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Law

for the 2nd year students
of the specialty 6.030601«Management»

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Preface to Second Edition

This course has been designed with the objective of developing clear perception and understanding of the students about the laws.

Introduction to Law is an intensive course that reviews the fundamentals of the legal system, including an overview of the Constitution, state, the structure and function of courts, sources of legal authority and common-law methodology. Introduction to Legal Practice teaches practical skills needed in a legal environment including locating cases, statutes and other legal source materials, citing legal authority correctly and checking the validity of case citations.

According to Hobbs

"The commands of him and them that have coercive power.."

According to Austin

"A law is a rule of conduct imposed and enforced by the sovereign."

According to Salmond

"Law is the body of principles recognized and applied by the State in the administration of justice."

According to John Erskine

"Law is the command of a sovereign, containing a common rule of life for his subjects and obliging them to obedience."

According to De Montmorency

"Coercion is a weapon of law which law has forged, but it is not the basis of law."

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LECTURE 1 THE NATURE OF LAW

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1.The nature of law

The term ‘law’ is used in many senses: we may speak of the laws of physics, mathematics, science, or the laws of football. When we speak of the law of a state we use the term ‘law’ in a special and strict sense, and in that sense law may be defined as a rule of human conduct, imposed upon and enforced among, the members of a given state. People are by nature social animals desiring the companionship of others,

and in primitive times they tended to form tribes, groups, or societies, either for self-preservation or by reason of social instinct.

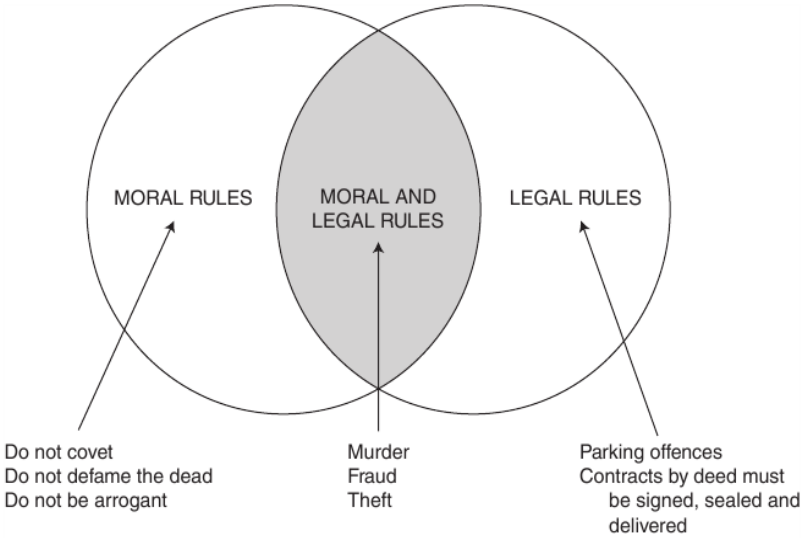
If a group or society is to continue, some form of social order is necessary. Rules or laws are, therefore, drawn up to ensure that members of the society may live and work together in an orderly and peaceable manner. The larger the community (or group or state), the more complex and numerous will be the rules.

If the rules or laws are broken, compulsion is used to enforce obedience. We may say, then, that two ideas underline the concept of law: (a) order, in the sense of method or system; and (b) compulsion – i.e. the enforcement of obedience to the rules or laws laid down. On examination of the definition of law given above certain important points should be noted.

When referring to ‘the law’ we usually imply the whole of the law, however it may have been formed. As we shall see later, much law of the countries was formed out of the customs of the people. But a great part of the law has been created by legislation, i.e. the passing of laws. Common law and statutory law together comprise what is referred to as the ‘Law of the Country. People resort to various kinds of rules to guide their lives. Thus moral rules and ethics remind us that it is immoral or wrong to covet, to tell lies, or to engage in drunkenness in private.

Society may well disapprove of the transgression of these moral or ethical precepts. The law, however, is not concerned with such matters and leaves them to the individual’s conscience or moral choice and the pressure of public opinion: no legal action results (unless a person tells lies under oath in a court, when he or she may be prosecuted for perjury). Thus there is a degree of overlap between moral and legal rules, as depicted by the diagram (see over).

