, so they have no ability to exercise legal rights independently.

If you decide to start a business, one of the most important decisions you will need to make is choosing a form of the legal entity. This decision impacts many things–from the amount of taxes you pay to how much paperwork you have to deal with and what type of personal liability you could face.

Forms of Business [41]

There are several legal forms of an enterprise – and not all of them are legal entities:

7.1. SOLE PROPRIETORSHIP

A sole proprietorship is a business owned by one person. The sole proprietorship is thus not a legal entity, as it actually is a natural person.

This is the simplest type of business to start and is the least regulated form of organization. Depending on where you live, you might be able to start a proprietorship by doing little more than getting a business license and opening your doors. For this reason, there are more proprietorships than any other types of business, and many businesses that later become large corporations start out as small proprietorships. The owner of a sole proprietorship keeps all the profits. That's the good news. The bad news is that the owner has unlimited liability for business debts. This means that creditors can look beyond business assets to the proprietor's personal assets for payment. Similarly, there is no distinction between personal and business income, so all business income is taxed as personal income.

The life of a sole proprietorship is limited to the owner's life span, and the amount of equity that can be raised is limited to the amount of the proprietor's personal wealth. This limitation often means that the business is unable to exploit new opportunities because of insufficient capital. Ownership of a sole proprietorship may be difficult to transfer because this transfer requires the sale of the entire business to a new owner.

41 https://wheelercpa.com/choosing-a-legal-entity-for-your-business/ (Accessed: 04-12-2020)

Normally, sole proprietorships are not registered by the company register, however, there are states, like Hungary, where even sole proprietorships can be registered in the company register. They are called "individual companies". The advantage to get registered is that business partners can access all important information (existing or no longer valid) that is present in the company register at the time of your request, like: corporate registration number; name of company; head office; business facility(ies); branch(es); activity(ies); issued share capital; tax number; whether bankruptcy, liquidation or final settlement proceedings have been initiated; whether a (former) executive officer or manager of a business association (in Hungary pursuant to Section 23 of Act IV of 2006 on Business Associations cannot be an executive officer or manager of another business association).

7.2. PARTNERSHIP

A partnership is similar to a proprietorship except that there are two or more owners (partners). In a general partnership, all the partners share in gains or losses, and all have unlimited liability for all partnership debts, not just some particular share. The way partnership gains (and losses) are divided is described in the partnership agreement.

In a limited partnership, one or more general partners will run the business and have unlimited liability, but there will be one or more limited partners who will not actively participate in the business. A limited partner's liability for business debts is limited to the amount that the partner contributes to the partnership.

The advantages and disadvantages of a partnership are basically the same as those of a proprietorship. Partnerships based on a relatively informal agreement are easy and inexpensive to form. There is no mandatory equity capital minimum amount this firm should start with.

General partners have unlimited liability for partnership debts, and the partnership terminates when a general partner wishes to sell out; dies without successors or when the firm is removed from the company register. All income is taxed as personal income to the partners, and the amount of equity that can be raised is limited to the partners' combined wealth.

Because a partner in a general partnership can be held responsible for all partnership debts, having a written agreement is compulsory.

Only the general partners are entitled to represent the company "ex lege", in other words, only they can be the manager of the company. Occasionally, however, limited partners can also do this with the regular written authorization of the manager. General partnerships in Hungary are legal entities from 2014.

7.3. CORPORATION

The corporation is the most important form (in terms of size) of business organization in the United States and in Hungary as well. A corporation is a legal entity separate and distinct from its owners, and it has many of the rights, duties, and privileges of an actual person.

Corporations can borrow money and own property, can sue and be sued and can enter into contracts. A corporation can even be a general partner or a limited partner in a partnership, and a corporation can own stock in another corporation.

Not surprisingly, starting a corporation is somewhat more complicated than starting the other forms of business organization. Forming a corporation involves preparing articles of incorporation (or a charter) and a set of bylaws.

The articles of incorporation must contain a number of things, including the corporation's name, its intended life (which can be forever), its business purpose, and the number of shares that can be issued. This information must normally be supplied to the state in which the firm will be incorporated. For most legal purposes, the corporation is a "resident" of that state.

In a large corporation, the stockholders and the managers are usually separate groups. The stockholders elect the board of directors, who then select the managers. Managers are charged with running the corporation's affairs in the stockholders' interests. In principle, stockholders control the corporation because they elect the directors.

As a result of the separation of ownership and management, the corporate form has several advantages. Ownership (represented by shares of stock) can be readily transferred, and the life of the corporation is therefore not limited. The corporation borrows money in its own name. As a result, the stockholders in a corporation have limited liability for corporate debts. The maximum amount they can lose is what they have invested.

The relative ease of transferring ownership, the limited liability for business debts, and the unlimited life of the business are why the corporate form is superior for raising cash. If a corporation needs new equity, for example, it can sell new shares of stock and attract new investors.

Example 1: Apple Computer was a pioneer in the personal computer business. As demand for its products exploded, Apple had to convert to the corporate form of organization to raise the capital needed to fund growth and new product development. The number of owners can be huge; larger corporations have many thousands or even millions of stockholders.

Example 2: In 2006, General Electric Corporation (better known as GE) had about 4 million stockholders and about 10 billion shares outstanding. In such cases, ownership can change continuously without affecting the continuity of the business.

The corporate form has a significant disadvantage. Because a corporation is a legal person, it must pay taxes. Moreover, money paid out to stockholders in the form of dividends is taxed again as income to those stockholders. This is double taxation, meaning that corporate profits are taxed twice: at the corporate level when they are earned and again at the personal level when they are paid out as dividends.

7.4. LLC, LTD

Law allowing for the creation of a relatively new form of business organization, the limited liability company (LLC). The goal of this entity is to operate and be taxed like a partnership but retain limited liability for owners, so an LLC is essentially a hybrid of partnership and corporation.

Although states have differing definitions for LLCs, the more important scorekeeper is the Internal Revenue Service (IRS). The IRS will consider an LLC a corporation, thereby subjecting it to double taxation, unless it meets certain specific criteria. In essence, an LLC cannot be too corporationlike, or it will be treated as one by the IRS. LLCs have become common. For example, Goldman, Sachs and Co., one of Wall Street's last remaining partnerships, decided to convert from a private partnership to an LLC (it later "went public," becoming a publicly held corporation). Large accounting firms and law firms by the score have converted to LLCs.

7.5. REQUIREMENTS FOR OPENING A HUNGARIAN COMPANY

Hungarian companies are regulated by the 2013 Act V, stated by the New Civil Code of Hungary; the shareholders' rights and obligations are regulated by the above mentioned Act.

Regardless of the type of company, there are rules applicable to all types of business associations:

1. First, a new company must prepare the Articles of Association signed by all members and notarized. The Deed of Foundation must contain the name of the company and the registered office and address, the activity object, the registered capital and the method of contributions (cash or in-kind). It should also include the authorities for signing on behalf of the company, the name and address of the supervisory board members and the auditor.

2. Secondly, the capital: the joint stock company in Hungary requires a minimum capital of HUF 5 million if it is private, and HUF 20 million if it is public. The limited liability company needs a minimum of HUF 3 million. The members of the companies have limited liability and these types of businesses are legal entities. In case of limited and unlimited partnerships, other forms of Hungarian businesses, there is no minimum capital required.

The management of the company is operated by a director or a board of directors. In case of a joint stock company, there must be a supervisory board made of non-executive directors. The supervisory board can elect and remove executive directors and fulfil other duties in the Articles of Association assigns so.

In not more than 30 days from the counter signature of the Deed of Foundation the company must apply for registration at the Company Registrar.

The following legal entities can be incorporated in Hungary:

- the limited liability company;
- the joint stock company;
- the general partnership;
- the limited partnership;
- the sole proprietorship;
- branches, representative offices.

7.5.1. The joint stock company in Hungary

The joint stock company in Hungary (Rt.) can be private (Zrt.) if its shares are not listed to the public or public (Nyrt.) if it is listed on the Stock Exchange.

An important difference between the two also lies in the minimum share capital necessary at the incorporation: 5 million HUF for the private one and 20 million HUF for the public joint stock company. This company can be opened by one or more founders and a board of directors must oversee the actions of the company.

Shareholders in a company have the same rights and obligations as long as they have the same proportion of shares of the company; those who have at least 5% of the voting rights in the company are allowed to call on a general meeting if needed (this rule is applicable for both ZRT or NYRT legal entities).

Shareholders have the following rights:

– participate at the general meetings;
– voting rights;
– receive dividends;
– ask for information related to the business.

Shareholders can take legal action against the directorate of the company, as long as the shareholders have at least 5% of the voting rights in the company.

7.5.2. The limited liability company in Hungary

The limited liability company in Hungary (Kft.) is suited for small and medium-sized businesses. Shareholders bear limited liability, according to the amount invested in the capital of the company. This legal entity requires lower incorporation costs and a minimum share capital of 3 million HUF.

7.5.3. Hungarian partnerships and sole proprietorships

Individuals who want to perform business activities together can form a general or limited partnership. The general partnership requires that all its members are jointly liable for the obligations of this business form. Like all partnerships in Hungary, it does not require a minimum share capital. The limited partnership allows only for some members to be fully liable, while others can have limited liability (according to the amount contributed to the capital, in cash or in kind).

A sole trader in Hungary is a natural person who has legal capacity but no legal personality and has registered his or her business with the Companies Register. The individual has full liability for the actions and obligations of the sole trader. This form of business may have only one member.

Investors looking to set up a company in Hungary can also incorporate a branch or a representative office. The branch is suited for foreign companies that want to open an office in Hungary and comply with the requirements for bearing full liability for the branch.

7.5.4. Branches

The regulation of the Branch Offices and Commercial Representative Offices Act CXXII of 1997 must be respected during the commercial activities carried by the branches of the foreign companies.

The main difference between a branch and a legal entity is that for all its actions the foreign company is responsible and only certain actions can be performed by branches without the approval of the parent company.

Actions like buying assets or shares from another company or branch must first receive the approval of the foreign company's representative. Parent companies must provide the necessary assets to the branches in order to perform any activities. When branches are requested to provide lists with assets, the properties of the foreign company are also included.

Every year, financial accounts of the branches established in Hungary must be deposited along with the balance sheets of the parent companies. A major advantage of opening a branch in Hungary is that is not necessary to subscribe a minimum share capital.

Before starting to operate Hungary, the company must register at the Court of Registration. Unlike local companies, foreign companies must present much more documents at registration. A dossier must be prepared and must contain the following documents:

- the standard application,
- the certificate of registration of the foreign company,
- the certificate of the share capital,
- the memorandum and the articles of association of the parent company,
- the decision of opening a branch,
- a list with the directors and the secretary, the registered address of the parent company,
- the name of the branch and its registered address,
- the name of the representative appointed with power of attorney,
- the specimen of signature for the person responsible with the branch's decisions.

7.6. THE HUNGARIAN COMPANY REGISTER

Regardless of the chosen business form, both types of companies must be registered with the Hungarian Company Register. The business register contains data on registered companies and corporate documents, which serve as the basis for registration. The data in the business register (on the companies registered therein) is managed by the courts in their capacity as courts of registration. Company information and corporate documents are stored electronically. The data of companies registered at any Hungarian court of registration are available free of charge on the website of the Service of Company Information and Electronic Company Registration of the Ministry of Justice (Company Information Service).

CHECKING QUESTIONS:

1. Are the member states of the EU legal entities?
2. List the possible legal forms of an enterprise?
3. What is the difference between a general and a limited partnership?
4. What does "limited liability" mean?
5. What is a "branch"?

UNIT 8: CONTRACTS

8.1. DEFINITION OF CONTRACTS

As usual in the law, the legal definition of "contract" is formalistic:

A contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.

A short-hand definition is: A contract is a legally enforceable promise.

