

# Introduction to Law

## Basic Concepts of Law

### Basic Concepts

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## Basic Concepts

### What is law?

#### Do's and Don'ts

Most people would agree that the law governs human behaviour by **rules**. It **forbids** certain ways of behaving, for instance stealing, killing or exceeding speed limits and **prescribes** others. For example paying taxes or driving on the right lane. Legal rules are also called **norms**.

The law does not stop at setting up rules. It also secures **compliance** with them by threatening persons who disregard a rule with some disadvantage, like being imprisoned or having to pay money. This consequence is called a **sanction**.

The task of the **state** is to put the sanction into effect, for instance to put the offender into prison or to take the money from him. We say: the sanction is **enforced** by the state.

#### Is and Ought

The legal rules do not describe facts: they do not tell us anything about reality. Instead they specifies facts and describes what should happen if they are fulfilled. It says what ought to happen in certain situations and what consequences should follow if this does not happen.

**Example:** If a newspaper reports: "Elfriede Blauensteiner was sentenced to jail for life for killing her husband", it describes facts. The relevant legal provision (§ 75 StGB) says: "Whoever kills another person will be sentenced to jail for life or to be imprisoned between 10 and 20 years". It has several effects: First, it prohibits murder; second, specifying that a murder has been committed, it describes what should happen to the perpetrator.

#### Right and Wrong

Many people think that the law not only prescribes or forbids certain acts but also indicates what is right and what is wrong. But how do we know whether the rules set up by the law are fundamentally right?; how can we be sure that they are just?

The **Doctrine of Natural Law** tries to answer this question by referring to meta-legal authority. According to its adherents law is correct if it conforms to the human nature (*Plato*), to divine revelation (*Augustinus, St. Thomas Aquinas, John Duns Scotus, William Ockham*) or to reason (*Cicero, Grotius, Hobbes, Locke, Rousseau, Kant*).

The **Positivist Doctrine** accepts that we have no means of deriving law from a higher authority. It points out that the law is made up of social norms which are generally accepted and adhered to (*Jellinek*) or are formally enacted (*Radbruch*) or are regularly enforced (*Austin, Holmes, Llewellyn*).

**Question:** What are the aims of law? What do they provide?

#### A lawyer's description

Law-books usually describe the law as a system of rules enforceable by public authority requiring the members of a community to meet certain standards of conduct. They go on to

state that the law makes sure that the society remains stable and its members are able to pursue their interests and that disputes are settled efficiently. To this purpose the law should conform to public morality, without, however turning all moral norms into legal rules.

## **Historical Development of Private Law**

### Roman Law

After the enactment of the *Twelve Tables* (450 B.C.), a code that concentrated on the most important problems that had arisen under the customary law, a body of specialists called **jurists** emerged who studied the law systematically and practiced it by giving legal advice and by teaching. Case by case approach they developed the fundamental **legal concepts** (e.g. obligation, property, pledge, contract, possession etc.) and the methods of formal and substantial reasoning. **Formal reasoning** works with the meaning of the words, parties' intent, legislative purpose, analogy, and logical conclusions. **Substantial reasoning** involves arguments based on values such as good faith, fairness (equity), public policy or practicability. It is important to notice that the jurists were no judges and their work was not concerned with the facts of the case; to ascertain the facts and to decide the cases was left to the judges; the jurists only gave legal opinions on which the judgment could be based.

### Emperor Justinian: Corpus Iuris Civilis

By the end of the classical period of the Roman Law in the 3<sup>rd</sup> century AD the hundreds of law books and commentaries produced by the jurists had become totally unmanageable. Around 530 AD the east-roman emperor *Justinian* compiled the material into four books, the *Digest*, the *Institutes*, the *Constitutions*, and the *Novels*, which were later labeled as the *Corpus Iuris Civilis*, a monumental work of about 1 Million words.

### Private Law in Western Europe

After the decline of the Roman Empire the Roman Law remained formally in force but was in practice superseded by tribal laws and **local customary laws**. In the 12<sup>th</sup> century *Irnerius*, a professor of Grammar at the University of Bologna, started to work on the Corpus scholarly. He founded a school that became known as the **Glossators**. They started by analysing the **meaning of the words** and went on to uncover the **underlying general principles** and to examine the **purpose of the rules**. Until the 15<sup>th</sup> century Roman Law spread to the universities all over Europe. Another school called the **Commentators** concentrated on adapting the findings of the Glossators to the practical problems of everyday life. They developed the **Commercial Law** and the **International Private Law**. During the same time **Canon Law** arose, the law of the Catholic church, which applied to clergymen and to laymen as far as marriages and wills were concerned. The graduates from the universities became judges or secretaries and chancellors to the rulers. Applying the Roman Law they had studied they gradually overcame the customary local laws. This process is known as the **Reception of the Roman Law**. The Roman Law as developed by the medieval scholars became **Ius Commune**, the common law all over Europe.

In modern times the idea of the sovereign national state emerged. The rulers aimed at establishing national laws within their territories. It was again the scholars that worked out national codes on the basis of Ius Commune and the rationalist natural law doctrine that had been developed since the end of middle ages. The ideal of a **code** was to present the law in

such a way that any legal question arising out of any situation could be solved by referring to the text without giving the judge too much **discretion**. To achieve this purpose the legislators used **abstract concepts and principles** which describe the characteristic features of the legally relevant situations in everyday life (eg exchange of property, damage to physical integrity or to property, marriage, last will and many others).

The first great **codification** was *Prussian Code of 1794*, followed by the *Code Napoleon of 1804* and the *Austrian Civil Code of 1812*. These codes reflect the spirit of enlightenment and rationalism, of equality of the citizens, freedom of private legal relationship from state control and freedom of economic activity. After almost a century of further intensive academic activity the *German Civil Code of 1900* and the *Swiss Civil Code of 1907* followed. Their philosophical and ideological foundations are similar to those of the elder codes again stressing freedom and equality of the citizens as well as private autonomy. Both these codes carried abstractio so far that they had the effect - unintended in the case of the German Code - to give the courts large leeway to adapt the law to the difficult social and economic conditions of the early 20<sup>th</sup> century, thereby creating an extensive body of **case law**.