We sometimes think of laws as being laid down by some authority such as a monarch, dictator, or group of people in whom special power is vested. In Ukrine we can point to legislation for examples of law laid down by a sovereign body, namely Parliament. The legal author John Austin (1790–1859) asserted that law was a command of a sovereign and that citizens were under a duty to obey that command.



Other writers say that men and women in primitive societies formed rules themselves, i.e. that the rules or laws sprang from within the group itself. Only later were such rules laid down by a sovereign authority and imposed on the group or people subject to them.

Clearly, unless a law is enforced it loses its effectiveness as a law and those persons subject to it will regard it as dead. The chief characteristic of law is that it is enforced, such enforcement being today carried out by the State. Thus if A steals a wallet from B, A may be prosecuted before the court and may be punished. The court may then order the restitution of the wallet to its rightful owner, B. The 'force' used is known as a sanction and it is this sanction which the State administers to secure obedience to its rules. A State is a territorial division in which a community or people lives subject to a uniform system of law administered by a sovereign authority, e.g. a parliament.

The law is a living thing and it changes through the course of history. Changes are brought about by various factors such as invasion, contact with other races, material prosperity, education, the advent of new machines or new ideas or new religions. Law responds to public opinion and changes accordingly. Formerly the judges themselves moulded and developed the law.

Today an Act of Parliament may be passed to change it. People desire justice in their personal, social and economic dealings. There is no universal agreement on the meaning of justice, and ideal or perfect justice is difficult to attain in this life. People strive for relative justice, not perfect justice; and good laws assist to that end. It is the business of citizens in a democracy to ensure that wise laws are passed and that they are fairly administered in the courts of law.

The basic functions of law are:

1. Keeping the peace.
2. Enforcing standards of conduct and maintaining order.
3. Facilitating planning.
4. Promoting social justice.

The primary sources of law are:

1. Constitutions
2. Treaties
3. Statutes
4. Court decisions
5. Private law

2.Philosophy of Law

Law as Power

Some philosophers argued that laws are nothing more than the will of those who hold power. In totalitarian regimes, military power often controls governmental institutions, and laws are essentially edicts. In a democracy, political majorities control legislative bodies and determine who exercises executive authority, and appellate court majorities determine legal precedents.

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 have also produced laws that are 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 ignoring arbitrariness, abuses of power, and tyranny and for producing bad law.

Natural Law

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. Some believed that this sense was God-given; others believed it was an intrinsic part of human nature.Natural law philosophers argued that society does not create law because true law is self-evident and describes ethical, or "right," behavior.

Our tort system is also a reflection of natural law thinking. 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. 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. (However, our law confers power in our judges to refuse to enforce contractual provisions that are too one-sided.) Finally, it is "right" to punish persons who commit crimes for those acts.

When there is no consensus in society about what is right and wrong, however, the notion of natural law falters. Current examples of this problem include issues such as abortion and capital punishment.

Historical Jurisprudence

Historical jurisprudence 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 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. Law, according

to this view, could not be arbitrarily imposed by legislators whose legal source was "right" reasoning. Instead, 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 is that it promotes stability in law. In fact, much law is largely grounded in judicially approved custom.

Utilitarian Law

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 through a legislated system of incentives and disincentives. For example, if the pain imposed by a criminal sentence exceeds the gain realized by an offender in committing the offense, future criminal actions will be deterred. 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 security of property is crucial to attaining happiness. People, they thought, 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. Instead, utilitarians would favor small claims courts, with their simplified pleading requirements, informality, low cost, and the optional use of lawyers.

Utilitarian influence can be found in legislative enactments that require the nation's broadcasters to operate "in the public interest," in "lemon laws" and other consumer protection legislation. A major problem with utilitarianism is that everyone does not agree about what is pleasurable and what is painful. And many, if not most, political scientists would dispute that legislators actually make decisions according to the pleasure-pain principle.

Analytical Positivism

Analytical positivists asserted that law was a self-sufficient system of legal rules that the sovereign issues in the form of commands to the governed. These commands do not depend for legitimacy on extraneous considerations such as reason, ethics, morals, or even social consequences. However, the sovereign's will was law only if it was developed according to duly established procedures, such as the enactments of a national legislature.