Legally enforceable promise [42]

42 https://www.ledgerinsights.com/agreements-network-legal-blockchain-contracts/ (Accessed: 05-12-2020)

A contract is thus an agreement, which is enforceable by law. An agreement is the result of a proposal or an offer by one party to another and its acceptance by the other.

Example: **A** offers to sell his watch to **B** for 1000 Euros. **B** accepts the proposal.

Consideration for **A**: is the money (1000 Euros)

Consideration for **B**: is the watch.

So basically both the parties promise each other something of value to them, which implies that consideration is the price of promise.

Acceptance is made:

– either through an act of writing or verbal announcement; or
– by doing something which is required (by conduct).

Example 1: A merchant receives an order from a customer to supply some household items. The merchant delivers the goods to the customer. The acceptance, in this case, is by conduct/ or by performance of the act i.e. the act of sending the goods to the customer.

Example 2: **A** loses his dog. **A** announces a general offer of a reward of 100 Euros to anyone finding his dog. **B** finds the dog and claims the reward. He is entitled to the reward (**B** does not need to communicate his acceptance as he had accepted the offer by doing the required act).

Promising reward for a lost dog [43]

43 https://therealdeal.com/national/2019/07/13/you-find-my-missing-dog-ill-give-you-my-one-bedroom-trailer-arizona-man/ (Accessed: 05-12-2020)

Example 3: You sit on a bus going destination Budapest. Only by sitting on the seat you imply that you accept the offer of the Transport Company to take you to destination Budapest.

Consider the following:

1. **A** offers to take **B** for dinner/movie. **B** accepts.
2. **A** offers to sell **B** his car for 200,000 Euros. **B** accepts.

In the first case it is an invitation to treat and there is no intention to create a legal relationship. In the second case there is an intention to create a legal relationship i.e. duly enforceable by law in case of non-performance by the parties. If B takes delivery of the car but does not pay A, then A can take legal action against B. But in the first example it is not the case as non-performance is not enforceable by law. This is because in the first case there is no intention to create a legal relationship while it is so in the second case. Law makes a distinction between social, religious and legal obligations. From the above discussion it follows that "All contracts are agreements but not all agreements are contracts."

8.2. ESSENTIALS OF A VALID CONTRACT

8.2.1. Intention to create legal relationship: one party must offer to enter into an agreement, and the other party must accept the terms of the offer;

8.2.2 Consideration: something of value received or promised, to convince a party to agree to the deal;

8.2.3. Contractual Capacity /competent parties/: both parties must be competent to enter into the agreement. It means that they must be at least 18 years, of sound mind and should not be disqualified by law to enter into a contract;

8.2.4. Legality: the purpose of the contract must be to accomplish some goal that is legal and not against public policy. It means that the subject matter should not be illegal e.g. kidnapping or organ trafficking;

8.2.5. Genuineness of assent (arguably part of agreement): the apparent consent of both parties must be genuine. It means that the parties must give their consent freely and it should not be obtained through force, coercion, duress or by fraud and misrepresentation ;

8.2.6. Form: The agreement must be in whatever form (e.g., written, under seal, attorney, notary public, etc.) the law requires.

8.3. UNILATERAL AND BILATERAL CONTRACTS

Every contract involves at least two parties -- the offeror/ promisor, who makes the offer/promise to perform, and the offeree/promisee, to whom the offer/promise is made.

8.3.1. Unilateral Contract: A unilateral contract arises when an offer can be accepted only by the offerees' performance (example: gifting - e.g., X offers Y to give him a cow).

8.3.2. Bilateral Contract: A bilateral contract arises when a promise is given in exchange for a promise in return (e.g., X promises to deliver a car to Y, and Y promises to pay X an agreed price).

8.3. 4. OTHER TYPES

Express Contract: A contract in which the terms of the agreement are fully and explicitly stated orally or in writing.

Implied-in-Fact Contract: A contract formed in whole or in part by the conduct (as opposed to the words) of the parties.

Example: if a seller ships goods without a customer's order, the customer is not obligated to ship the goods back to the seller, or to pay for them, unless he or she takes the delivery and proceeds to use or resell them.

Quasi or Implied-in-Law Contract: An obligation that the law creates in the absence of an agreement between the parties. A fictional contract imposed on parties by a court in the interests of fairness and justice, typically to prevent the unjust enrichment of one party at the expense of the other.

Example: Assume that a homebuilder has built a house on Alicia's property. However, the homebuilder signed a contract with Bobby, who claimed to be Alicia's agent but, in fact, was not. Although there is no binding contract between Alicia and the homebuilder, most courts would allow the homebuilder to recover the cost of the services and materials from Alicia to avoid an unjust result. A court would accomplish

this by creating a fictitious agreement between the homebuilder and Alicia and holding Alicia responsible for the cost of the builder's services and materials.

8.4. FORMAL AND INFORMAL CONTRACTS

8.4.1. Formal contract

A formal contract requires a special form or method of formation (creation) in order to be enforceable. E.g:

- Contract under Seal: A formalized writing with a special seal attached.
- Recognizance: An acknowledgement in court by a person that he or she will perform some specified obligation or pay a certain sum if he or she fails to perform. Example: promise made by someone in a court of law, especially a promise to return to the court at a later date. If they break their promise, they have to pay money to the court.

Example: George is a barista in a coffee shop who has a problem with overindulging in alcohol. A few years ago he was convicted of driving under the influence, and has just been arrested again for the same offense. Other than these offenses, he is a law-abiding citizen. The judge does not believe that George needs to be detained while awaiting trial, and is considering granting release on his own recognizance. Let's help George understand what exactly this means and how it affects his release from jail. Criminal suspects may be released from custody following an arrest rather than spend time in jail awaiting trial. When this happens it is said that the suspect is released on their own recognizance. The suspect must sign a written promise to appear in court as ordered. This also means that the suspect does not have to pay bail money to the court or post a bail bond to be released from jail. Of course, if George fails to appear in court then a warrant will be issued for his arrest and now he has an additional charge against him. In some jurisdictions the county sheriff (instead of a judge at the initial trial) may release criminal suspects on their own recognizance even before an initial court appearance. This of course with the threat that a criminal warrant for arrest will be issued if the suspect fails to appear in court. The judge may place specific conditions and requirements for George until the court date in exchange for granting a release on his own recognizance./

Getting Released on Your Own Recognizance (ROR) [44]

– Negotiable Instrument: A check, note, draft, or certificate of deposit -- each of which requires certain formalities.
– Letter of Credit: An agreement to pay that is contingent upon the receipt of documents (e.g., in voices and bills of lading) evidencing receipt of and title to goods shipped.

8.4.2. Informal Contract

An informal contract that does not require a specified form or method of formation in order to be valid. The vast majority of contracts are informal).

8.5. INTERPRETATION OF A CONTRACT

Once the contract is validly concluded, the second stage of its life begins: the parties have to perform in conformity with what they promised. Fortunately, this does not pose a problem in the great majority of cases, and the parties doing what they should do will then automatically lead to the extinction of the respective obligations. However, the law also needs to provide rules for those cases in which problems arise:

44 http://www.bailforjail.com/blog/2014/04/14/getting-released-on-your-own-recognizance-know-what-ror-means (Accessed: 05-12-2020)

– it can be that the parties are in disagreement about what they actually agreed upon;
– or that a party refuses to perform because of the manifest "unfairness" of one or more of the contract terms;
– a third problem arises when the contents of the contract are considered as illegal or immoral by the state.

The law shares with literature and theology the characteristic that it is an interpretative discipline: legislative statutes, governmental decisions, treaties, and written contracts may be unclear and therefore have to be interpreted. In contract law, this interpretation often takes place implicitly, even without the parties realizing it. However, it may also happen that parties differ explicitly about what they actually agreed upon.

Example: If Newcom Ltd agrees that its customer Agri Gmbh is allowed to "give back" the machine it purchased within 3 months after delivery, it could well be that Newcom intended Agri to be allowed to terminate the contract only in the event of a defect with the machine, while Agri understood the term as allowing it to simply end the contract at its own will. This raises the question of how the contract should be interpreted.

Interpretation of contracts can take place starting from two fundamentally different positions:

A) One view is to give preference to the intention of the promisor: since the words she used are only the expression of her intention, it is the intention that should prevail.

B) The opposite view is to give priority to the declaration and therefore to the external expression of the intention, this being the only thing that is apparent to the other party.

The tension between giving priority to the party's (subjective) intention and to its (objective) declaration is clearly visible in the great codifications of private law.

8.5.1. The „Reasonable Person"

All European jurisdictions adopt a compromise between attaching importance to intention and declaration. As a general principle, interpretation is aimed at ascertaining the meaning that the text would convey to a „reasonable person" having all the knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract. The contract is thus interpreted in the way in which a reasonable person would understand it.

"Reasonable person" [45]

Civil law and common law reach this result from two different perspectives:

A) In civil law countries, the subjective intention of the parties is the starting point: in case of a dispute the meaning that a reasonable man in the position of the party would give to this intention is decisive.

B) In English common law, it is rather the objective meaning of the words of the contract that is given preference, although this is also mitigated by what is reasonable. This is reflected in Art. 5:101 PECL (= The Principles on European Contract Law: [46]

"(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.
(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.
(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."

8.5.2. Unfairness of Contract Terms

45 https://medium.com/@nicolawright/who-is-a-reasonable-person-anyway-4d5118d2adfc (Accessed: 05-12-2020)
46 https://www.trans-lex.org/400200/_/pecl/) (Accessed: 05-12-2020)

8.5.2.1. Fairness and Reasonableness

An eternal question of contract law is whether only "fair" contracts should be enforced. Until well into the nineteenth century, an important strand of thought was that without some equivalence among the performance and counter-performance, a contract of sale would not be valid. Indeed, this prohibition of „laesio enormis" (violation in normality) can still be found in various European codifications, including Art. 934 of the Austrian Allgemeines Bu¨rgerliches Gesetzbuch (ABGB) of 1812, allowing a party to invalidate a sale for less than half of the value if it did not explicitly agree with it at the time of conclusion of the contract. This means that if a party did not know the true value of the good, it is allowed to ask for the good back.

8.5.2.2. Fraud and Mistake

It is a mistake if a party contracts under an incorrect assumption: it can be under the impression that it buys a second-hand car in excellent shape, although it is in reality a death trap. While it is clear that this affects the proper formation of the party's intention to buy, it is less clear what this should lead to. The law has to find a balance between the duty of the buyer to investigate for himself what shape the car is in and the duty of the seller to inform the prospective buyer about possible defects. Each jurisdiction balances these interests in a different way.

8.5.2.3. "General conditions"

Many professional parties make use of general conditions. This poses a problem for the fairness of consumer contracts in particular. In practice, consumers that are confronted with these standard contracts cannot influence their contents (assuming they are able to understand them at all) and have to decide either to accept the general conditions or to not enter into the contract at all. Here, too, it is possible for the law to intervene on the basis of deficiencies in the formation of the contract, holding that—as Lord Bingham stated in the English decision of Director General of Fair Trading v. First National Bank (2001):

> ***„ in a case about consumer credit—the contract terms "should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. (. . .) Fair dealing requires that a supplier should not (. . .) take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position (. . .)."***

However, practice shows that safeguarding procedural fairness may not be enough, particularly in the case of standard form contracts. Preceded by statutes in many individual Member States, the European legislature therefore issued Directive 93/13 on unfair terms in consumer contracts, allowing courts to hold a standard clause in a contract invalid ***"if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract."***

General conditions of Purchase, EFTEC[47]

This test of substantive fairness invites the court to consider the actual contents of the contract, even if its formation did meet the necessary standard. While testing the substantive fairness of general conditions is now daily practice in the national courts of the European Union, this is different for the part of the agreement that the parties explicitly discussed.