### Civil Procedure

Until the end of the 19<sup>th</sup> century civil procedure on the continent was strongly influenced by the canon **inquisitorial procedure**: it was the task of the judge both to ascertain the facts by conducting appropriate inquiries and to find the law. The proceedings were largely conducted in writing. The modern civil procedure is based on the principles of **orality**, and **adversarity**: it is the task of the litigants to assert the relevant facts and to prove them. The judge then decides what facts he considers as established and makes the legal ruling.

### Private Law in England

After the conquest in 1066 the Norman kings established a strong central government. They did not abolish the local customary laws but set up a *King's Court* which they encouraged to compete with the local courts. The King's court soon developed superior procedural rules: they gave the parties freedom to present and conduct their case in the way they thought would fit without conducting inquiries of their own (**adversarial procedure**), they introduced juries to establish the facts (**jury trial**) restraining themselves to resolve the question of law. The royal judges accomplished a task similar to the Roman jurists. Not starting from abstract principles but by a **case-by-case approach** they created the **Common Law**. From the early 13<sup>th</sup> century onwards their decisions were reported in writing and a huge body of **Case Law** evolved. The judges considered themselves bound by their own previous decisions (**precedents**).

By the 15<sup>th</sup> century the Common Law was fully developed but there were two inconveniences: The only **remedy** was money and the court procedure had become extremely technical. To overcome these problems the King instructed his Chancellor, usually a clergyman trained in Roman and Canon Law, to hear complaints and to grant relief. The chancellors developed **Equity**, a body of rules that corrected and supplemented the Common Law, and they created the **equitable remedies** designed to provide what was needed in the particular circumstances (especially specific performance)

Unlike on the continent, the universities had almost no influence on the development of law. Until the end of the 19<sup>th</sup> century the lawyers were trained and organized in professional guilds

**(Inns of Court)** and until very recently the judges were appointed exclusively from the members of the Inns (**Barristers**).

## 20<sup>th</sup> Century

The Common Law and the Civil law systems converge. In the Civil Law the case law has gained in importance and in the Common law countries statutes become more numerous. Recently the British government introduced significant changes to Civil Procedure in order to reduce the adversarial character and to introduce inquisitorial elements. **International and supranational Organisations** have been created that increasingly determine the laws of the national states and even take over more and more legislative powers from them. **Human rights** have been enacted on an international level (Universal Declaration of Human Rights, European Convention on Human Rights, African Convention on Human Rights); they have increasing influence on the interpretation and the development of private law.

## Major Legal Systems today

- *Civil Law/German tradition*: Austria, Germany, Switzerland, Liechtenstein, Greece, Turkey; Japan, South Korea, Thailand
- *Civil Law/Roman tradition*: France, Belgium, Luxembourg, Spain, Italy, Portugal; Egypt, former French Colonies in Africa; Ethiopia; Haiti, Bolivia Dominican Republic, Chile, Peru; Louisiana, Quebec.
- *Common Law*: Great Britain, former English Colonies, USA
- *Scandinavian Laws*
- *Socialist Laws (?)*
- *Religion-based Laws*: Islamic Laws, Hindu Law

## Working with rules

"If ... , then...."

A norm specifies certain facts and describes what should happen if they are realised. We can identify an "if ..., then ..." structure. If certain factual elements are fulfilled, a certain legal consequence ensues. Thus a norm consists of two parts: the elements and the legal consequence or sanction.

### **Example:**

Art 169 EC-Treaty.

If the Commission considers that a Member State has failed to fulfil an obligation under this treaty, it shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its observations.

If the state concerned does not comply with the opinion within the period laid down by the commission, the latter may bring the matter before the Court of Justice.

The **elements** may be: real facts, psychological facts, but also a legal concept, a legal rule. The norm describes certain categories of situations, certain sets of facts. Therefore the elements are **general** in scope and are described in **abstract** terms.

The **consequence** may be: in private law an obligation to do or not to do something, an amendment to a legal set-up; in criminal law a sentence, in public law an order or a permission to do or not to do something.

Of course not every section in the law codes is couched in an “if ..., then...” structure. Sometimes the order is reversed or the wording is different. It is also possible that the norm has to be drawn from several different parts of a section (e.g. Art. 169 above) or different sections of a statute.

### Subsumption

To apply the law means to bring the facts of the case at hand under a particular rule of law. We convert the general and abstract norm into an **individual** and **specific** one. This involves the following steps:

1. First we have to ascertain all seemingly relevant facts of our case.
2. Then we look for the appropriate rule.
3. Next we identify all its elements.
4. Then we have to check whether the facts before us fit the elements of the rule.

For the consequence to ensue the facts must fit every single element of the rule.

### Interpretation

Interpretation is a key part of legal practice.

To see whether facts fit with the elements we have to interpret the words which describe the elements, we have to find the meaning of the legal wording. This process of interpretation follows itself certain rules (§ 6 ABGB)

- Literal interpretation: what does the term ordinarily mean?
- Systematic interpretation: what is the context with other legal provisions?
- Historical interpretation: how did the rule develop?
- Teleological interpretation: what is the purpose of the rule?

What happens if apparently we cannot find a rule that applies to the case in question? We may either conclude that the legislator did not intend to make a rule in point so that the law has a **gap** on this point or we may construct a new rule from given rules by **analogy** or by **generalisation**.

Legal interpretation is formal, because the texts a lawyer interprets are in writing and have authority as they can be statutes, contracts, treaties or wills. The interpretation chosen will make a difference to someone's rights and duties. There is another way in which the interpretation of a legal text is formal. When it is disputed, there is such a thing as an official interpretation of the text. Judges provide this when they try cases or hear appeals. Ministers and servants also issue official interpretations of statutes, though their interpretations have in the end give way to those of judges if there is a difference of opinion between the two. Another way in which the interpretation of legal texts is unlike interpreting a request from a friend is that the evidence on which the interpreter of legal texts has to come to a decision is limited.