Legal Realism

The legal realists were concerned with the behavior of judges and juries rather than focusing solely on legal rules. They were convinced that legal rules do not primarily determine who wins and loses in the courtroom. Rules, they pointed out, do not adequately account for witness perjury and bias, nor do they compensate for the differing levels of ability, knowledge, and prejudice in individual lawyers, judges,

and jurors. Realists believe that deciding the facts of a case is a unique process that does not lend itself to rationalization. Because legal realists were nonempirical in their methodology, they were unable to answer their own questions—they did, however, point the way to others who empirically examined such issues.

Sociological Jurisprudence and Legal Sociology

Many early sociologists were interested in examining jurisprudence from a social scientific perspective. Their methodology was empirical, and they focused on what they called the living law—not the law declared by legislature and courts, but the informal rules that actually influence social behavior.

The sociological school maintains that law can only be understood when the formal system of rules are considered in conjunction with social realities (or facts). In this sense, they are similar to the historical school.

3.Kinds of Jurisprudence

The jurisprudence has been classified as under:

- Analytical Jurisprudence
- Historical Jurisprudence
- Ethical Jurisprudence

Analytical jurisprudence

It analyses the prevalent law, that is, the principles of law as these exist now. It also studies theory of legislation, precedent and customs and study of different legal concepts such as property, possession, trust, contract, negligence etc.

Scope of Analytical jurisprudence

It analysis the basic principles of civil law, it does not pay any attention to the evolutionary process and there Ethical aspects that is weather they are good piece of law or bad one. We can say that analytical jurisprudence does not consider the historical and ethical aspects. Its scope can be underlined as given below:

a) An analysis of the law
b) Treatment of a complex idea or concept in its elementary sub-divisions
c) Examination of the relations between civil law and other forms of law
d) A study of the legal source of law
e) An investigation of the theory of legislation, precedent and custom
f) Classification of the different sub-divisions of corpus jurist or the entire body of law with reason therefore
g) A treatment of rights, their kinds and classes, their creation, transfer and extinction
h) Dealing with legal liability, its kinds, extent and incidence
i) To investigate such legal concepts as property, possession, trust, contracts, persons, acts, intention, motive, negligence. etc.

Historical jurisprudence

It studies history of law and evolution of law over a period of time and also amendments, introduction of new principles of law.

Scope of Historical Jurisprudence

It studies the principles of law in their origin and developments that take place over a period of time. We can say that it gives the past history of important existing

legal conception and principles of a particular system. For instance, the origin and development of the nature of private property, of individual ownership, of contract, etc. The object of historical jurisprudence is to vindicate the earliest of mankind as they are reflected in ancient law and to point out their relation to the modern thought. This branch is not the same thing as legal history.

Ethical jurisprudence

It deals with the law that should be in an ideal state. It lays down the different purposes which should be fulfilled in an ideal state. It studies the modifications in the existing law in order to achieve these purposes and objects. The main object of ethical jurisprudence is the attainment of justice.

Scope of Ethical Jurisprudence

Ethical jurisprudence deals with the law in the ideal state as it should be. Law exists to fulfill certain purposes. It is for this branch of jurisprudence to lay down what those purposes are and whether these are fulfilled by the law existing at any given time. It considers the modifications necessary in the existing law so that it may fulfill the objects for which it exists. The other two branches are concerned with an analysis of the law as it is or as has been without being concerned with its adequacy or in-adequacy. Ethical jurisprudence has as its object the attainment of justice. It strives to bring the principles of the law to such a form that they serve best that end.

Difference between Analytical Jurisprudence and Historical Jurisprudence

Historical jurisprudence is a scientific study of the origin and development of the principles of law—it treats the law as it has been in the past; whereas analytical jurisprudence is a scientific study of the first or fundamental principles of law as now extended—it treats the principles of law as it exists today.

Historical jurisprudence tells us what the source of a particular principle of law was, where from it was derived, what was its shape and scope in ancient times, how and under what influences it came to develop and through what states it passed to assume finally the shape in which we find it existing today.

Analytical jurisprudence studies the basic principles of law as they exist today without being concerned with the history of those principles. The modern tendency is to make a comparative study of the two, and while dealing with analytical jurisprudence not to ignore entirely the historical jurisprudence.

4.Objectives of law

One of the foundations of our society is the belief that ours is a nation committed to the rule of law. No person is above the law. Our shared legal heritage binds us together. We use law to regulate people in their relationships with each other, and in their relationships with government. Law reflects our societal aspirations, our culture, and our political and economic beliefs. It provides mechanisms for resolving disputes and for controlling government officials. Private law includes property, family, tort, probate, and corporate law. Public law includes constitutional, criminal, and administrative law. Common to both, however, are certain legal objectives.