Example: If Rafael is unequivocally clear about his intention to sell his Ferrari to Roger for only a tenth of its actual value but subsequently realizes that he has entered into a disadvantageous agreement, he cannot go back on his promise arguing that this contract is manifestly unjust.

The notion of good faith (fairness and reasonableness) referred to in Directive 93/13 is well known in civil law countries, even to such an extent that it is often remarked as the "queen of rules." The English judge Lord Bingham excels in describing the principle:

47 https://www.eftec.ch/fileadmin/ems-gruppe/documents/AGB/EMS-EFTEC/EFTEC__Elabuga__OOO__Russia/General_conditions_of_Purchase_EFEL__English_.pdf (Accesssed: 05-12-2020)

> ***"In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing (. . .)."***

This fair and open dealing implies that parties have to take into account each other's legitimate interests, not only in interpreting the contract (which should take place in a reasonable way), but also in supplementing the party agreement with duties to give information to, and cooperate with, the other party.

In countries like Germany (242 BGB) and the Netherlands (Art. 6:248 s. 2 BW), the principle is even used to limit the exercise of contractual rights, namely where it would be grossly unfair to invoke a contractual provision.

8.5.2.4. Prohibited contracts

Despite the prevalence of the principle of freedom of contract, parties are not free to enter into any contract whatever its contents. Every legal system places limits on the freedom of contracting parties by declaring contracts void if they are contrary to law, public order, or morality.

Example: If Tom were to sell nuclear arms to a terrorist group or if Jens were to agree to act as a hired assassin in return for a sum of money wired to his Swiss bank account, not many would doubt that these contracts interfere with the public interest and should not be enforced.

The same is true for agreements among companies to divide the market among themselves and to refrain from competition in a cartel. [48]

Example: If I were to buy a knife in a nearby supermarket with the aim of killing my neighbor, it is not likely that I will tell the seller about this motive. But if the other party should reasonably know about my intentions, one can argue that this contract should be void as well.

48 A cartel is a group of independent market participants who collude with each other in order to improve their profits and dominate the market. Cartels are usually associations in the same sphere of business, and thus an alliance of rivals. Most jurisdictions consider it anti-competitive behavior.

Another type of case is where sensible persons would doubt the extent to which the contract violates public order or morality. This is, in particular, problematic if one would like to base one's decision on a notion of shared European values, as Art. 15:101 PECL suggests. This provision states that ***"A contract is of no effect to the extent that it is contrary to principles recognized as fundamental in the laws of the Member States of the European Union."***

But even within one country, views can differ on what should be recognized as fundamental.

Example: Does it violate human dignity if Manuel, who is 25 years old and 114 cm tall, is employed in a discotheque by allowing himself to be thrown short distances onto an airbed by clients (so-called "dwarf-tossing")? This is a question of balancing the personal freedom of Manuel to work in the way he chooses with the responsibility of the State to guard people against themselves. The court may have a difficult job in deciding what national public morality has to say in this respect.

8.6. REMEDIES OF THE PARTIES

If the contract is validly concluded and if it is clear what the (valid) contents of the contract are, a third question arises: what if the other party does not perform the contract?

This nonperformance could be because:

a) the other party is not performing at all, or
b) is performing too late (delay), or
c) is performing in the wrong way (defective performance).

Breach of the contract [49]

Every jurisdiction has an elaborate set of rules on the remedies that a party can claim in the event of such a breach of contract. These include the action:

– or performance,
– for damages,
– for the termination of the contract

It seems to follow from the principle of the "binding force" of contract that if a party does not perform, it can be forced to do so by a court of law. This is indeed the position of all civil law jurisdictions. In countries like Hungary, Germany, France, and Poland, the claim for performance is seen as the natural remedy that follows automatically from the fact that a valid contract exists. And if a party does not abide by the court decision to perform, it can be forced to do so by an official (Gerichtsvollzieher, huissier, deurwaarder or bailiff) who would take the goods or the money from the defaulting party and give it to the creditor. However, this main rule cannot always be applied.

Example 1: If the computer that Sarah sold to Lena is stolen from Sarah before delivery is due, it does not make much sense for Lena to claim performance. Such a case of „objective impossibility" also exists if performance is only useful if it takes place before a fixed date.

49 https://www.etsvision.com/resources/blog/breach-of-contract-what-happens-next/ (Accessed: 05-12-2020)

Example 2: If Christa is to marry on 8 August, it would be futile to claim performance from the manufacturer of the wedding dress on any later date.

In addition to these cases of objective impossibility, it can happen that performance is still possible but would cause the debtor unreasonable effort or expense.

A final situation in which a claim cannot be brought is where performance requires specific personal qualities of the debtor, or as Art. 9:102 PECL states: ***"the performance consists in the provision of services or work of a personal character or depends on a personal relationship."***

Example: A music company cannot force Coldplay to make a record to the best of its artistic ability, and the organizers of the Zurich Grand Prix cannot make an athlete run.

Coldplay: A Head Full Of Dreams (Photo: Corvin Movie) [50]

This does not mean that contracts with artists or sportspeople do not contain provisions to this effect, but they only allow the other party to bring a claim for damages or termination in case of breach of the contract. It is clear why a court in these cases would not allow a claim for performance: not only would this turn the debtor into some sort of slave, but it is also difficult to believe that an unwilling debtor will in fact perform to the best of its abilities when being forced to do so.

50 https://welovebudapest.com/program/coldplay-a-head-full-of-dreams (Accessed: 05-12-2020)

Voidable Contracts: are enforceable by law but the parties have the right to avoid it. Such as in a case where consent is obtained through fraud, such a contract will remain a valid contract until the offended party cancels the contract.

Void Contract: contracts, which are valid but later on became void. This can be due to impossibility, destruction of subject matters, illegality etc.

8.7. THE ROLE OF CONTRACT IN SOCIETY

Contract is probably the most familiar legal concept in our society because it is so central to a deeply held conviction about the essence of our political, economic, and social life. In common parlance, the term is used interchangeably with agreement, bargain, undertaking, or deal; but whatever the word, it embodies our notion of freedom to pursue our own lives together with others. Contract is central because it is the means by which a free society orders what would otherwise be anarchy. So commonplace is the concept of contract—and our freedom to make contracts with each other—that it is difficult to imagine a time when contracts were rare, an age when people's everyday associations with one another were not freely determined. Yet in historical terms, it was not so long ago that contracts were rare, entered into if at all by very few. In "primitive" societies and in the medieval Europe from which our institutions sprang, the relationships among people were largely fixed; traditions spelled out duties that each person owed to family, tribe, or manor.

Contract law from an economic point of view:

1.) helps to maintain firms and individuals to exchange goods and services efficiently;

2.) reduces the costs of economic transactions because its very existence means that the parties need not go to the trouble of negotiating a variety of rules and terms already spelled out;

3.) warns the parties of the trouble spots that have arisen in the past, thus making it easier to plan the transactions more intelligently and avoid potential risks.

CHECKING QUESTIONS:

1. What is a contract?
2. What are the essentials of a valid contract?
3. What is the difference between formal and informal contracts?
4. What does "reasonable person" mean in contract law?
5. What are the "general conditions"?
   How is the notion of "good faith" related to them?

UNIT 9: INTRODUCTION TO CRIMINAL LAW

9.1. INTRODUCTION: THE NATURE AND FUNCTION OF CRIMINAL LAW

Case:

John B. has recently lost his job as a civil servant. He embezzled money from his employer, the municipality, which his rival Markus M. had reported to B's superiors. Disgruntled and desperate for revenge John decides to kill M. He buys a cake from a local bakery to which he adds a large dose of arsenic and subsequently sends it by post to Mr M's house, where M. lives together with his wife. As Mr M. is not at home on the day the cake is delivered, Mrs M. gladly accepts the parcel. Although the parcel is addressed to her husband, Mrs M cannot resist the temptation and cuts herself a nice piece of cake. She dies that very evening from arsenic poisoning.

Under extreme media pressure, the police engage in a swift investigation. They carry out a forensic analysis of the dead body, question Mr M and all the family relatives, and thoroughly search their houses. Having found out that M's wife had a love affair with a neighbour, the police place M in custody for murder. The arrest receives large media coverage, with the police being praised for having discovered the culprit so swiftly. A few days later John B. voluntarily goes to the police claiming that he might have information on how M killed his wife. He narrates that a few weeks before the lethal incident he had a chat at the office with M during a coffee break about how he had managed to kill the mice infesting his house by using poison. On that occasion M had asked him to provide him with some of that poison because he shared the same problem. M. is brought to trial on the charge of murder, where he is acquitted.

The cross-examination of John B. by M's counsel, combined with the depositions of the local baker and of some employees of the municipality proved crucial. A month later John B. is taken to trial and convicted for murder.

Crime and criminal law arguably constitute omnipresent topics in our society. Literature, newspapers, and television programs are full of examples of the one above, which seem to fascinate and appal us at the same time. Likewise, issues of criminal law and criminal policy often feature prominently in political discussions and election campaigns. Citizens demand security from their governments, and criminal law seems one suitable tool for the task of providing it.

Is it difficult to judge? [51]

Criminal Law stands between the sword and the shield. In light of the foregoing, it becomes apparent that criminal law has two functions that require delicate balancing. On one hand, it is a tool to maintain public order and control deviant social behavior; on the other hand, its function is to canalize and circumscribe the application of coercive measures and punishment in legally determined channels that respect basic human rights.

In other words, criminal law lays down rules under which the state can exercise its powers and thereby protects the citizen from arbitrary and disproportional state measures. Thus, criminal law functions, on one hand, as a tool of the state against its citizens to control deviant behavior and, on the other hand, as a tool of the citizens against repressive state powers. In other words, criminal law has both a crime control function (sword) and a safeguard function (shield) in our democratic society.

51 https://www.stanlaw.com.au/how-can-a-lawyer-help-me-in-criminal-law/ (Accessed: 06-12-2020)

9.2. WHICH CONDUCT OUGHT TO BE CRIMINAL? THE CRIMINALIZATION DEBATE

Criminal law is a mechanism for the preservation of social order. A fundamental preliminary question in this connection is as follows: which forms of conduct should rightly be dealt with by means of criminal law?

To criminalize a certain kind of conduct is to declare that it amounts to a public wrong and that therefore it ought to be avoided. To provide a pragmatic incentive to adhere to its rules, criminal law uses public censure and punishment as a sanction to rule violations. The consequences of violating criminal norms are so onerous and severe for citizens that the decision to criminalize conduct should never be taken lightly and should always require the careful consideration of a variety of competing interests and factors. Failure to do so not only may lead to overcriminalization—it is, for instance, now a criminal offense in the Netherlands for a person under 18 to possess or consume alcoholic beverages in public places – but also may create an oppressive criminal justice system.

9.2.1. Theories of legal punishment

Since punishment involves pain or deprivation of some fundamental rights (e.g., freedom), its intentional imposition by the state requires justification: what could justify a state in using criminal law to inflict burdensome sanctions upon its citizens when they violate certain legal rules? Due to its inherent painful character and far-reaching impact, punishment requires a solid legitimization. In the philosophical and political debate, one may distinguish two main types of theories of punishment: utilitarian and retributive.

9.2.1.1. UTILITARIAN

According to Jeremy Bentham's[52] classical utilitarianism, laws should be used to maximize the happiness of society. This means that punishment can only be justified if the harm that it prevents outweighs the harm it creates through punishing the offender.

52 Jeremy Bentham (1748 – 1832) English philosopher, lawyer, and social reformer. More: Sweet, William (n.d.). "Bentham, Jeremy". Internet Encyclopedia of Philosophy (Accessed: 06-12-2020)

Jeremy Bentham [53]

Deterrence: a major utilitarian rationale for punishment is individual deterrence and general deterrence.

Individual or specific deterrence: punishes an offender in order to prevent the same person from reoffending.