**Question:** If I am not sure what my friend meant by his request my best move is to ask him. But in general, problems of interpreting legal texts cannot be solved by going back to the authors. Could you explain why?

## Working with cases

When reading a common law case in the law reports 4 elements should be identified:

- the facts - the circumstances that gave rise to the law suit
- the legal issue - the legal problem the judge must resolve
- the court's decision- the judge's answer to the problem
- the court's reasoning - the basis and rationale for the decision; this ought to be distinguished from **obiter dicta**, which are those arguments in the reasoning that do not directly support the decision.

As already said, English courts follow their previous decisions (**doctrine of precedent**). The part of the case that is considered to possess authority is the **ratio decidendi**, the rule upon which the decision is founded. The ratio decidendi of a case can be defined as the material facts of the case plus the decision thereon. It is found by a process of abstraction.

### **Wilkinson v. Downton [1897] 2 Q.B. 57**

Facts: The defendant by way of what was meant to be a joke told the plaintiff that the latter's husband had been smashed up in an accident. The plaintiff, who had previously been of normal health, suffered a shock and serious illness.

Held: The defendant was liable because he had wilfully done an act calculated to cause physical harm to the plaintiff, and had in fact caused such harm.

Shock, serious illness → physical harm

Joke, lie → act calculated to cause harm

### *Donohue v. Stevenson [1932] AC 562*

Facts: The plaintiff had been invited to a drink in a country inn during a walk in the hills of Scotland. She ordered a bottle of ginger ale. The drink came in an opaque and sealed bottle. Mrs. Donohue opened the bottle and took a sip. When she poured out the rest, parts of a decomposed snail came out of the bottle. The plaintiff suffered shock and Gastro-eEnteritis.

Held: A manufacturer of products owes a duty to the consumer to take reasonable care in the course of the production and is liable for damages if the consumer suffers physical harm in consuming the product.

Ginger ale producer → manufacturer of goods (later cases: → professional providing services)

Shock, gastro-enteritis → physical harm (later cases: → economic loss)

## **Generality/Why study the Law?**

The law addresses itself to all members of a community or all persons living within the state. A state has power to regulate any set of facts with the exception of an exempt sphere guaranteed by the Human Rights. The legislator is free to make rules for specific groups of the community (e.g. entrepreneurs) and for specific fields of activity.

Every member of the society is supposed to know the law. Not to know the law is no excuse. In business, like in ordinary life, managers and their companies may become liable to damages or penalties if they do not conform with the legal requirements of their business. Knowing the law improves one's understanding of the courses of action available.

## The Legal System

Given generality it is necessary to arrange the legal provisions in certain ways such as to make them operable. There are several classifications.

- Public Law - Private Law

Public law governs the relations between the state and the subjects as well as between the different state powers and authorities. Private law is concerned with the rights and duties among individuals.

Public Law:

- Constitutional Law
- Administrative Law (Taxes and Excises, Public Education, Media Law, National Security, Economic Laws, and others)
- Criminal Law
- Procedural Law (Civil Procedure, Criminal P. Administrative P.; the Law making process in Parliament)

Private Law:

- Civil Law (Contract, Torts, Real Property, [Trusts], Family, Inheritance)
- Business Law (Commercial L., Company L., Negotiable Instruments, Insurance, Banking, Transport, Unfair Competition, Intellectual Property)
- Labour Law

- Substantial Law - Adjective Law

Substantial law is about the material rights and duties, adjective law are the rules of the procedure to establish and enforce rights and duties.

- Mandatory rules - non-mandatory rules

Some rules in the codes are only intended to be applied if the parties to a contract do not make any provision for the issue covered by the rule; others prevail over agreements made by the parties.

## Enforceability

How will legal conflicts be settled? In exceptional circumstances by **self help**. In general the state provides the means and procedures to settle disputes. Two issues arise: to ascertain the law on the point and to make sure that it will be obeyed. The first is the proper judicial task undertaken by the courts of law. However, in the field of private law it is open to the parties to use **alternative dispute resolution (ADR)**, eg **mediation** or **arbitration**.



## **Sources of Law**

### Acts of Parliament (Statutes)

In democratic system the power to make law is with the citizens. They elect people who constitute the law-making body, the parliament. The parliament creates statutes via the **law-making process**.

### Regulations

Administrative bodies are called to execute the parliamentary statutes. Parliament may give them the power to enact on the basis and within the scope of statutes detailed provisions within their field of activity.

### Courts' Decisions

Under the Civil law system the courts are called to settle legal disputes between individuals, between an individual and the state or between two state bodies by applying the law – statutes and possibly regulations - to the individual case before them. They are not supposed to make law.

However, the positive law may not contain a provision on the point. Then the courts will fill the gap by creating a new provision. In **filling the gap** the courts will primarily use interpretation, analogy or generalization or even take recourse to the general principles of law. The practice of the courts may clarify the meaning of a statutory provision and in effect amend the initial norm.

Under Common Law the judges do make the law. They base their decision on a general reasoning. That will be followed in future decisions. Parliament is not bound by the courts' decisions. It may create statutory law to amend or supplement the common law rules.

### International public law

International public law governs the relations between states and international organisations. Its rules are created by the states either customarily or by way of international agreements. They are binding upon the state and only exceptionally upon the individual citizens (eg the directives of the EU). The generally accepted rules of international public law are, however recognised part of the domestic law

### Academic writing

On the continent academic discussion has a considerable influence on the courts. Judgements are subject to academic criticism and the courts are expected to refer to the opinions expressed in the discussion when the issue comes up the next time. In Common Law the courts seem to refer less to the current academic discussion but they refer to books of authority.