Continuity and Stability

It is important that established laws change gradually. Litigants have greater confidence that justice has been done when preexisting rules are used to determine legal outcomes. Laws work best when people become aware of them and learn how they work and why they are necessary. Stable laws are also more likely to be applied uniformly and consistently throughout a jurisdiction, and will be better understood by those charged with enforcement.

Stable laws are also very important to creating and maintaining a healthy economy because they are predictable and serve as a guide for conduct. Businesspeople, for example, are not likely to incur risk in a volatile legal and political environment. They are likely to feel more comfortable in making investments and taking economic risks where it appears likely that the future will resemble the present and the recent past. This stability is threatened by society's appetite for producing rules. Various state and federal legislative and administrative rule-making bodies are currently promulgating so many regulations that it is difficult, if not impossible, for affected citizens to stay current.

Adaptability

In one sense it would be desirable if society could create a great big "legal cookbook" that contained a prescribed law or rule for every conceivable situation. We would then only have to look in the cookbook for definitive answers to all legal problems. In reality, there is no such cookbook. Legislators produce statutes that have a broad scope and are designed to promote the public health, safety, welfare, and morals. Judges make law in conjunction with resolving disputes that have been properly brought before the court. Experience has shown that legislative enactments and judicial opinions produce imperfect law. Lawmakers cannot anticipate every factual possibility. Courts, in particular, often feel compelled to recognize exceptions to general rules in order to provide justice in individual cases. Judges often find that there are gaps in the law that have to be filled in order to decide a case, or that a long-standing rule no longer makes any sense, given current circumstances and societal values. In this way law adapts to social, environmental, and political changes within our evolving society.

Determining Desirable Public Policy

Historically, law is used to determine desirable public policy. It has been used to establish and then abolish discrimination on the basis of race, gender, age, and sexual preference. Law has been used to promote environmental protection and to permit resource exploitation. Through law, society determines whether capital punishment is permissible and whether women have the right to obtain abortions.

5. Classifications of law

Law may be classified in various ways. The four main divisions are as follows:

(a) Criminal Law and Civil Law

(b) Public Law and Private Law

(c) Substantive Law and Procedural Law

(d) Municipal Law and Public International Law

Criminal Law is that part of the law which characterizes certain kinds of wrongdoings as offences against the State, not necessarily violating any private right,

and punishable by the State. Crime is defined as an act of disobedience of the law forbidden under pain of punishment. The punishment for crime ranges from death or imprisonment to a money penalty (fine) or absolute discharge. For example, to commit murder is an offence against the State because it disturbs the public peace and security, so the action is brought by the State and not the victim.

The police are the public servants whose duty is the prevention and detection of crime and the prosecution of offenders before the courts of law.

Private citizens may legally enforce the criminal law by beginning proceedings themselves, but, except in minor cases of common assault, rarely do so in practice.

Civil Law is concerned with the rights and duties of individuals towards each other. It includes the following:

(i) Law of Contract, dealing with that branch of the law which determines whether a promise is legally enforceable and what are its legal consequences.

(ii) Law of Tort. A tort is defined as a civil wrong for which the remedy is a common law action for unliquidated (i.e. unspecified or unascertained) damages and which is not exclusively the breach of a contract or breach of trust or other merely equitable obligation. (Salmond: Law of Torts.) Examples of torts are: nuisance, negligence, defamation, and trespass.

(iii) Law of Property is that part of the law which determines the nature and extent of the rights which people may enjoy over land and other property – for example, rights of 'ownership' of land, or rights under a lease.

(iv) Law of Succession is that part of the law which determines the devolution of property on the death of the former owner.

(v) Family Law is that branch of the law which defines the rights, duties, and status of husband and wife, parent and child, and other members of a household.

The above are the major branches of civil law. Its main distinction from criminal law is that in civil law the legal action is begun by the private citizen to establish rights (in which the State is not primarily concerned) against another citizen or group of citizens, whereas criminal law is enforced on behalf of or in the name of the State. Civil law is sometimes referred to as Private Law as distinct from Public Law.

Public Law comprises (i) Constitutional Law, (ii) Administrative Law, and (iii) Criminal Law.