General deterrence: uses the threat or example of punishment to discourage other people from committing crimes. Eg: most European systems have significantly increased the penalties for driving under the influence of alcohol in order to deter citizens from drunk driving

Rehabilitation: another utilitarian rationale for punishment is rehabilitation. The object of rehabilitation is to prevent future crime by giving offenders the necessary treatment and training that enable them to return to society as law-abiding members of the community E.g: programs that will teach prison inmates how to control their crime-producing urges, like the tendency to abuse drugs or alcohol or to commit sex crimes.

9.2.1.2. RETRIBUTE THEORIES

According to retributive theories, offenders are punished for their crimes because they deserve punishment. One of the best known ancient forms of retributive thinking can be found in the ***"lex talionis" of Biblical times: "an eye for an eye, a tooth for a tooth, and a life for a life".*** [54]

53 https://iep.utm.edu/bentham/(Accessed: 06-12-2020)

54 The principle is found in Babylonian Law, in Hammurabi, Code of 1780 BC.

The bright side of lex talionis [55]

9.3. THE STRUCTURE OF A CRIME

Although penal laws differ greatly from country to country, it is nevertheless possible to discover on a doctrinal level some striking similarities among different criminal justice systems.
It seems, for instance, to be a general principle of law that the attribution of liability generally requires an analysis of two aspects: each crime can be split into

A) actus reus, the objective element of a crime, and
B) mens rea, the mental or subjective element of the crime.

The offense of murder is, for instance, often defined as the intentional killing of another human being. In this case, the actus reus consists of killing another person, while the mens rea element of this offense requires that the perpetrator did so intentionally.

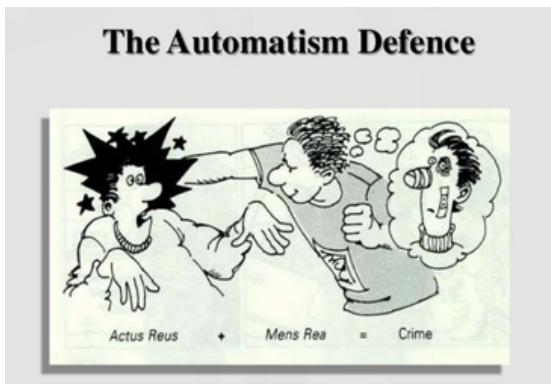
In our opening case, it seems clear that the actus reus requirement of murder has been fulfilled as Mrs. M. has been killed by the poisoned cake. But how about the mens rea requirement? Did the defendant really intend to kill Mrs. M.?

55 White, Mark D. (2010): The bright side of lext talionis. https://www.economicsandethics.org/2010/12/the-bright-side-of-lex-talionis.html (Accessed: 06-12-2020)

This seems more difficult to establish, but as we will discover later on, it all depends on how intention is defined in a legal system. In any case, in order to be liable for murder, a perpetrator needs to fulfil both the mens rea and the actus reus requirements.

This legal demand often finds expression in the famous Latin phrase ***"actus non facit reum nisi mens sit rea",*** which can loosely be translated as ***"an act does not make a man guilty unless his mind is (also) guilty."***

This important dichotomy in criminal law arguably stems from the distinction between the objective or tangible side of a person's conduct, which is susceptible to objective assessment, and the intangible, subjective side of a person's conduct, i.e. his state of mind, which is not.



The automatism defence [56]

Furthermore, as modern criminal law has its roots in the tradition of the Enlightenment, the very effort to distinguish between objective and subjective elements of criminality rests on the old Cartesian conception that human beings consist of two separate elements, i.e. mind and body.

In order to be held criminally liable, the elements generally need to be present simultaneously, as a person cannot be held liable in a liberal society for a conduct that he did not intend and at most contemplated (thoughts are free). This basic distinction between actus reus and mens rea is however not a hard and fast one, and it should be kept in mind that the two notions are best viewed as conceptual tools under the umbrella of which a multitude of different doctrines are pigeonholed.

56 https://quizlet.com/365849211/criminal-law-2-flash-cards/ (Accessed: 06-12-2020)

Under the heading of mens rea, for instance, the different gradations of intention, recklessness ("Latin: luxuria"), and negligence (Latin: "negligentia") are frequently discussed. The actus reus element, on the other hand, is generally considered to include the doctrine of conduct, including omissions, as well as the doctrine of causation.

9.4. THE TRIPARTITE STRUCTURE OF CRIME

Many civil law systems, such as those of Germany, the Netherlands, and also Hungary, have developed an entirely different framework for assessing criminal liability. According to the there prevalent tripartite structure of crime, the assessment of criminal liability takes place in three stages:

1. in stage one, it needs to be assessed whether or not the legal elements of the statutory offense definition (i.e., actus reus and mens rea) have been fulfilled.
2. in the second stage, the wrongfulness (Rechtswidrigkeit) of the conduct in question is assessed,
3. while the third stage is devoted to assessing the blameworthiness of the defendant (Schuld).

Thus, the issues in the tripartite framework of criminal liability line up in the following way:

1. Fulfillment of offense definition (actus reus and mens rea),
2. Wrongdoing ➔ the criminal code describes the act as a crime,
3. Blameworthiness ➔ punishable because he is not a child or mentally ill.

9.5. CRIMINAL OMISSIONS: LIABILITY IN THE ABSENCE OF ACTION

Think, for instance, of a mother who omits to feed her child, leading to his starvation. It seems clear that criminal censure would be in order here, but adhering to a definition of action as "willed bodily movement" would imply that no liability can arise in the case of inaction.

9.5.1. Intention

Intention (or dolus in Latin) is considered the most serious kind of mens rea in all legal systems. Intention consists of knowing and wanting. Accordingly, the elements of intention can be distinguished in a cognitive part, on one hand, and a volitional part, on the other. Both elements are required, but depending on which of those aspects dominates, we can distinguish two main forms of intention:

A) direct intent (dolus directus) and
B) indirect intent (dolus indirectus)

Intention [57]

A) Direct Intent

This form of intent is characterized by a strong volitional element, where the consequence of an intention is actually desired. It is what we would consider to be intentional conduct in an everyday meaning.
Example: John shoots at Mike with a firearm because he wants to kill Mike. Whether he succeeds or not— John may happen to be a poor shooter, or the shot may not be lethal— John desires the death of Mike and is therefore acting with direct intent. The focus is on the will of the agent to bring about a certain result. And if Mike would, as a matter of fact, survive his wounds, John would still be liable for an attempt to homicide.

57 Zapiro on Twitter: "16 Sep 2014:The Times: Zapiro cartoon on legal reasoning Oscar Pistorius verdict Dolus Directus, Evantualis, Mens Rea http://t.co/WIwXvd2fSi" twitter.com (Accessed: 06-12-2020)

B) Indirect Intent

By contrast, indirect intent is characterized by a strong cognitive aspect and exists where the agent knows his conduct will almost certainly bring about the result, which he does not actually desire or primarily aim at.

E.g.: John burns down his villa in order to collect the insurance money for the building, while knowing that his 90 year old grandmother is still upstairs sleeping in her bedroom. John may not actually want the death of his grandmother—it is not his purpose to kill her—but her death is nevertheless an almost certain side-effect of his actions. Therefore, John directly intends the arson and indirectly intends to kill his grandmother.

9.5.2. Indirect Conditional Intent versus Recklessness

The most problematic question regarding the required mens rea is what we should do with those actors who did not want the result or where it cannot be proven that they knew their conduct would almost certainly bring about the result.

E.g.: Imagine that John gets involved in a bar fight and in the heat of the moment hits Mike several times on the head with an empty beer bottle. Mike loses consciousness and a few hours later he dies from his injuries. What should we do with John, accused of manslaughter, who argues that he did not want to kill, but merely to injure the victim?

In such a case there can be no criminal liability based on direct or indirect intent. Neither would negligence really define John's actual state of mind, which is rather a case of taking a serious risk that the victim will die (as a consequence of being hit with a bottle) than mere carelessness. An adequate protection of legal interests against dangerous risk taking demands an additional subjective element in between negligence and (in)direct intention.

Most continental legal systems have solved this problem by distinguishing a third type of intention next to direct and indirect intent, called C) conditional intent (dolus eventualis). Conditional Intent: This form of intent can be defined as the conscious acceptance of a possible risk. Dolus eventualis is thus said to consist of:

1) a cognitive element of awareness of a risk, and
2) a volitional element of accepting the possibility that this risk would materialize.

This lowest form of intention differs considerably in culpability in comparison to the other two forms, as the agent only knows about a risk that may materialize but takes this risk for granted and acts anyway.

Think again of the case described in the introduction. Although John is, in the end, unsuccessful, his direct intent is definitely to kill Markus M. He does not want the death of the actual victim, Mrs. M., neither does he know that it is almost certain that she would eat and die from the poisoned cake. Nevertheless, he is aware of the risk and accepts the possible but undesired consequence of Mrs. M's death.

Recklessness in common law systems, such as the English system, do not know the concept of conditional intent. They tend to apply a separate mens rea requirement for risk taking, in between intent and negligence, called recklessness. Recklessness denotes the conscious taking of an unjustified risk.

An important difference between conditional intent and recklessness is that the latter does not require the volitional element of acceptance. It only needs to be proven that the defendant was aware of a risk, which is, in the circumstances known to him, unreasonable to take. Whereas conditional intent focuses on the attitude of the defendant (accepting the risk or taking it for granted), recklessness focuses on what he knew, his awareness. Cases of risk taking that would not lead in continental legal systems to a liability based on conditional intent could therefore lead to reckless liability in England.

E.g.: Two construction workers dig a hole and fail to take appropriate safety measures. If they omit to do this while believing that no one would fall in the pit and someone gets injured anyways, this could in England be considered reckless behavior. However, in Hungary, Germany or the Netherlands, this bad risk taxation can hardly be defined as conditional intent.

What is lacking here is the volitional element of dolus eventualis, i.e. the acceptance of the risk. In other words, only if they had reconciled themselves with the risk that someone could get hurt—instead of just believing nothing bad would happen— would there be conditional intent. Now, according to Hungarian, Dutch and German laws, this is only a form of negligence.

9.5.3. Negligence

Negligence (Latin: culpa) is the most normative form of mens rea and is primarily based on a violation of the required duty of care that causes a result prohibited by criminal law. Negligence may be expressed in many different ways. The use of terms as "carelessness" and "lack of due care" or "lack of reasonable care" indicate that negligence is required as a condition for criminal liability. Most continental legal systems

distinguish between conscious and unconscious deviation from the required duty of care.

A) When the agent wrongfully does not consider the consequences of his conduct, this is called unconscious negligence. The agent is not conscious of a risk, but he should and could have been aware of it.

E.g.: The offender's undertaking an activity requiring a level of knowledge in excess of his or her own knowledge (if one undertakes to fly a motor-powered airplane, but before he only drove a glider; if one throws a banana peel on the street);

If you throw a banana peel on the street… [58]

B) By contrast, when the agent is aware of a risk but assumes that the result will not occur, this is called conscious negligence.

E.g.: A circus artist who has been looking for his bread with a knife toss for twenty years in every performance can trust that he will not find his partner. Once he does, he is not criminally liable for negligence. If, on the other hand, the head of the family returning home from the circus tries the stunt on his wife at home, he is obviously unfounded in his belief in the absence of serious injury, as there was no basis for it, so in case of injury or death, he is responsible for conscious negligence.

58 https://www.lawyersandsettlements.com/lawsuit/negligence.html (Accessed: 06-12-2020)

CHECKING QUESTIONS:

1. What is deterrence? What forms of deterrence do You know?
2. What is the main difference between actus reus and mens rea?
3. What is the difference between direct and indirect intent? Give examples!
4. What happens if somebody wrongfully does not consider the consequences of his conduct?
5. What was John B.'s actual state of mind in the case?