### Hierarchy of Norms

1. Universally accepted rules of international public law
2. General rules of the law
3. International public law
4. European law (a. primary; b. secondary)
5. Constitutional Law (a. fundamental principles; b. simple constitutional law)

6. Ordinary Law (Statutes, cases, customary law)
7. Regulations
8. Individual decisions by the courts or by the administrative bodies

#### Conflict of norms

1. The special norm has priority over the general one.
2. The later norm has priority over the older one

### Important Concepts

#### Legal Subjects: Natural Persons - Legal Persons

All human beings (**natural persons**) are equally able to have rights and duties, regardless of race, sex, age or nationality. The **ability to have rights and duties** is different from the **capacity to create and dispose of rights and duties**. This capacity is reserved to persons with some experience and full intellectual abilities (in Austria: 14 years for accountability in tort and majority for contractual liability).

For reasons of practicability the law confers the capacity to have rights and duties as well to artificial creations, so called **legal persons** or **corporate bodies**. These have the same capabilities as legal persons in terms of rights and duties (with the exception of those based on human nature), they are even subject of "Human Rights". Legal persons may be created under Public Law (eg. the State, National Insurance, Broadcasting Corporations) and under Private Law (associations, charitable societies, public limited companies, private limited companies, co-operatives).

#### Legal Objects

Anything that is different from persons but may be of use to persons and may be dealt with in a legal transaction.

- Immovable property (land)
- tangible movables (choses in possession or chattels)
  - intangible property; intangible objects (choses in action) - debts, shares in a company, negotiable instruments, patents and designs, trade marks and trade names, copyright.

#### Time

Time is often an important factor in law. The law may prescribe certain periods or terms within which an action must be brought or some thing must be done unless it is **barred** or prescribed. Sometimes the law prescribes that a right is acquired if a certain period of time has passed.

**Absolute rights** are positions that must be respected by everybody. The most important example is property, but also copyright and the rights in patents, trademarks and designs.

**Relative rights** are positions which the person entitled can enforce only against particular other persons but no others. These positions are usually based on contracts (the creditor can

enforce the rights due to him under the contract only against the other party to the contract) or torts (the victim can only sue the tortfeasor but has no claim against someone else).

## **Public Law**

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 **sovereign**.

## **The State**

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 (Montesquieu) distinguishes the **legislative power**, the **executive power** and the **judicial power**. 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.

## **Sovereignty**

Sovereignty can be external or internal or both. External sovereignty is 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.

**Example:** A state is not allowed to use force against another state except in self-defence or with the authority of the Security Council of the United Nations.

Another limit on a state`s freedom of action is that it is legally bound by the treaties it makes. For example 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 Britain, the law of the Union prevails. Despite this, the members of the United Union remain sovereign states. 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. But it is not legally bound to do what the South African government tells it to.

**Example:** It can and does negotiate treaties with South Africa, for instance about its water resources.

The external sovereignty of a state is its independence in international law.

### *The Sceptical View: Checks and Balances*

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). **Federalism** divides it according to geographical region. **Bills of rights** divide power between the state and ordinary citizens.

- Two ideas underline the separation of powers: The first is that, to avoid too much concentration of power, the same people should not legislate, govern and judge. Each branch of the state should be independent of the others. But if each branch is independent of the others, the danger is that they will each go their own way and abuse their powers. Each will be selfish and corrupt. To avoid this, a second idea comes to play. There should be some way in which each branch can be kept in check by the others.
- Federalism: In a federal state there is a federal government, legislature and courts. There are also regional governments, legislatures and courts. Both may get their powers from a written constitution. Powers to make laws, to govern and to judge are each divided between the federal state and the regions. The regions go by different names in different countries (states, provinces, lands, cantons, republics). One reason for dividing power in this way is that the country is too large to be governed conveniently from a single centre. Another is that its regions vary in language or culture. A third is that a central government might be too powerful if it was not balanced by regional governments with some independent powers.
- Bill of Rights: Dividing up powers between the state and private citizens is done by listing in a law certain basic rights of citizens. If there is a written constitution the list will be part of the constitution. When a bill of rights is in force a citizen has some rights that cannot be taken away from him either by the legislature, or the government, or the courts.

**Example:** If a citizen has the right not to be imprisoned for more than so many days without trial the legislature cannot make a law that provides for imprisonment for a longer period without trial. Nor can the government disregard the law and imprison the opponents without trial.

One way to ensure that the rights are respected is by **convention**, the other one is through an **international treaty**. The simplest way of protecting fundamental rights is to give the courts of the country in which the rights are to be respected the power to enforce them.

### *The Trustful View: Legislative Sovereignty*

Internal sovereignty consists in the right of the legislature of a state to make any law it pleases. **Internal sovereignty is legislative sovereignty.** In a country like Britain the sovereign legislature could make a law, for example, abolishing elections. It could even lay down that people who criticized the law abolishing elections should be detained to trial. That law would be an outrage but it would be valid in Britain. British courts would have to apply to it. Of course a conscientious judge might refuse to do so and resign. Despite this, supporters of the legislative sovereignty argue that in democratic countries the legislature can be relied on not to pass a law of this sort.

**Question:** If it did, what consequences may it have?

If the legislature consists of two or more people or bodies a problem arises. In many countries laws are made by a lower house, an upper house and a head of state. To make a law all three must agree on the same written text. But how do they agree? In what order? In what majority? What if they disagree?

There are two basic possibilities: One is that law must provide the answer. The other one is that the matter is to be settled by custom. Custom of this sort, which regulate the way in which government works, are called **conventions**. A convention is a practice that people in political life think they are bound to respect though it is not laid down in any law. The questions we have put can be settled either by convention or law or a mixture of the two. In answering them the **trustful school** favours convention and the **sceptical school** law. A supporter of convention will argue that each House of the legislature should decide for itself what procedure to follow when it considers whether to agree to a proposed law. It should decide how many times the proposal needs to be approved and what majority in favour is needed if it is to pass. If the parts of the legislature disagree the trustful school would leave it to the good sense of each to decide whether to give way.

**Example:** In Britain, the Queen should agree to a proposed law if both Houses of Parliament have already agreed to it.