(i) Constitutional Law has been defined as the rules which regulate the structure of the principal organs of government and their relationship to each other, and determine their principal functions. This subject includes:choice of monarch, his or her powers and prerogative; the constitution of the legislature; powers and privileges of Members of Parliament; the relationship between the separate chambers of Parliament; the status of Ministers; the civil service; the armed forces; the police; the relations between the central government and local authorities; the making of treaties; admission and rights of aliens; the courts of justice; liberties of speech, of meeting, of association; and voting rights.

(ii) (ii) Administrative Law is defined as that body of legal principles which concerns the rights and duties arising from the impact upon the individual of the actual functioning of the executive instruments of government.(C. K. Allen: Law and

Orders.) For example, administrative law determines the legal rights of a private citizen whose house a local authority intends to acquire compulsorily.

(iii) (iii) Criminal Law has already been described, with its distinction from civil law.

Substantive Law is the body of rules of law in the above branches which regulate the rights, duties and liabilities among citizens and governments.

Procedural Law lays down the rules governing the manner in which a right is enforced under civil law, or a crime prosecuted under the criminal law. Thus a legal action is started by issuing a claim form in civil cases, by a summons or an arrest in criminal cases, and ends by the trial and judgment in the court itself, followed by the execution of the judgment. Procedural law governs the steps in the progress of the civil legal action or criminal prosecution.The distinction between substantive law and procedural law is not always clear. It is an important rule of law that the prosecution may not (except in special circumstances) refer to the accused's bad character during the course of the trial, for this could clearly prejudice their case. (English law presumes that an accused person is innocent until proved guilty.) This rule may be regarded as either substantive or procedural, depending on the view taken of its nature.

This is the law operative within a State. One branch of that law is the law relating to conflict of laws, otherwise known as Private International Law, which determines which national law governs a case in which there is a foreign element.

6.Origin of law

The British victory over the French in the French and Indian War and the signing of the Treaty of Paris (1763) concluded the competition between the two nations for domination of North America. A French victory might well have resulted in the establishment of the civil law system of France in the colonies along the Atlantic seaboard. The British victory, however, preserved the English common law system for what would become the United States. The following discussion highlights some of the important milestones in the development of the common law.

The Origins** of **English Common Law

Anglo-Saxon kings ruled England prior to 1066. During the reign of Edward the Confessor (1042-1066), wealthy landowners and noblemen, called earls, gained power over local affairs. There was no central legislature or national judicial court. Instead, the country was organized into communal units, based on population. Each was called the hundred, and was headed by an official called the reeve. The primary function of the hundred was judicial; it held court once each month and dealt with routine civil and criminal matters. Local freemen resolved these cases in accordance with local custom.

The hundreds were grouped into units called shires (counties) that had in earlier times often been Anglo-Saxon kingdoms. The shire was of much greater importance than the hundred. The king used it for military, administrative, and judicial purposes. The king administered the shires through the person of the shire reeve (sheriff). Royal sheriffs existed in each of the shires throughout the country. The sheriff was the king's principal judicial and administrative officer at the local level. Sheriffs collected taxes, urged support of the king's administrative and military

policies, and performed limited judicial functions. The shire court, composed of all the freemen in the county, was held twice a year and was presided over by the bishop and the sheriff. It handled criminal, civil, and religious matters that were too serious or difficult for the hundred court as well as disputes about land ownership. The freemen in attendance used local custom as the basis for making decisions, even in religious matters, resulting in a variety of regional practices throughout the country. Anglo-Saxon law did not permit a person to approach the king to appeal the decisions of these communal courts.

The Anglo-Saxon king had a number of functions. He raised armies and a navy for the defense of the kingdom. He issued writs, which were administrative letters containing the royal seal. The writs were used to order courts to convene, the sheriffs to do justice, and to award grants of land and privileges. The king administered the country with the assistance of the royal household, an early form of king's council. He also declared law (called dooms), sometimes after consulting with the Witan, a national assembly of important nobles.

When. Edward the Confessor died childless in 1066, the candidates to succeed him were his brother-in-law Harold, the Earl of Wessex, and his cousin, William, Duke of Normandy (a French duchy). Harold was English and the most powerful baron in the country. William was French. Each claimed that Edward had selected him as the next king. William also claimed that Harold had agreed to support William's claim to the throne.[30] Harold, however, was elected king by the Witan and was crowned. William's response was to assemble an army, cross the English Channel, and invade England.