UNIT 10: INTERNATIONAL LAW AND EU LAW

10.1. SOVEREIGNTY

During the late Middle Ages and the centuries immediately following, two developments took place in Europe that led to the constitutional phenomenon of sovereignty. One development was that the power struggle between state and church was won by the state. In one territory, there would only be one supreme power: the power of the state. The phenomenon that a territory has one highest power is called "internal sovereignty."

The other development was that Europe was subdivided into independent countries. These countries were taken to be their own bosses and interference from other countries was not allowed. One state should not interfere with the "internal affairs" of another state.

States would be "sovereign," here in the sense of "external sovereignty," according to which states do not depend on each other in a political sense.

This combination of internal and external sovereignty lies at the heart of the "Westphalian duo". Political scientists have traced the concept to the Peace of Westphalia (1648)[59], which ended the Thirty Years' War.

59 On 24 October 1648, the peace treaty of Westphalia was signed in Münster, marking the end of the Thirty Years' War. The war or series of connected wars began in 1618, when the Austrian Habsburgs tried to impose Roman Catholicism on their Protestant subjects in Bohemia. It pitted Protestant against Catholic, the Holy Roman Empire against France, the German princes and princelings against the emperor and each other, and France against the Habsburgs of Spain. The Swedes, the Danes, the Poles, the Russians, the Dutch and the Swiss were all dragged in or dived in. Commercial interests and rivalries played a part, as did religion and power politics. More: https://www.historytoday.com/archive/months-past/treaty-westphalia (Accessed: 07-12-2020)

Peace of Westphalia[60]
The Swearing of the Oath of Ratification of the Treaty of Münster, oil on copper by Gerard Terborch, 1648, depicting the settlement of the Peace of Westphalia.
Photos.com/Thinkstock

The principle of non-interference was further developed in the 18th century. The Westphalian system reached its peak in the 19th and 20th centuries, but it has faced recent challenges from advocates of humanitarian intervention. This is the theory that there are two kinds of law, each defined by the kind of actors for which the law is meant, the "addressees" of the law.

After World War II, several developments took place, developments that meant that the Westphalian duo had to give up its claim to exhaust the kinds of law, even in the Western world. These developments include (but this is not an exhaustive list):

– the rise of human rights,
– the creation and development of the European Union, and
– the revival of the Lex Mercatoria.

According to the theory above, on one hand, there is national law, which addresses the inhabitants and nationals of a particular country.

60 https://www.britannica.com/event/Peace-of-Westphalia (Accessed: 07-12-2020)

Because internal sovereignty means that the state is the single highest authority in a particular territory, it is up to the state to determine the contents of this law, either by making it in the form of legislation or case law or by not abolishing it by means of legislation. On the other hand, there is international public law, which addresses states and regulates the relations between them.

In this picture of two kinds of law, international law cannot have an institution that takes the role of the state in national law because states are externally sovereign. So it is not merely a matter of fact that there is no international legislator or an international judiciary. According to this Westphalian picture, it is impossible to be otherwise.

An international counterpart of the legislature and the judiciary of national states would only be possible if states would give up their external sovereignty and thereby overthrow the Westphalian constitutional model, which took centuries to develop and which has lasted for centuries. And yet, this issue is presently at stake.

10.2. LAW FROM INTERNATIONAL OR EU ORIGIN

There are two kinds of law —international public law, which addresses states, and national law, which addresses citizens (and organizations)— the question arises as to how the two relate to each other. In theory, the answer to this question should be easy. Since public international law addresses only states while national law only addresses nationals, both kinds of laws would have their own addressees and interference or conflicts would not be possible. In practice, it is not that simple.

There are forms of international law that indirectly affect nationals, such as human rights law and EU directives. If a state undertakes an obligation towards other states to protect human rights, is it then possible for citizens of that state to invoke these human rights for national courts? If an EU member state has not yet implemented a directive, is it then possible to invoke this directive before a national court as if it were implemented?

Flags of the member states in front of the European Parliament[61]

These questions are traditionally labeled as dealing with the "direct effect" of international or —for that matter— EU law. The usual answer to them is that under certain circumstances, international regulations can be invoked by citizens for national courts. There is less agreement about the reason why this is possible.

From one perspective, the distinction between international law and national law is strict. Citizens of a country can only invoke national laws, and the judiciary of a country only has to apply national law. However, law that was originally of an international nature can become part of the national law, and then citizens can invoke it and courts will have to apply it.

If, however, this approach to international law is adopted, a new question arises: how can law with an international origin become national law? Several answers are possible – depending on the decision of states. In Hungary, law with an international origin can only become national law if it is explicitly "transformed" into national law by means of legislation. In the Netherlands, however, law with an international origin to which the Dutch state is bound "automatically" becomes part of the national legal system.

Another perspective was propagated by the Austrian philosopher of law Hans Kelsen [62], namely that the world has only one law, with local variations.

61 https://europeanconstitution.eu/ (Accessed: 07-12-2020)

62 Hans Kelsen (1881-1973) Austrian lawyer, legal philosopher and political philosopher. He was the author of the 1920 Austrian Constitution, which to a very large degree is still valid today. See more: Kelsen, Hans (1955), "Foundations of Democracy", Ethics, 66(1/2) (1): 1–101, doi:10.1086/291036

10.3. HUMAN RIGHTS [63]

Traditionally, human rights were conceived as rights of individuals against their governments. These are part of the national law of states and were safeguarded in national constitutions. Ironically, the responsibility of national states to protect human rights is meant to protect citizens against the national states themselves.

The scope of these human rights was determined by national judges, who had to decide in particular cases on whether a state had violated a human right. After World War II, human rights came to be protected under treaties. Some of the most important ones have been created under the aegis of the United Nations.

Examples of treaties with a world-wide scope are the:

– International Covenant on Civil and Political Rights, and the
– International Covenant on Economic, Social and Cultural Rights (both 1966)

The Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in 1948, is very important. It is not a treaty properly speaking, as it was not created by an agreement between states.

In Europe, the European Convention on Human Rights (1953) has also been an influential source of human rights.

Because human rights were proclaimed and protected by international treaties, they no longer belonged exclusively to the domain of national law. Although states can theoretically withdraw from treaties, in practice this is often not a viable option.

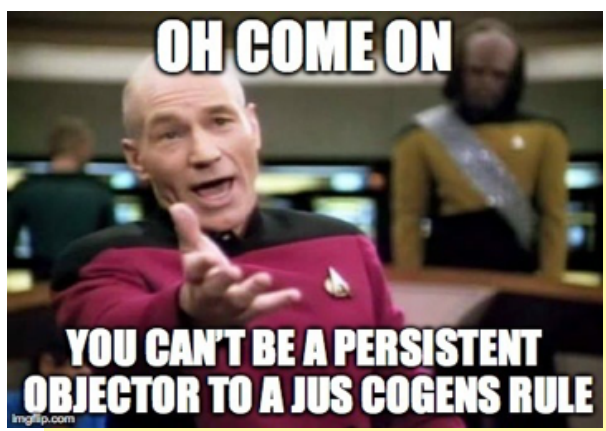
States that have committed themselves to the protection of human rights have undertaken commitments towards their citizens who are, to a large extent, outside their control. This phenomenon is even enforced if the application and interpretation of the treaties are assigned to judicial bodies that are beyond the power of national states. An example of such a body is the European Court of Human Rights, which can deliver rulings that interpret the application of the European Convention on Human Rights, and this is binding on states.

63 See also: Unit 4.

So while states can still determine to which human rights they bind themselves by means of treaties, the scope of these rights is often determined by independent courts. In this way, ***states have lost control over part of the law that is binding on their territories and which also binds them.***

10.4. IUS COGENS

This loss of control goes even further when it is assumed that states can also be bound by human rights to which they did not consent in the first place. This is the case if human rights are part of what is known as the ius cogens, a set of peremptory (= unconditional, absolute) norms of international law that are accepted and recognized by the international community of states as norms from which no derogation is permitted. Prohibitions on torture and genocide and fundamental rules of humanitarian law have been recognized as human rights that are described as ius cogens.



Ius cogens in a meme [64]

A norm is said to be peremptory if it is binding and cannot be set aside by another norm. This means that peremptory norms prevail if there is a conflict of norms.

As these examples illustrate, the field of human rights has freed itself, to some extent, from the control of national states and states are, in modern times, bound by legal norms that they cannot control.

64 https://memecogens.tumblr.com/post/80796936435/jus-cogens-this-comes-from-norway (Accessed: 07-12-2020)

10.5. EUROPEAN UNION LAW

In the treaties that created the European Union (EU), the institutions of the European Union have been given powers to make new European legal rules.
In two famous decisions (Van Gend & Loos and Costa/ENEL), the Court of Justice of the European Union decided that these European legal rules belong to a separate and autonomous legal system.

a) Van Gend & Loos case [65]:

It was a landmark case of the European Court of Justice (ECJ) which established that provisions of the Treaty Establishing the European Economic Community were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Community's member states. This is now called the principle of direct effect. The case is acknowledged as being one of the most important, and possibly the most famous development of European Union law. The case arose from the reclassification of a chemical, by the Benelux countries, into a customs category entailing higher customs charges.

Preliminary questions were asked by the Dutch Tariefcommissie in a dispute between Van Gend en Loos and the Dutch Tax Authority (Nederlandse Administratie der Belastingen). The European Court of Justice held that this breached a provision of the treaty requiring member states to progressively reduce customs duties between themselves, and continued to rule that the breach was actionable by individuals before national courts and not just by the member states of the Community themselves.

Van Gend en Loos, a postal and transportation company, imported urea formaldehyde from West Germany to the Netherlands.

This is how the history of the company began [66]

65 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61962CJ0026 (Accessed: 07-12-2020)
66 https://www.bhic.nl/ontdekken/verhalen/van-gend-en-loos (Accessed: 07-12-2020)

The authorities charged them a tariff on the import. Van Gend en Loos objected, stating that it was a clear violation of Article 12 of the Treaty of Rome (now replaced by Article 30 TFEU = Treaty on the Functioning of the European Union), which stated:

"Member States shall refrain from introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other."

Van Gend en Loos paid the tariff but then sought to retrieve the money in the national court (Tariefcommissie). The Tariefcommissie made a request for a preliminary ruling to the European Court of Justice, asking whether the then Article 12 of the Treaty of Rome conferred rights on the nationals of a member state that could be enforced in national courts.

The Tariefcommissie argued

1. that as the Netherlands had, for the most part, complied with Article 12 (by generally reducing and abolishing tariffs), their exceptional increase in the tariff on urea-formaldehyde should be overlooked („de minimis lex non-curat"/ „de minimis non curat praetor"); and
2. that the treaty was an agreement between member states, and as the importers were obviously not parties to the treaty, they had no „locus standi" (= the right or capacity to bring an action or to appear in a court).

Advocate General Roemer's opinion indicated that some provisions of the treaty could have "direct effect" (that citizens could rely on them) but that Article 12 was not one of them.

Ignoring advocate opinion, the European Court of Justice held that Van Gend en Loos could recover the money it paid under the tariff.

Article 12 was capable of creating personal rights for Van Gend en Loos, even though this was not expressly stated. The Netherlands could not impose a higher tariff than that in force on 1 January 1958 (when the treaty came into force).

An increase in the tariff could arise either through an increase in the rate or through the reclassification of a product into a higher-rated category; both were illegal under Article 12. The question of the proper tariff for urea-formaldehyde (i.e., that which was correctly applied on 1 January 1958) was remitted to the national court.

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights

which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community. [...]

The wording of article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects.

The court decided that the fact that the failure of member states to comply with EU law could be supervised by enforcement actions brought either by the commission or other member state, did not mean that individuals should not also be able to act as enforcers in national courts.

Two reasons were given:

1. The first was that a failure to recognise a concept of direct effect would not give sufficient legal protection to individuals.
2. The second was that individual enforcement was an effective supervisory mechanism.