**Question:** Which idea does this reflect?

### **Human Rights (Civil Rights, Constitutional or Fundamental Freedoms)**

Since Ancient times the theory existed that every individual has a **private sphere** which the state or society must respect. The natural law doctrine argued that men had by their nature certain **unalienable rights**, especially the right to life, freedom and property, honour, freedom of speech, and others. In the course of the 19<sup>th</sup> century several states established catalogues of human rights. After World War I such catalogues were made at the international level. The Charter of the United Nations contains a number of references to the protection of human rights. In 1948 the **Universal Declaration of Human Rights** was proclaimed by the General Assembly of the United Nations. It was followed by the **International Covenant on Civil and Political Rights** and by the **International Covenant on Economic, Social and Cultural Rights**. On the regional level the **European Convention on Human Rights** and the **African Charter on Human and People's Rights** must be mentioned. Furthermore there are specialized treaties like the **European Convention for the Prevention of Torture** and the **European Social Charter**.

In the 19<sup>th</sup> century the Human rights catalogues were more or less one-sided declarations by the states to respect the guaranteed positions. Only gradually Human rights gained in effectiveness by giving the individuals claims against the states if they infringed the guaranteed legal positions. Initially these claims were only decided in the national courts. Since the codifications were enacted at international level appeal lies to international courts.

The further development will probably tend to strengthen the international control of human rights, to extend their scope by creating new rights (for instance the right to work), and to add the private law dimension so that human rights may be invoked in disputes between private subjects.

### **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. In 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: The law predominates over, and excludes, the arbitrary exercise of governmental power
- Separation of powers
- The liberal principle: The individual is guaranteed a legal sphere withdrawn from state influence.

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. Constitutional law includes Administrative law.

### **Administrative Law**

The law that regulates how the state should exercise its functions and conduct public affairs. It deals with the relations between officials and citizens and the ways in which people can object to official decisions.

The matters that affect business are Taxes and Customs, Trade Regulations, Employee Protection, Food Quality Control, Alcohol Sale licences, Building Regulations and Zoning Laws and many more.

## **Criminal Law**

**Crimes** are offences against certain goods, interests or values protected by the state. The protected issues include physical integrity, property, honour of human beings and the state as a whole as well as the execution of the state's functions. The offences are prosecuted by the state. The criminal sanctions are imprisonment and fines and an elaborate set of corrective measures.

What type of conduct amounts a crime?

The state targets

- (1) conduct that by causing or threatening harm creates insecurity;
- (2) conduct that causes offence, and
- (3) conduct that undermines the smooth working of society, its government and economy

Laws make conduct criminal if by causing or threatening harm it creates a sense of insecurity. What counts harm depends to some extent on what each society thinks is objectionable. But behaviour that strikes people's lives and bodies, their property or the safety of the whole community is everywhere regarded as harmful. To begin with people's lives and bodies, all countries make it a crime intentionally to kill another person (murder) or to wound them. It is also a crime to threaten someone in such a way that they think that they are about to be killed or wounded (assault). Equally or more disturbing is forcing someone to have sexual intercourse against their will (rape).

### **When somebody is hold guilty of a crime**

For someone to be guilty of a crime he must obviously have done what the state forbids. To be stamped a criminal is, at any rate if the crime is serious, to suffer disgrace. Before anyone is held up to shame in this way, it seems fair that he should have known, or at least been able to find out, what the law forbade. And he must have been able to avoid breaking the law. Should we go further and say that it is only fair to punish someone when he **intended** to do what the law forbade? Or is it enough that he **negligently broke the law**, through not taking enough trouble to keep it? Most countries demand some form of **fault**, either intention or negligence, before anyone is convicted of a crime, apart from regulatory crimes. But they differ in their view of what sort of negligence is criminal.

To show that someone is guilty of a crime the state must prove that he did what the law forbade. What the law forbids depends on the definition of the crime; and crimes are mostly defined in codes or statutes, though in some countries judges define them.

Homicide is a good example to take. One form of homicide (murder) is probably the most serious crime; but almost any other crime could be chosen to illustrate the idea of doing what the criminal law forbids. Homicide is killing another human being. The state's aim in making homicide a crime is to prevent killing. But what is to kill another person? **To kill someone is to cause his death.** But it is not always easy to decide what amounts to causing another person's death.

**Example:** Suppose I stab Tom. Tom is taken to hospital and given the wrong medical treatment. He dies, though the right treatment would have saved his life.

**Question:** Have I killed him? He would not have died had I not stabbed him. But does it follow that I killed him? The stab wound does not have to be the only cause of Tom's death, but it must be a cause. How can we decide if I have killed him? Would it make a difference if the medical treatment seemed right at the time, though in retrospect, because of an allergy from which he suffered, it was mistaken? Or if the treatment was obviously mistaken, even at the time? Discuss the issue by finding arguments!

It would not be fair to hold someone guilty of a crime if he could not do what the law required, for instance because he **was too young or mentally unstable** to have full control of himself. At the very least the punishment should be reduced when this is the case. Even if a sane adult breaks the criminal law but can show that she was intolerably provoked into doing so.

**Example:** Joe keeps beating his wife and one day when he is drunk and starts beating her she kills him. This in many systems reduces the seriousness of the crime.

### **When killing is permissible**

Sometimes killing is allowed, and it may even be the right thing to kill. There are three sorts of case to be mentioned:

- (1) necessary self-defense and the defence of others: We certainly have the right to defend ourselves against someone who attacks us. But we can only kill an attacker when it is necessary in order to prevent or stop the attack.

**Example:** If the person who attacks me threatens to kill me, or seriously injure me, the only method of defence may be to kill him; if so, I am entitled to take his life.

- (2) other cases of necessity

- (3) military service: Human beings are legally entitled to kill, when they are ordered to attack the enemy.

### **Procedural Law**

As a consequence of the democratic principle and the rule of law, the activities of all state organs and authorities are governed by legal rules. This applies to all powers: parliament- law making process; executive power- administrative procedure; judicial power – civil and criminal procedure; procedure of the Constitutional Court and the Administrative Court.