The Norman Invasion

In 1066, Duke William of Normandy with 5,000 soldiers and 2,500 horses defeated the Anglo-Saxons and killed King Harold at the Battle of Hastings. William became King of England and the Normans assumed control of the country. Although the Anglo-Saxons had implemented a type of feudalism before the invasion, the Normans developed and refined it. Feudalism was a military, political, and social structure that ordered relationships between people. Under feudalism, a series of duties and obligations existed between a lord and his vassals. In England, the Normans merged feudalism with the Anglo-Saxon institution of the national king. William insisted, for example, that all land in England- belonged- ultimately to the king, and in 1086 he required all landholders to swear allegiance to him. In this way, all this barons and lords and their vassals were personally obligated to him by feudal law. At his coronation, King William decreed that Englishmen could keep the customary laws that had been in force during the reign of the Anglo-Saxon King Edward the Confessor. This meant that the communal, hundred, and shire courts could continue to resolve disputes between the English as they had in the past. William did, however, make one significant change in the jurisdiction of the communal courts: he rejected the Anglo-Saxon practice of allowing church officials to use the communal courts to decide religious matters. Instead, he mandated that the church should establish its own courts and that religious matters should be decided according to canon (church) law, rather than customary law. William also declared

that the Normans would settle their disputes in the courts of the lords and barons in agreement with feudal law.

England at that time consisted of two societies, one French and the other English. French was the language spoken by the victorious Normans, as well as by the king, the upper classes, the clergy, and scholars. English was only spoken by the lower classes following the invasion, and it did not achieve prominence and become the language of the courts and the "common law" until 1362. The French legacy can be seen in many words used by lawyers today. Acquit, en banc, voir dire, demurrer, embezzle, and detainer are some examples of "English" words that were borrowed from the French. Although the Normans spoke French, formal written documents were written in Latin. This may help to explain why students reading law in the 1990s encounter

Latin words such as certiorari, subpoena, mens rea, actus reus, in camera, mandamus, capias, and pro se.

LECTURE 2 COURTS AND THE RESOLUTION OF DISPUTES

1. *Courts and the Resolution of Disputes*
2. *The Court System*
3. *Alternative Dispute Resolution Methods*
4. *Court Decisions*

Laws are classified as either criminal or civil. *Criminal law* not only prohibits a specific kind of action, such as unfair competition or mail fraud, but also imposes a fine or imprisonment as punishment for violating the law. A violation of a criminal law is thus called a crime. *Civil law* defines all the laws not classified as criminal, and it specifies the rights and duties of individuals and organizations (including businesses). Violations of civil law may result in fines but not imprisonment. The primary difference between criminal and civil law is that criminal laws are enforced by the state or nation, whereas civil laws are enforced through the court system by individuals or organizations.

Criminal and civil laws are derived from four sources: the Constitution (Constitutional law), precedents established by judges (common law), federal and state statutes (statutory law), and federal and state administrative agencies (administrative law). Federal administrative agencies established by Congress control and influence business by enforcing laws and regulations to encourage competition and protect consumers, workers, and the environment. The Supreme Court is the ultimate authority on legal and regulatory decisions for appropriate conduct in business.

1. Courts and the Resolution of Disputes

The primary method of resolving conflicts and business disputes is through **lawsuits,** where one individual or organization takes another to court using civil laws. The legal system, therefore, provides a forum for plaintiff and defendant to resolve disputes based on our legal foundations. The courts may decide when harm or damage results from the actions of others.

Because lawsuits are so frequent in the world of business, it is important to understand more about the court system where such disputes are resolved. Both financial restitution and specific actions to undo wrongdoing can result from going before a court to resolve a conflict. All decisions made in the courts are based on criminal and civil laws derived from the legal and regulatory system.

A businessperson may win a lawsuit in court and receive a judgment, or court order, requiring the loser of the suit to pay monetary damages. However, this does not guarantee the victor will be able to collect those damages. If the loser of the suit lacks the financial resources to pay the judgment—for example, if the loser is a bankrupt business—the winner of the suit may not be able to collect the award. Most business lawsuits involve a request for a sum of money, but some lawsuits request that a court specifically order a person or organization to do or to refrain from doing a certain act, such as slamming telephone customers.