The case is authority for the proposition that articles of the EC treaty are directly effective (as distinct from directly applicable) in their application against the state. The case illustrates the creative jurisprudence of the European Court of Justice. The concept of direct effect is not mentioned in the treaty. The court held that such a doctrine was necessary to ensure the compliance of member states with their obligations under the Treaty of Rome.

It seems likely that the court took the decision under the influence of French judge Robert Lecourt, who had been appointed to the court in May 1962. Lecourt's speeches and writings repeatedly connect the direct effect doctrine with the suppression of inter-state retaliation and unilateral safeguard mechanisms within the European Economic Community.

The case illustrates a procedure of enforcement of EC law at the national level—direct effect does not require the commission to bring an action against the state. This is significant because it provides a more effective distributed enforcement mechanism.

b) Flaminio Costa v ENEL case [67]*:*

Mr. Costa was an Italian citizen (a lawyer) who had owned shares in an electricity company, Edisonvolta, and opposed the nationalisation of the electricity sector in Italy. He asked to two lower courts in Milan (two different Giudice Conciliatore) to ascertain that the real creditor of his electricity bill (a relatively small amount of money, 1,925 lire) was the nationalised company, Edisonvolta, and not the newly established state company, Enel. He argued that the nationalisation of the electricity industry violated the Treaty of Rome and the Italian Constitution. The first Giudice Conciliatore of Milan referred the case to the Italian Constitutional Court and the second Giudice Conciliatore referred it to the European Court of Justice (ECJ).

The Italian Constitution Court gave judgement in March 1964, ruling that while the Italian Constitution allowed for the limitation of sovereignty for international organisation like the European Economic Community, it did not upset that normal rule of statutory interpretation that where two statutes conflict the subsequent one prevails ("lex posterior derogat legi anteriori/priori"). As a result the Treaty of Rome which was incorporated into Italian law in 1958 could not prevail over the electricity nationalisation law which was enacted in 1962.

In light of the decision of the constitutional court, the Italian government submitted to the ECJ that the Italian court's request for a preliminary ruling from the ECJ was inadmissible on the grounds that as the Italian court was not empowered to set aside the national law in question, a preliminary ruling would not serve any valid purpose.

The ECJ held the Treaty of Rome rule on an undistorted market was one on which the Commission alone could challenge the Italian government. As an individual, Costa had no standing to challenge the decision because that Treaty provision had no direct effect. However, Costa could raise a point of EC law against a national government in legal proceeding before the courts in that member state since EC law would not be effective if Costa could not challenge national law on the basis of its alleged incompatibility with EC law.

67 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61964J0006 (Accessed: 07-12-2020)

Inside Enel's head office in Viale Regina Margherita in Rome. The photo was taken on 28/01/2016.[68]

This groundbreaking case established the principle of supremacy in EU law, which is an independent source of law that cannot be overridden by domestic laws.

The rules that stem from the EU do not only bind the Member States but also their legal subjects. Moreover, these European legal rules have precedence over the states' domestic legal rules. As a consequence, the Member States of the EU and their legal subjects are bound by a legal system that is neither the system of a nation state nor a system that regulates the mutual relations between nation states. In other words, the existence of EU law does not fit in the Westphalian picture that takes national states as its starting point.

10.6. LEX MERCATORIA

The Lex Mercatoria is a set of rules created by merchants to regulate their mutual dealings.
In principle, commercial relations are governed by the rules of private law, the law that deals with mutual relations between private actors. However, the existing rules of private law were not always found suitable for the peculiar needs of trade relations, and therefore as early as in the Middle Ages, a separate and independent body of rules emerged. For the same reason, separate courts originated, which had more expertise in commercial matters and which operated more swiftly. Nowadays, there still exists a body of rules that govern international commercial relations.

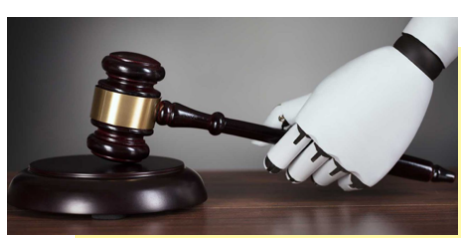
68 https://www.enel.com/media/explore/search-photos/photo/2020/03/italy-enel-headquarters-rome (Accessed: 07-12-2020)

This body consists of treaties, such as the Vienna Convention on the International Sale of Goods (1980)[69] , and also conventions that are not officially binding but nevertheless exercise influence on the behavior of commercial partners (soft law).

Soft law consists of rules which are not binding, but are nevertheless influential. A typical example is the Unidroit Principles of International Commercial Contracts [70]. Moreover, disputes in commercial relations are often dealt with by means of arbitration, decisions made by persons who are not official judges but whose decisions are accepted by the parties who invoke their services. Because much of the Lex Mercatoria operates outside the traditional framework of national states and their relations towards each other and towards their legal subjects, it also provides counterevidence to the exhaustive nature of the Westphalian duo.

10.7. TRANSNATIONAL LAW

The phenomenon that is illustrated by human rights, European Union law, and the Lex Mercatoria, namely that there are many and important legal phenomena that do not fit in the picture of law that arose after the Westphalia peace treaties, has become known under the name of transnational law. Transnational law might summarily be characterized as law that is not made or not enforced by national states or that is not meant for the regulation of behavior of legal subjects within nation states or the mutual relations between nation states. This is a negative characterization: transnational law is law that does not belong to the Westphalian duo. The increasing importance of this branch of law marks an important development in the long history of the law, which gives rise to new questions about the nature of the law for the future.



The future of law? [71]

69 https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf (Accessed: 07-12-2020)

70 https://www.unidroit.org/contracts (Accessed: 07-12-2020)

71 https://medium.com/kageera/the-future-of-law-firms-and-the-legal-sector-4-ai-trends-in-the-law-profession-9ced071ed91a (Accessed: 07-12-2020)

CHECKING QUESTIONS:

1. How do national and international law relate to each other? What is the "Westphalian duo"?
2. What is Hans Kelsen's perspective about law?
3. Describe and analyze the Van Gend & Loos case! What does "direct effect" mean here?
4. What does Lex Mercatoria regulate? Give examples!
5. What is the relation between the Westphalian duo and the transnational law?

UNIT 11: CASES

CASE 1: INVITATION TO DINNER

I'm a professor as you know, and Cathy is this very nice person who was my student. She just graduated last year and she's got a job in a big fancy law firm.

It turns out that Vincent, the managing partner in the law firm, the person on whom her career depends, has been my student too many years ago. In casual conversation, Vincent mentioned to Cathy that he would like very much to be back in touch with me. So Cathy thinks, wouldn't it be nice if she and her husband invited Vincent and me to dinner. She would cook a wonderful dinner and I would have a wonderful dinner to eat. And a good time would be had by all and this would have a very good effect on her career in the firm.

All of us are very busy, but we end up finding an evening that works for Vincent, for Cathy and her husband, and for me. So there we go. She spends a lot of time, spends a lot of money buying the food and the wine. It is going to be marvellous. And you know what happens?

I just don't show up. It is not even that I forgot. Something came up and I figured, oh well, what do I care? I would really rather go to the movies with my friend and I just don't show up. What's worse, I don't even call.

The dinner was spoiled because Cathy tried to keep it warm hoping that I would show up. Vincent was annoyed and, altogether, what could have been a nice occasion leaving good feeling all around was a really awful occasion. Well, I made a promise that I would show up for dinner.

But is that a promise that the government should stand by? She is really angry and she decides she's going to sue me. And you know what? She is going to lose, because an invitation to dinner is the kind of informal, friendly occasion, a kind of informal, friendly interchange that nobody expects is going to end up in court no matter what happens. It just isn't the kind of thing which people think is going to create legal relations. It certainly creates a moral relation, and I have behaved miserably. So this is the first principle that we can apply to a given case.

We can ask if the parties intended to create legal relations. Sure, it is true that the invitation to dinner created expectations, but it is not something that anybody thinks should end up in court.

***TASK:** Why not? Can you think of other situations and relations where people make promises to each other, but don't expect to end up in court about them?*

CASE 2: THE SILVER WATCH

Let's move on to the second kind of a promise, which isn't a contract. Here's how a court described it. It took place a long time ago.

The judge found, as facts, that Keller gave Holderman a check for $300. The check was given for an old silver watch worth about $15, which Keller took and kept till the day of trial when he offered to return it to the plaintiff, who refused to receive it. The whole transaction, the judge found, was a frolic and banter.

The plaintiff, not expecting to sell, nor the defendant, intending to buy the watch at the sum for which the check was drawn. And the judge said since this was a frolic and a banter - those are the words the court used, a frolic and a banter. Probably a couple of drunks fooling around in a bar. This was not a serious contract. This was not meant to be a purchase or a sale. And this is not a lawsuit which the court is going to fuss about.

The principle that this last example reveals is that when both parties know that the promise is a joke, when neither side takes it seriously, well, that's just not the kind of situation where the government wants to be hauled into, use its force to stand behind the interaction. Now of course life is full of people who sell things for much, much more than they're worth.

They give a check and those checks are honored and have to be honored and should be honored, because it's up to you to decide how much you want to pay for a designer set of shoes or for a silly hat. That's up to you. And you don't want the courts figuring well that hat or those shoes only cost the manufacturer about $20 to make. So we're not going to allow anybody to buy them for $400.

Why? If people could only pay what these things are worth, the whole fashion industry would be in

deep trouble. Those are real deals. But the silver watch wasn't even that kind of a real deal. It was no deal at all. It was a frolic and a banter.

***TASK:** Can you think of other situations and relations where people make such frolic and banter deals?*

CASE 3: LEONARD V. PEPSICO, INC.

(Case: 88 F. Supp. 2d 116, (S.D.N.Y. 1999), aff'd 210 F.3d 88 (2d Cir. 2000)

Now that I've given you these first two principles let me challenge you for a moment and give you a more contemporary example, which is a bit more difficult.

At the time this took place, back in the 1980s, Pepsi had a promotional campaign. You've seen these kinds of things. And what you could do is with each bottle of Pepsi, I think it was in the bottle top cap, you get a Pepsi Point. And with Pepsi Points you could buy stuff, a key chain. And for a lot of Pepsi Points, several hundred, could even get a leather jacket with a Pepsi logo on the back. And what you would do is you collect your Pepsi Points, maybe get some from your friends, you go to a catalog, you pick out the stuff you want, you send in an order form, and there you go.

This is the ad: https://www.youtube.com/watch?v=ZdackF2H7Qc

And what happened was that this guy Leonard, a real wise guy, figured "you know, a Harrier Jet, that's pretty cool." You can top up your Pepsi Points the commercial said like frequent flyer miles at $0.10 a point. And a Harrier Jet, according to the ad, only was worth 7 million Pepsi Points. That's $700,000. "Well, I had a couple of Pepsi Points from drinking Pepsi and I could top it off," he thought "with $700,000. And there I am and I get a jet fighter."

Now, of course, a jet fighter like that, even in those days went for about $21 million and now it's probably more like a quarter of a billion, but whatever. So Leonard gets together with a bunch of friends, also wise guys, and they put together $700,000. They go to a bank and get a certified check for $700,000 made out to Pepsi Points. And a certified check is as good as money. And they send that in to Pepsi. On the order form they add, they write in, because there's no space for a Harrier jet, "one Harrier Jet, 7 million Pepsi Points."

***TASK:** What do you think PEPSI does?*

CASE 4: UNCLE'S PROMISE

Ready for a challenge? Here is another example. It's a real case, too, though I am adapting the details for when this occurred in the 1800's just to get the money up to today's standards. We have a rich uncle, who is very fond of his nephew. But his nephew, he thinks, a late adolescent. He kind of runs in bad company, and he needs to get his act together.

So what he says, look, I'll give you a quarter of a million dollars when you reach the age of 21 on condition that in the next few years, before you are 21, you don't drink, you don't smoke, you don't swear, and you don't gamble. Well, the nephew keeps to these terms all that time. He doesn't smoke, drink, gamble. And come 21, he wants his money.