Civil Procedure:

The **plaintiff (Claimant)** files a **statement of claim (complaint)** with the appropriate court. The statement of claim contains the **basis for the claim**, ie the details why the plaintiff is suing the defendant, and a **claim for relief** ie what the court should order the defendant to do e.g. pay the plaintiff a sum of money. After a **preliminary consideration** by the court the



complaint is **served** upon the **defendant** and the court orders him to defend the allegations made against him. The defendant will usually file the **defence**, i.e. an answer to the complain, raising points of procedure, of fact or of law. It may be that the case comes to an end at this stage by way of a **summary judgment**. Otherwise the case proceeds to **trial**. In the English and in the American system there is an intermediate **pre-trial procedure**, where each party has to disclose all information relevant to the case it possesses. The case may be tried by one or more professional judges or by a jury. The basic principles for the trial are **publicity**, **orality**, **immediacy**, **due process of law** and **party disposition**. The roles of judge and parties differ as to whether the civil procedure is based on the **adversarial** or on **inquisitorial system**. The trial ends at first instance – if no **settlement** can be reached – with the **verdict** (jury) or with the **judgement**. There is usually an **appeal** to higher court (**appellate court**) to review the decision. The appellate court can **affirm**, **amend** or **reverse** the decision of the lower court, **order a new trial** or **order the case to be dismissed**.

## **Private Law**

Private Law is that part of the law which is primarily concerned with the rights and duties of the members of the community as equals. The state and its agencies are subject to private law if they do not act in their sovereign capacity.

Civil Law System: Obligations (Contracts, Torts, Unjust enrichment), Real Property, Family, Inheritance

Common Law: Contracts, Torts, Trusts, Real Property, Family, Intestacy

The **law of obligations** deals with the rights and duties between individuals in connection with legal transactions and unlawful acts. The **law of real property** is concerned with the persons' rights with respect to physical property.

### **Absolute Rights – Relative rights:**

**Absolute rights** are rights of the individual that are to be respected by everybody; the individual can enforce those rights against everybody (e.g. property, personality rights). **Relative rights** exist between one individual against another individual (eg. obligations). Both absolute and relative rights may pertain not just to one individual but a specified group of individuals.

### **Individual Autonomy (Self Determination)**

In free or social economies the individuals are largely free to determine their legal environment, their rights and duties. This is not the case in planned economies or in feudal or status societies. In our system the individuals are free to determine **what legal relations** they want to **create, with whom** and **when**.

Individual autonomy has of course its exceptions and limitations. These are based on the ideas of fairness and trust. Legal relations that are contrary to public policy or that violate the law are void or voidable.

Individual autonomy is of course not the only source of rights and duties under private law. In several fields legal relations are not created by the individuals but arise **under law**. Thus the rights and duties among parents and children are regulated by the law; unlawful acts give rise to tortious liability and claims for damages under the law.

### **Manifestation of Will (Declaration of intent)**

As the individuals are free to determine their legal relations, the determinant factor is the **individual's will** or **intention**. In order to be legally relevant the will must be **expressed** or **declared** verbally, in writing, or by acts. If the meaning is not clear, it must be established by **interpretation** taking account the ordinary meaning of the words, the party's intention and the criteria of fair dealing.

## Legal Deals (Legal Transactions)

Rights and duties can be **created**, **amended** and **extinguished** by legal deals (transactions). Where rights arose under the law they can be **disposed** of by legal transactions. As an individual cannot unilaterally affect the rights and duties of another, **unilateral acts** are possible and valid only where no legal relations of any other person are affected. An important example is **authorization**, which consists of one person (the principal) granting another person (the agent, representative or proxy) the legal power to conclude legal transactions in the principal's name. Legal transactions are usually **bilateral** (eg a sales contract) or **multilateral** (eg formation of a company), only in exceptional cases **unilateral** (dereliction, last will).

## Contracts

Contracts are bilateral or multilateral legal transactions that create mutual obligations between individuals or between individuals and states. In Business Law the contracts are the basis for the exchange of goods and services. It is necessary to understand that the contract does not effectuate the exchange but only creates the mutual duty to do so in the future.

Individual autonomy in the context of legal transactions means freedom of contract (A Fundamental Law in Germany!), again limited by statutory prohibitions (eg sale of drugs) and by public policy (eg usury). **Freedom of contract** means that the individual is free to decide whether and with whom to conclude a contract and what contents the contract should have. Only in exceptional cases there is a **legal duty to conclude a contract**. An important example would be essential services provided by a monopolist. Another example is the common law obligation of innkeepers to provide accommodation to all who seek them.

The contract comes into existence by two corresponding declarations of will, **offer** and **acceptance**. In order for the contract to be valid the parties must have the **legal capacity to contract**, their **assent** must be genuine (no fraud, misrepresentation or mistake), the contract must be for a **lawful purpose** and where the law requires a certain **form** (eg writing) that must be complied with. Under Common Law there is a further requirement: **consideration**, which means that each person must give something and receive something in return.

If any of the mentioned elements is lacking the contract will be **void**, that is unenforceable in court, or **voidable**, which means that the contract may be cancelled at the option of one party.

If one party fails to abide by the agreement, this constitutes a **breach of contract** and gives the other parties **remedies** that can be enforced in court. These may be **damages** or specific **performance**.

From the start of the contractual negotiations and irrespective of whether a contract is concluded in the end, the parties are under a **mutual duty to act fairly**; breach of this duty may also give rise to a claim for damages.

**Example:** A singer who was due to sing at a concert has failed to turn up on the day agreed and it's too late to arrange for it to be held on another day will have to pay compensation (damages) for breaking the agreement.

## Agreements which are legally binding

Many civil law systems hold that if an agreement is serious, definite and meant to be legally binding it is legally enforceable. Common law systems, on the other hand, generally require something more. Their point of view is derived from the model of business dealings.