2. The Court System

Jurisdiction is the legal power of a court, through a judge, to interpret and apply the law and make a binding decision in a particular case. In some instances, other courts will not enforce the decision of a prior court because it lacked jurisdiction. State courts are granted jurisdiction by the Constitution or by Congress. State legislatures and constitutions determine which state courts hear certain types of cases. Courts of general jurisdiction hear all types of cases; those of limited jurisdiction hear only specific types of cases. The Federal Bankruptcy Court, for example, hears only cases involving bankruptcy. There is some combination of limited and general jurisdiction courts in every state.

In a **trial court** (whether in a court of general or limited jurisdiction and whether in the state or the federal system), two tasks must be completed. First, the court (acting through the judge or a jury) must determine the facts of the case. In other words, if there is conflicting evidence, the judge or jury must decide who to believe. Second, the judge must decide which law or set of laws is pertinent to the case and must then apply those laws to resolve the dispute.

Plaintiff A person who brings (starts) a lawsuit against another person.

Defendant The person against whom a legal action is brought. This legal action may be civil or criminal.

An **appellate court,** on the other hand, deals solely with appeals relating to the interpretation of law. Thus, when you hear about a case being appealed, it is not retried, but rather reevaluated. Appellate judges do not hear witnesses but instead base their decisions on a written transcript of the original trial. Moreover, appellate courts do not draw factual conclusions; the appellate judge is limited to deciding whether the trial judge made a mistake in interpreting the law that probably affected

the outcome of the trial. If the trial judge made no mistake (or if mistakes would not have changed the result of the trial), the appellate court will let the trial court's decision stand. If the appellate court finds a mistake, it usually sends the case back to the trial court so that the mistake can be corrected. Correction may involve the granting of a new trial. On occasion, appellate courts modify the verdict of the trial court without sending the case back to the trial court.

Appellee The person against whom an appeal is taken (usually, but not always, the winner in the lower court). Compare with appellant.

Apelant The person who appeals a case to a higher court. Compare with appellee. Ap late Refers to a higher court that can hear appeals from a lower court or refers to an appeal.

3. Alternative Dispute Resolution Methods

Although the main remedy for business disputes is a lawsuit, other dispute resolution methods are becoming popular. The schedules of state and federal trial courts are often crowded; long delays between the filing of a case and the trial date are common. Further, complex cases can become quite expensive to pursue. As a result, many people are turning to alternative methods of resolving business arguments: mediation and arbitration, the mini-trial, and litigation in a private court.

Mediation is a form of negotiation to resolve a dispute by bringing in one or more third-party mediators, usually chosen by the disputing parties, to help reach a settlement. The mediator suggests different ways to resolve a dispute between the parties. The mediator's resolution is nonbinding—that is, the parties do not have to accept the mediator's suggestions; they are strictly voluntary.

Arbitration involves submission of a dispute to one or more third-party arbitrators, usually chosen by the disputing parties, whose decision usually is final. Arbitration differs from mediation in that an arbitrator's decision must be followed, whereas a mediator merely offers suggestions and facilitates negotiations. Cases may be submitted to arbitration because a contract—such as a labor contract—requires it or because the parties agree to do so. Some consumers are barred from taking claims to court by agreements drafted by banks, brokers, health plans, and others. Instead, they are required to take complaints to mandatory arbitration. Arbitration can be an attractive alternative to a lawsuit because it is often cheaper and quicker, and the parties frequently can choose arbitrators who are knowledgeable about the particular area of business at issue.

A method of dispute resolution that may become increasingly important in settling complex disputes is the **mini-trial,** in which both parties agree to present a summarized version of their case to an independent third party. That person then advises them of his or her impression of the probable outcome if the case were to be tried. Representatives of both sides then attempt to negotiate a settlement based on the advisor's recommendations. For example, employees in a large corporation who believe they have muscular or skeletal stress injuries caused by the strain of repetitive motion in using a computer could agree to a mini-trial to address a dispute related to damages. Although the mini-trial itself does not resolve the dispute, it can help the parties resolve the case before going to court. Because the mini-trial is not subject to

formal court rules, it can save companies a great deal of money, allowing them to recognize the weaknesses in a particular case.

In some areas of the country, disputes can be submitted to a private nongovernmental court for resolution. In a sense, a **private court system** is similar to arbitration in that an independent third party resolves the case after hearing both sides of the story. Trials in private courts may be either informal or highly formal, depending on the people involved. Businesses typically agree to have their disputes decided in private courts to save time and money.