Now, may I say in the meanwhile, the good hearted uncle had died. And who the nephew was suing for the money are his lawyers and his heirs. And though the uncle may have been minded to give the money, the lawyers are more hard hearted and they say, we're not going to give you this money.

Why?

Because it was simply a promise to make a gift and our law does not enforce promises to make gifts. So if you want to make a gift, make your gift. But a promise to make a gift, we're not going to bother with.

***TASK:** Can You guess what happened in this case?*

CASE 5: CAR ACCIDENT

Let me tell you another story. This is a true story, too. It's a sad story about a young woman who when she was a teenager, got hit by a car in a parking lot, and she got injured. She sued the driver who hit her and recovered quite a lot of money from him or his insurance company.

Well, I told you she was a teenager and the courts are not so willing to turn over a large sum of money to a teenager, just like that. An adult's another story. So what they did they decreed that the guy who hit our teenager and injured her had to give her something called an annuity. An annuity is something which is sold by insurance companies, for instance.

And instead of a great big lump sum of money, because what was decided in this case was that she was owed up to $600,000, instead of giving her that outright they will give her this annuity. And the annuity company, the insurance company, would give her a certain amount of money every year as long as she lives. And that way she is sure to have money each year.

This story, however, is a sad tale. She fell in with bad company and she acquired a really, really bad boyfriend. Her boyfriend, among other things, introduced her to hard drugs. She became an addict and was pretty much in the power of this boyfriend. The boyfriend, as so often happens with people like that, was himself deeply in debt to some other people. He himself was a drug addict. And these other people said, 'look. You owe us money. We'll tell you how you can get it. Get your girlfriend to sell her annuity to us for $50,000. And then you can split the $50,000. Give her 25 and take 25 for yourself, deducting what you owe us. And he got her to sign these papers selling the annuity.

And now these people to whom she has sold the annuity, these people have something which in a few years' time will pay out over $600,000. And if she had gone to a bank, or even gone to the annuity company, and said I want the immediate cash value, she would have gotten over $100,000. So she took something worth $100,000 now or over a number of years $600,000 and sold it for $50,000.

***TASK:** Do You think it was a real bargain?*

CASE 6: THE EMPTY BAG

There are conversations, dealings, which looks like bargains, but when you think about them carefully, they're not bargains at all. Here's an example, quite a common one.

You're in the lumber business. You're a lumber mill. You sell lumber at wholesale to all kinds of local fix-it places, lumber yards, that kind of thing.

And there's a great big chain of lumber yards. Let's call it D's, where D is distributor. And we'll say I work for them.

Let's say they are a chain, like OBI, which is a chain of lumber yards, a great big chain of lumber yards. I sell lumber to small contractors, homeowners and so on, all over the state. I'm a very good customer and you're a small lumber mill.

So what D's the lumber yard says to you is I want to be sure that I will have enough lumber to supply my customers during the next year and I want to be sure that the price stays stable. Now, the index price these days is $2.25 for an 8 foot two by four. And I'm willing to agree to pay you a bit more, $2.50 just so that the price stays stable. You're going to get a little bit more now and then maybe you'll make more money. If the price goes up, well, you'll make less money. You might even lose some. But at least we'll both know where we are. So the deal is over the course of the year.

Whenever I ask for lumber, you're going to sell it to me at $2.50 for an 8 foot two by four. Because this could be a very big customer and you're a small mill, you say good I agree, sounds like a bargain.

But think about it for a minute. What is it that I, the great big chain of lumber yards, has agreed to, and what is it that you the little lumber mill has agreed to? You, the little lumber mill, has agreed that whenever I put in an order for let's say 5,000 8 foot two by four sticks, you will sell them to me and $2.50 a stick.

But what have I, the lumber yard chain, agreed to in this scenario?

I haven't agreed to anything. I've left myself completely open. If I don't want any lumber during the year, I don't have to put in any orders. And if I decide to buy it from another mill, I can do that. If the price of lumber goes down to $2, I can order it from other mills that are willing to sell it to me at $2. So, whereas you have bound yourself to sell to me whatever I want at $2.50, what I bound myself to? To order lumber from you if I want to at $2.50 a stick. But if I don't want to, I won't and I can buy it elsewhere, or not buy any at all. So it's a completely one sided obligation.

And a completely one sided obligation is not what our law looks at as a bargain. That means if you, the little lumber mill decides well, I can sell my lumber now the price has gone up at $2.80, I'm not going to sell it to this big guy for less. You're free to do that.

And why are you free to do that?

Because I, the chain, am free not to buy from you if the price goes down. The idea is, that because I, the big guy, have bound myself to nothing, made no commitment to you, your commitment to sell to me whatever I ask for at $2.50 is a commitment that's made in return for nothing. So you should be as free as I am. Sounds fair, sounds logical. This is similar to a promise to make a gift, which is not a bargain, and not something the government will stand behind. In a sense, I have made no promise to you and you've made a promise to me in return for an empty bag.

***TASK:** How can you change the scenario for a real bargain?*

CASE 7: THE MANUSCRIPT

Now let me complicate this a little and tell you about another kind of situation that happens quite a lot in the world. Suppose you have written a wonderful first novel, and certainly you think it's wonderful. You may think it's wonderful, but nobody ever heard of you, and if you put it on a publisher's desk along with 300 or 3,000 other such manuscripts, it's just going to sit there. Among other things, it takes a lot of time for the publisher to read through that.

So what you do is, you go and visit this publisher and you say, I'm going to show you this great manuscript, this great novel I've written, if you promise to read it. And I'm not going to give it to anyone else for a period of three months. So you've got three months in which to make up your mind. But you've got to promise me that at least you will read it in those three months.

And the publisher's an honest kind of guy and he says, well, I don't know you from Adam, and you're asking me to spend, you know, maybe two days of my time reading this pile of paper? It may be wonderful, but it may not be. I'll tell you what, leave it here with me, don't show it to anyone else for three months, and maybe I'll read it and maybe I won't. I won't promise you anything.

Does that sound like life? Well, it is. Here is the question: are you free to walk out of there and print off another copy of your novel, having left it there, having agreed, having promised, and then go to another publisher, and another publisher, and another publisher with the same manuscript? What has the publisher agreed to do?

It seems like he hasn't agreed to do anything. That doesn't sound like a bargain. It's something - my promise- for nothing.

What happens if you are not in a position to bind yourself- you, the author. In other words, if you didn't make a promise about not showing the manuscript to anyone else for three months. The publisher wouldn't even take your novel.

But here's the problem. If the law will not enforce your promise, if the publisher knows perfectly well that you can be shopping this thing around to dozens of other people so that he may be wasting his time even opening it up, he's not going to bother.

Aren't you better off being able to make this commitment, make it in a way that the law will enforce, even though he makes no commitment to you?

So we've got a bit of a dilemma here.

Because there are no mutually binding promises, the law uses the phrase of there being a lack of mutuality. You've bound yourself not to show it to anyone else for three months, and he's bound himself to do what? He's bound himself to nothing.

Now, there are ways to get around this. For instance, the publisher could say: „Very good, I understand your situation. You're anxious, you're worried about the fact that I may not even bother to open your package. And you've got to understand my situation. So I'll tell you what I'll do. Because the law won't enforce your promise if there's no mutuality, let's turn this into a real bargain. I'll take you to lunch. And if I take you to lunch, in return, you promise that you're going to leave this manuscript for me for three months exclusively. Lunch for the exclusivity."

The word for that is an option. In return for lunch, you're going to give me a three months' option on this manuscript. And now we've got a bargain.

Now let's develop this manuscript story just a little bit. Suppose that instead of a book, we're dealing with an op-ed piece. I've got a lot of opinions about all kinds of things, and every once in a while I write those opinions up, particularly if something happens which is very timely. Now the big newspapers publish op-ed pieces by people who are not on their staff.

And a lot of people see your name and read your stuff if you can get an op-ed into a famous journal. Such magazines also pay, maybe about $300 for publishing them. Well, let's say it's you with a manuscript or the op-ed. What do you do?

You send in an op-ed to the journal and they will write you back an automated form letter because they insist that you send it in on the internet. You send it in via the internet and you'll get an automated response which says, "Thank you very much for your submission. We get a great many submissions. We can only publish very few of them, but we will consider it. Please do not submit it to anyone else for three days."

***TASK:** Is there a bargain lurking there? What do you think?*

CASE 8: WOOD V LUCY, LADY DAFF-GORDON

(Case: 222 N.Y. 88, 118 N.E. 214 (1917))

It's the famous case of Wood against Lucy, Lady Duff-Gordon. Lady Duff-Gordon was married to a minor British aristocrat called Cosmo Duff-Gordon. She was sort of a celebrity of the time in Great Britain. And she designed clothes. This was back in the early part of the 20th century.

Sometimes, she'd just put her name, her endorsement, on the clothes. And that helped to sell them. That is done today, too, you know. Lucy was a colorful person. She and her husband, Cosmo, were quite a well-known couple. Like the Beckhams today.

She wanted to make a lot of money on this. She thought she'd make money in the United States. So she made a deal with a guy called Wood, also a fairly colorful character from a fairly colorful family. What Wood does is he's an agent for people like Lucy. And the deal was that Lucy would give Wood the exclusive right to commercialize her brand in the United States in return for which Lucy would get all the advantages of the commercialization, the sales, and Wood would pick up a reasonable percentage commission on anything that he sold. That was the deal. She'd given him the exclusive, and he would get a commission for anything he was able to sell.

And so it stood for a while, until Lucy heard of Sears Roebuck and the Sears catalog. And she thought, ah-ha, this is an opportunity. Sears catalogs go to thousands and thousands of people. And Sears thought this was terrific, because they had very few things in those days that were endorsed by the British aristocracy. So they made a deal. And Lucy made a bit of money on it.

Wood was furious. He sued. After all, he had the exclusive right. She'd given him that and went behind his back. The exclusive right, and here she was dealing with Sears, not paying him anything.

That was a breach of contract. The trouble was, what commitment had Wood made? Wasn't he just like the lumber yard?

I'll sell your brand if I want to, and I won't if I don't want to. If I do sell your brand, I get to keep a commission. But I don't have to do it. I don't have to do anything. But you, Lucy, have to promise not to deal with anyone else. That doesn't seem like a real bargain.

Here's what the court said when Wood sued Lucy. The court was stymied in a way, because the law, as the lumber yard example shows, requires that there be mutuality. And there wasn't any here. They didn't include the clause, like the New York Times, we'll consider it, or the $5 lunch. Lucy seemed to have committed herself to give him the exclusive, and he committed himself to do nothing.

So what did the court do? A very famous judge, Benjamin Nathan Cardozo, said, oh, there was a real bargain here. She promised him the exclusive, and he promised to make the best efforts to commercialize her name. Now, of course, he had made no such promise. He never said such a thing at all. No matter, said the judge.

It's implicit in the arrangement, because, after all, it would be an act of bad faith-- bad faith-- for him, on one hand, to get Lucy to promise him an exclusive, and on the other hand, to be entirely free to do nothing, just to sit on it and tie her up without tying himself up. Therefore, what we will do as a court, we will assume that there is what is called good faith on both sides.

Remember, that wasn't too much of a stretch, because Wood had made efforts, and he had sold some of her stuff. Her good faith spelled out in the contract, which she broke; his good faith not spelled out, not written down anywhere, but implicit-- that's the big word-- implicit in the transaction.

***TASK:** WHAT do you think? Was Wood's good faith implicit in the transaction?*

CASE 9: 9/11

(See the dispute of the case: https://www.zelle.com/assets/htmldocuments/BRF_v046n01_Fall2016_Suga_StPeter.pdf)

Interpretation, of course, is everywhere. You're reading this text now and you're interpreting my words. You have a conversation with a friend, well you interpret your friend's words and she interprets yours.