Bargains, in which each party stands to gain something from the agreement, can be enforced, just because each party stands to gain from them. And an agreement can be enforced by a party who stands to lose if it isn't enforced, because he has relied on it. But a promise to do someone a favour or to make a gift, however seriously meant, cannot be enforced, unless the promise is made by a written deed, signed or witnessed.

**Example:** Suppose you have rented a flat and the landlord has told you that, as you are in financial difficulties, he will let you off the rent for three months. Later he finds that he needs the money and demands the rent for those three months all the same. His agreement to let you off was seriously meant but, but it wasn't a bargain. He did not stand to benefit from the agreement. So from a common law point of view the agreement is not binding, though from a civil law point of view it is. The agreement would be binding in common law if to your landlord's knowledge you had lost the chance of moving to cheaper lodgings because you relied on his keeping his promise.

## How contracts can be enforced

For contracts to be enforced the state must have sufficient force at its disposal. Given state force, courts can order parties to an agreement to carry it out, or to provide a substitute for what was promised, or to pay compensation for not doing what was agreed.

The law can also allow to withdraw from an agreement which the other party is clearly not going to carry out.

**Example:** If the plumber who has agreed to repair my leaking cistern delays too long in coming to my apartment to carry out urgent repairs I can withdraw from my contract with him (rescind the contract) and get another plumber instead.

**Example:** If I have made an advanced payment for the rent of a holiday villa and the owner does not make it available as agreed I can recover the advance payment (claim restitution). These remedies, as they are called, reflect one of two ideas. One is that a legally binding agreement must be carried out. If it is not, state force should be used to see that it is, or that the other party is put in as good a position as if it had been. When a contract is broken, it sometimes seems right to put the party who suffers in as good a position as if the other party had kept his agreement. In other cases it seems right to put the party who suffers in as good a position as if he had not made the agreement in the first place.

## Torts

Rights and duties can also arise on the basis of statutory law or common law. The law protects certain goods, positions and interest and grants claims for restitution or damages against the person that infringes them.

The **legal protection** covers the physical integrity and the freedom of a person, her honour, her property and generally her rights. In modern systems only in exceptional cases will the infringement per se be actionable in tort (**strict liability**); these cases are the liability for

accidents caused by dangerous machinery (motor vehicles, air planes, atomic power plants) and product liability. In general only a course of conduct that satisfies specific requirements will give rise to liability in tort. Under common law a person becomes liable in tort (the tortfeasor) if he causes damage or injury by violating a legal duty; this duty may simply consist in acting reasonably so as to prevent another person from incurring damage, in which case the tort of **negligence** is committed. Under civil law the act causing the damage must be **unlawful**, ie violate a statutory or contractual obligation, and it must be committed at least **negligently**, ie the tortfeasor acted without the necessary care. Under both systems the tortfeasor's act must be a **proximate cause** of the damage, which means there must be no other causal factors between the act and the damage.

Under Civil Law the primary legal consequence is **restitutio in integrum**: The tortfeasor must put the injured person into the position she would have been if the tortious act had not been committed. Other remedies are **compensatory damages** and **compensation for lost earnings**: The victim's loss is evaluated in money and the tortfeasor has to pay. Under Common Law the injured is entitled to **compensatory damages** and - in the U.S.- to **punitive damages** if the tortfeasor's wrongful act was aggravated by violence, malice, fraud or a similar wrong.

**Question:** When is it fair to make someone who harms another pay them compensation?

**Question:** What is the difference between strict liability and fault liability?

### Interests which tort law protects

The system of tort law does not only protect bodily injuries and property, furthermore it protects **economic** and **personal** interests.

**Example** for economic security: An employer can sue someone who negligently kills a valuable employee, causing a loss to the business. A football club can sue the person responsible for killing its star footballer.

Legal system tend to be cautious about compensating for emotional distress as it is almost impossible to be measured like economic loss. The solution to this problem varies from country to country, because some do not allow claims for bereavement, whereas some allow a limited sum to be claimed.

## Property Law

### **Definition of property**

**Property (Ownership)** is the legal power to deal with a piece of property according to one's will. It is anything that has a money value and can be cashed or exchanged: land, buildings, furniture, vehicles, leases, money, shares, copyrights. For something to be property it has to be possible to have an exclusive right on it. Under modern law it is subject to severe limitations in the public interest. There are absolute rights which confer a more limited power to dispose of a piece of property e.g. a pledge, which is the right to sell off an object belonging to somebody else in order to cover a money claim out of the proceeds.

**Possession** is the physical control of a thing. As property rights are absolute rights that have to be respected by everybody, possession is important in that it gives an indication of the legal situation: The person who has a thing in his possession is considered to be the owner; the consequence of this legal assumption is that anybody who disputes that the possessor is the owner, has the **burden of proof**.

Possession may be lawful, e.g. in the case of the tenant, or unlawful, e.g. that of a thief.

### **Who owns what?**

The owner is said to have the property in the thing he owns. By “owner” is meant the person who has the best right to control the thing in the long run, though in the short run someone else may have a more immediate right on it.

**Example:** I can own an apartment though at the moment it is let to you or mortgaged to a building society.

To decide who has the best long-term right, several factors need to be taken into account, of which the most important are: rewarding initiative, giving effect to agreements to pay for or transfer things, encouraging trade, and seeing that things are properly looked after. The present owner will be the person who can trace his right back to the original owner by one or more sales, gifts, etc. Owning a thing includes the right to pass on the ownership of the thing on to another. Sometimes, however, the ownership of a thing is transferred without the owner's consent. There are two ideas. One is that a person cannot be deprived of his ownership without his consent. This idea gives priority to long-term security.

**Example:** If I lend or hire my lap-top computer to you or you steal it or find it left in your office and you then sell it to Jane, I can claim it back from Jane, even if she thought it was yours. When she bought it, she took the risk that it did not belong to you.

To sum up, property must have some value: and things have value only if they can be controlled; and the control, for which the legal term is possession, can be physical or legal. Let's have an example according to that.

**Example:** Can one own fish in the sea? Not if they are swimming about freely. But if I am fishing in a place where I have the right to fish and have caught fish in my net I have them in my control and so I can own them.