If it is an extended and informal conversation, you can pretty well tell if she's not getting what you're saying, or if there is some doubt, and then you'll explain it some more. And in any case, if she does not quite understand, she'll just say, "What do you mean by that? Explain your words to me." You can look him in the eye and see that he doesn't quite get it. He looks puzzled. And you say, "Let me put it another way, I'll tell you what I meant."

But if all you have is a written text, you don't get to supplement it, or rephrase it, or put it another way. There's no conversation or back and forth. It's fixed.

And this is why the subject of interpretation becomes both important and difficult. In case of a contract there's been an offer and an acceptance, there's consideration, it's put in writing, the parties mean it. It passes the four principles. It really is a contract.

We will focus on what that contract means, and when there are questions, how a court can interpret it. Let me tell you about one famous case. You remember the terrorist outrage of 9/11 and the destruction of the Twin Towers.

That was a terrifying event with terrible loss of life, and it was the backdrop for many legal disputes. I want to tell you about one of them. It was a dispute about the meaning of an insurance contract related to the Twin Towers.

The Twin Towers had somebody whom I will call the owner. It was actually a company called Silverstein Properties, and it did not own the Twin Towers. It had a 99-year lease.

There had been some financing loans and so on, and in connection with that, the investors with Silverstein insisted, as people who lend a lot of money often do, and certainly, when they lend this much money, that the owners, Silverstein, have insurance. Even if the lenders hadn't insisted on it, anybody who has a valuable piece of property should have insurance. You're going to have insurance against fire and accidents just the way that an ordinary homeowner does. And the owner of a car will have car insurance.

Because these were new financing arrangements being made now, new lenders, the Silverstein's were required by investors to have a whole lot of insurance. The value of the Twin Towers was estimated at something like $7 billion. And in order to get its financing promptly, Silverstein had to get the insurance together by a certain date. So Silverstein shopped for insurance.

Now, for that much property, of course, no insurance company will take on the whole thing. That is a huge risk, something as large as the Twin Towers. Insurance companies will get together to share the

risk among many insurance companies. So that's the situation. Silverstein had multiple insurance policies through many insurance companies.

We're going to look at the contract, the insurance policy, that one of the insurance companies had with Silverstein, the owner of the building. The contract Silverstein had with this particular insurance company said the insurance company's going to be responsible for up to $25 million for a loss or damage to the Twin Towers.

This insurance policy had a $1 million deductible per occurrence, and those words were what the whole dispute turned on, not just in my policy, but in all of them. Per occurrence, billions of dollars on what that term, those two words, meant.

Now imagine you have insurance on your home or your car, your car for $20,000, your home for $150,000. Usually, you will have a deductible. The insurance company doesn't want you to run to them every time a sink overflows and you have $50 worth of damage, or every time somebody dings your car in a parking lot and you have $100 worth of repainting.

That's too much trouble for them, and they would charge you a larger premium for that trouble of having to come out and assess every nick and scratch. So it's in everybody's interest to say, let's have a deductible.

Let's say it's a $1,000 deductible on your home or, on your collision damage, you have a $500 deductible per occurrence. That means if somebody in a parking lot opens his car door next to mine and puts a dent in my door, that's one occurrence. But it doesn't amount to $500 worth of damage, and I've got to fix that myself. But let's say it happens on Monday, and then on Wednesday the same thing happens on the other side of the car. Now, that's a $500 deductible per occurrence.

You can't just drive around for a year waiting for this knock, this little fender bender, this spill inside your car, and add it all up at the end of the year, and it comes to a couple of thousand dollars and say, now, insurance company, pay up. I'll pay the first $500, and you pay the rest. No. It's per occurrence. Each of those things was less than the deductible, so the insurance company won't have to pay.

And it was the same thing with the insurance on the Twin Towers. All of the insurance policies by the many insurance companies that insured the Twin Towers had per occurrence deductible.

But what is an occurrence?

It turned out, that was the question on which billions of dollars turned. Now, the insurance policy also has an upper limit. We've got a floor and a ceiling. They say, we will pay you up to, in the case of my client, up to $25 million. That's all that the client paid for, in terms of premiums. Also, per occurrence. So there's a ceiling per occurrence and a floor per occurrence.

Some of the other insurance companies insured up to a lot more and, of course, they charged more. In fact, if you added up all the insurance that the Twin Towers had, that Silverstein had, it added up to about

$3.5 billion, which is about one-half of what the buildings were estimated to be worth, just the physical buildings.

But nobody imagined that there was going to be an event or an attack that would bring the whole thing down, total destruction. $3.5 billion seems like a pretty safe amount of insurance for these two buildings.

The words, per occurrence, applied not only to the deductible, but to the upper limit for an event. Neither side worried much, when they wrote the policies, about the "per occurrence" language limiting ceiling, the top amount that would have to be paid. It was all about the deductible, the floor.

In this case, it was a $25 million ceiling and a $1 million deductible, the floor, both per occurrence. As it turned out, the occurrence language made a great deal of difference, about $3.5 billion worth of difference.

So why did it matter?

Because the question was: Were the events in New York on 9/11 that morning one occurrence or two? Remember what happened. One group of terrorists crashed a hijacked Boeing 767 loaded with 20,000 gallons of jet fuel into the North Tower. 18 minutes later, a second hijacked Boeing 767, hijacked by the same terrorist organization working together, crashed into the South Tower. Both towers were completely destroyed by the explosions and fires killing some 3,000 people.

Was that one occurrence or two? So there was a legal question of interpretation.

Now the contract between the owners and the insurance company involved in this case, defined the term occurrence in the contract. This is how it was defined, "'Occurrence' shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of time or area over which such losses occur."

TASK: What do you suppose happened?

CASE 10: AGENCY

Let's suppose, that I want to participate in an auction in another city. I could just send in a bid.

That happens. I could write the auctioneer, "I am willing to pay up to $50" and the auctioneer knows right then that he has an offer for $50 on the table. He has my circuit with the offer in the down position for $50 already, but remember how the auction turns out. Clara only wants to go up to $30. The auctioneer knows that he has got my $50 to fall back on.

So that's a great situation for the seller, the auctioneer, no matter how low the last active bid may be. And it's not so great for me, because I'm overpaying. So I'm not going to want to do it that way. But I still want to get in on the bidding. And maybe get the bottle for $35 somehow.

There are various ways to do that. I could bid on the phone, but it is a little hard to tell from the catalogue how much this particular item is worth. I'm willing to go up to $50, but if I can get it for 35 by bidding it's a loss to me if I agree to pay 50.

What do I do?

I can't go in person, so I decide to send my friend who happens to live in that city. Let's say my friend is Cathy. And what I do is I arrange to pay her $5 to bid for me. That's a contract between Cathy and me. She has been contracted by me to go to this auction, to show up at the auction and to bid for me. I give her instructions. It's part of our contract. I say I'm willing to go up to $45, if she thinks, and I trust her judgment that the item is worth it. I said $45 now, because remember, I said the thing may be worth up to $50, but I've just paid Cathy $5 to go there and bid for me. Cathy is my agent. That's the technical term. It is somebody who is under contract under an agreement to act for another person.

So Cathy goes to the auction, and she bids $20 before Bob can get his paddle up. But she doesn't get it for $20. Remember Clara, in the straw hat. She bid 30. So Cathy, my agent, bids 35. Clara gives up and the bottle is struck down, or sold to Cathy $35. Good deal for me and a good deal for the auctioneer. I got the bottle for less than what I was willing to offer and the auctioneer gets $5 more than if Cathy had not been there and bidding.

Okay, let's add some complications. Suppose Cathy pays the money my agent, she picks up the bottle and accidentally drops it, whoops! It shatters into pieces. If I were the one to go there, picked it up and dropped it that would be very sad. I would be very upset, but I could hardly ask for my money back from the auctioneer because I had bought and paid for it by then. I was the one that dropped it.
But in the real scenario, one which I gave you, I didn't drop it. Cathy did.

***TASK:** Can she get her $5 from me?*

CASE 11: THE HURRICANE INSURANCE

Suppose I own a house on the Jersey Shore and around January I remember that last year was a really terrible hurricane season and a lot of my neighbors suffered great damage. Some of them had their houses completely swept out to sea. So the time has come to buy hurricane insurance.

Now, what is hurricane insurance? I'm paying money to cover the risk that there will be a hurricane that will damage my house. If the hurricane were a certainty, no insurance company would sell me that insurance. But of course, it isn't a certainty. There's a gamble, a gamble on both sides. So I buy my hurricane insurance policy. I pay for it in full.

But it turns out to be a relatively quiet season, a few tropical storms, but no major hurricane and my house makes it through to the late fall without any damage.

TASK: ***What do you suppose any court in the world would say if I tried to sue the insurance company to get my premium back? Was it a real bargain here? What was it?***

CASE 12: POM WONDERFUL LLC V. COCA-COLA CO.

(Case: 573 U.S. 102 (2014)

I'm sure you've heard the buzz about antioxidants, how healthy they are and how you get antioxidants from pomegranate juice and from blueberries. Well, manufacturers have been meeting the demand that this creates. One of the most prominent manufacturers is relatively small in this world of soft drinks. It's called POM Wonderful. That's got pretty high concentrations of pomegranate juice. 100 percent pomegranate juice in one. 85 percent in another. 15 percent blueberry, and so on.

Coca Cola, which is the „800-pound gorilla" in the soft drink business, decided it would get into the antioxidant juice business, too. They came out with a drink under their Minute Maid brand. Coca Cola, under its Minute Maid brand, created a juice containing 99.4 percent apple and grape juices, 0.3 percent pomegranate juice, 0.2 percent blueberry juice, and 0.1 percent raspberry juice. Despite the minuscule amounts of pomegranates and blueberry juices in the blend, the front label of the Coca Cola product displays the word POMEGRANATE BLUEBERRY in all capital letters, on two separate lines. Below these words, Coca Cola placed the phrase "flavored blend of FIVE juices", in much smaller type. And below that phrase, in still smaller type, were the words, "from concentrate with added ingredients". And with a line break before the final phrase, "and other natural flavors". The product's front label also displays a vignette of blueberries, grapes and raspberries in front of the halved pomegranate with the halved apple.

Would You say that Coca Cola was taking care not to say or do anything tending to impose on its customers?

I think not. It's not exactly odometer fraud, but there is a strong implication that this juice drink has all the wonderful qualities attributed to blueberries and pomegranates.

But who, after all, is hurt?

The label, if you read it very, very closely, is not inaccurate. There is pomegranate juice, minuscule amounts. Blueberry juice, minuscule amounts. But the suggestion is that this is a pomegranate blueberry drink.

So what are you going to do?

Take your can of juice back and get your money back? Never buy again? Maybe if you're a supermarket that bought from a Coca Cola distributor and you bought a large quantity of this stuff and then discovered all of this, you might be able to ship it back to them and get your money back.

But who is really hurt?

Who is really hurt is POM Wonderful, Coca Cola's competitor. Because here, POM Wonderful is spending a lot of money selling something which is much closer to being a pomegranate drink, and they're having to compete with this phonied-up product.

TASK: ***What do you think: can POM Wonderful sue Coca Cola company? Why?***

The Digital Legal Knowledge Textbook for International Students is a gap-filling 21st century university textbook for foreign university students studying in Hungary. It combines legal culture with current European and international legislation, introducing students to the context of legal thinking in the different branches of law. The richly illustrated text is suitable to meet the visual needs of the target age group, and the internet links help students to immerse themselves in the original legislative texts and in the sources of the scientific fields. It introduces students to the following topics with examples of completed legal cases and legal cultural-historical curiosities: human rights, constitutional law, legal competency, legal representation, legal entities, establishment and termination of firms, contracts, and the basics of criminal law.

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ISBN 978-615-6142-12-2