**Question:** What about those I have almost netted when your boat cuts the net? Can I then claim that you let my fish get away? Could you discuss this issue and find a solution by giving arguments?

### **The protection of property rights**

In protecting property rights law has two main aims. One is protecting the owner, the other one is protecting the possessor.

The owner is the person with the best long-term right to the possession of the thing; so there are two ways to protect him. One is to give him a right to claim the thing from anyone who cannot show that he is entitled to keep it temporarily. The second way is to give the right to claim not to the owner but to the person who is immediately entitled to possess the thing. This protects the owner in the long run. The owner is always entitled to possess the thing in the long run, but not always in the short run.

**Example:** A lessee is entitled to possess the flat he has leased until the lease runs out.

But to protect the owner it is not enough if the law is to promote social peace and harmony. To discourage people from taking the law into their own hands, the person who possesses a thing without owning it also needs to be protected. A person who is dispossessed of a thing can get it back from the person who took it.

**Example:** If you take the motorcycle I have been riding without asking me, you dispossess me and I can take it back without asking you. Provided I don't use force. If someone else took the motorcycle from you, he dispossessed you in turn and you can claim it back from him though you don't own it. And if I use force to get the motorcycle back from you there are countries where the law would make me return it to you before I can claim it back from you, even if I own the cycle.

### **Why protect property?**

One reason for protecting private property is that it helps those who own it to be more independent. For this purpose there have to be rules that lay down who owns what. Another reason is to make sure that economic and domestic life can be carried on without too much interference by others. A viable economy and home life is only possible if people are not free to take things from others without their leave. It is better that those who are in control of things (who have what the law calls possession), should remain in control and be free to use the thing broadly. A third reason for having a law of property is that property law can be used to create assets of a sort that did not exist before, such as patents and copyrights, and in that way reward originality and stimulate enterprise.

Protecting ownership makes for long-term stability and protecting possession for short-term stability. Both have a place in a system of property law.

Common Law positions as to real property: freehold, fee simple, fee tail; mortgage.

**Transfer of rights in real property** is by way of legal transaction. This falls into two parts: an agreement that property should pass and a visible act transferring the object of the property.

**Remedies for interference with property rights:** action for restitution; action for disturbance of possession

### **Business entities**

#### *Corporations*

As already said, the law may accord artificial entities the capacity to have rights and duties ie legal personality. These entities are named **corporations**. Legal personality with respect to a corporation is termed corporate personality.

Once a **corporate personality** comes into existence its legal identity is separation and independence from its members. Corporations may sue and be sued; they are entitled to carry

on activities like human persons, and to hold and dispose of land and other property. They also may form themselves and become members of corporations.

As corporate personality is accorded by law, the law determines what corporations may be formed and what formalities must be complied with for their formation. In essence what is necessary is a contract (**memorandum and articles of association**) in the form deed certified by a public notary and the **registration** with companies` register. The contract is the constitution of the corporation; it sets forth the rights and duties of the members, the organs and the management and the control of the corporation.

The business corporations are the **public limited company**, the **private limited company** and the **co-operative**. For non-business purposes the law provides for the **associations** and **societies**. However as professional associations, trade associations or trade unions they play an important role in business.

### *Partnerships*

Partnerships are relationships between several persons carrying on business together with a view of profit. Initially they had no legal personality at all. The partner where jointly owners of the assets and liable for the liabilities. Gradually it became recognized that partnerships could sue and be sued and that they could own property. However there was still the important criterion that they were not independent from their members, which means that if one of the members dies, resigns or is expelled, the partnership dissolves. In recent years partnerships were introduced in Germany and in Austria by legislation which have legal personality but are still dependent on their members.

## **Sources of Interests**

### Austria

Österreichischer Verfassungsgerichtshof	<a href="http://www.vfgh.gv.at/">http://www.vfgh.gv.at/</a>
Österreichischer Verwaltungsgerichtshof	<a href="http://www.vwgh.gv.at/">http://www.vwgh.gv.at/</a>
Justiz – Justizressort	<a href="http://www.bmj.gv.at/justiz/index.html">http://www.bmj.gv.at/justiz/index.html</a> <a href="http://www.bmj.gv.at/justiz/gerichte/ogh.html">http://www.bmj.gv.at/justiz/gerichte/ogh.html</a>
Österreichs Beämter, Behörden und Institutionen	<a href="http://www.help.gv.at/">http://www.help.gv.at/</a>
Bundeskanzleramt Österreich Rechtsinformationssystem	<a href="http://www.ris.bka.gv.at">http://www.ris.bka.gv.at</a>

### Germany

Bundesverfassungsgericht	<a href="http://www.bundesverfassungsgericht.de/">http://www.bundesverfassungsgericht.de/</a>
Bundesverwaltungsgericht	<a href="http://www.bundesverwaltungsgericht.de/enid/2.html">http://www.bundesverwaltungsgericht.de/enid/2.html</a>
Deutscher Bundesgerichtshof	<a href="http://www.bundesgerichtshof.de">http://www.bundesgerichtshof.de</a>



Bundesverfassungsgericht → Info <http://www.paper.olaf-freier.de/bvg.htm>

Bundesarbeitsgericht Deutschland <http://www.bundesarbeitsgericht.de/>

Bundesfinanzhof <http://www.bundesfinanzhof.de/>

German Law Journal  
Review of Developments in German, European  
and International Jurisprudence <http://www.germanlawjournal.com>

### England

Lord Chancellors Office <http://www.lcd.gov.uk/>

House of Lords [http://www.parliament.uk/about\\_lords/about\\_lords.cfm](http://www.parliament.uk/about_lords/about_lords.cfm)

### Switzerland

Schweizer Bundesamt für Justiz <http://www.ofg.admin.ch/d/index.html>

### Europe

European Court of Human Rights <http://www.echr.coe.int>

### USA

Supreme Court <http://www.supremecourtus.gov/>

US State Department for Human Rights <http://www.state.gov/g/drl/hr/>