4. Court Decisions

Courts make law in three ways:

1. *Interpretation*—they determine the meaning of statutes, administrative rules, executive orders, and even treaties and constitutions.
2. *Common law*—they "find" or determine the law in settling disputes where none of the other sources of law appears to supply an applicable rule.
3. *Judicial review*—they review the constitutionality of the acts of the legislative and judicial branches.

Interpretation

Courts make law by the first process—**interpretation.** The courts have the last word on what a legislature has said in a statute. Since many statutes are written in very broad and general language, the "power to interpret" is an important one. Of course, a court cannot say the legislature meant to establish a 65-mile-per-hour speed limit when the statute says 55. However, courts can decide if a statute applies to a specific case. This is especially important where the case involves a situation the legislature did not foresee when it passed the law. Through such interpretation courts can broaden or narrow the reach of a law.

In interpreting a statute, courts generally:

1. Look to the **plain meaning** of the statute's language.
2. Examine the **legislative history** of the statute.
3. Consider the **purpose** to be achieved by the statute.
4. Try to accommodate **public policy.**

Where a statute has been interpreted by a government agency the courts traditionally defer to that interpretation if it seems reasonable.

Common Law

The second manner in which courts make law is by "declaring" the law. This "decisional law" arises because courts generally must decide any dispute properly brought before them. If there is no statute or other type of law providing a rule the court can use to resolve a dispute, it is not excused from making a decision. Instead, the court must declare the rule of law for that dispute. Such court-created law is called **common law.**

The term "common law" comes from English origins. The Normans conquered England in 1066, and one of the principal devices William the Conqueror and his successors used to unite the country was to send royal judges around to hold court in

the various cities. In this manner he varying customs and law of each locality were replaced by a uniform or "common" system. The common law developed as the judges resolved the disputes brought to them. If the facts were similar to those of an earlier case, they tended to follow the earlier decision. In this way the rule of precedent (or the doctrine of stare decisis) was developed.

Another important source of decisional law is ***equity.*** *The early English common law courts could determine title to land and could award money damages in settling disputes. However, when someone wanted some other remedy such as an order to the defendant not to do something, that person's only recourse was to petition the king through the chancellor. Eventually a new court, the court of chancery took form. It provided remedies different from those of the common law courts, most notably the injunction. An injunction is a court order forbidding a party to do some act, or ordering the parry to do something. Equity also differed from common law because its procedures were much less rigid. It sought fairness between the individual parties more than blind adherence to past precedents. Almost all states have now abolished a separate court of chancery, but the remedies and the approach of the equity courts continue to be applicable in the kinds of disputes those courts were accustomed to handling*

Judicial Review

The third way in which courts make law—**judicial review**—derives from their power to interpret a constitution. A court has the power to declare that a decision of a lower court is inconsistent with a state or Constitution. In addition, courts have the power to declare statutes passed by the legislature, as well as acts of the executive branch, unconstitutional.

LECTURE 3 CRIMINAL LAW

1. Introduction
2. Criminal Law and Criminal Procedure
3. The Difference between Civil and Criminal Law
4. Classification of Crimes
5. The Purposes of Punishment
6. End-of-Chapter Material

1. Introduction

Definition of a Crime

Let’s begin at the beginning by defining a crime. The most basic definition of a crime is “an act committed in violation of a law prohibiting it, or omitted in violation of a law ordering it. It is important to understand that criminal act, omission to act,

and criminal intent are **elements** or parts of every crime. **Illegality** is also an element of every crime. Generally, the *government* must enact a *criminal law* specifying a crime and its elements before it can punish an individual for criminal behavior. Laws in a democratic society, unlike laws of nature, are created by *people* and are founded in religious, cultural, and historical value systems. People from varying backgrounds live in different regions of this country. Thus you will see that different people enact distinct laws that best suit their needs. However, the bulk of any criminal law overview is an examination of different crimes and their elements.

Laws are not *static*. As society changes, so do the laws that govern behavior. Evolving value systems naturally lead to new laws and regulations supporting modern beliefs. Although a certain stability is essential to the enforcement of rules, occasionally the rules must change.

Key Takeaway

- A crime is an act committed in violation of a law prohibiting it or omitted in violation of a law ordering it. In general, the criminal law must be enacted before the crime is committed.

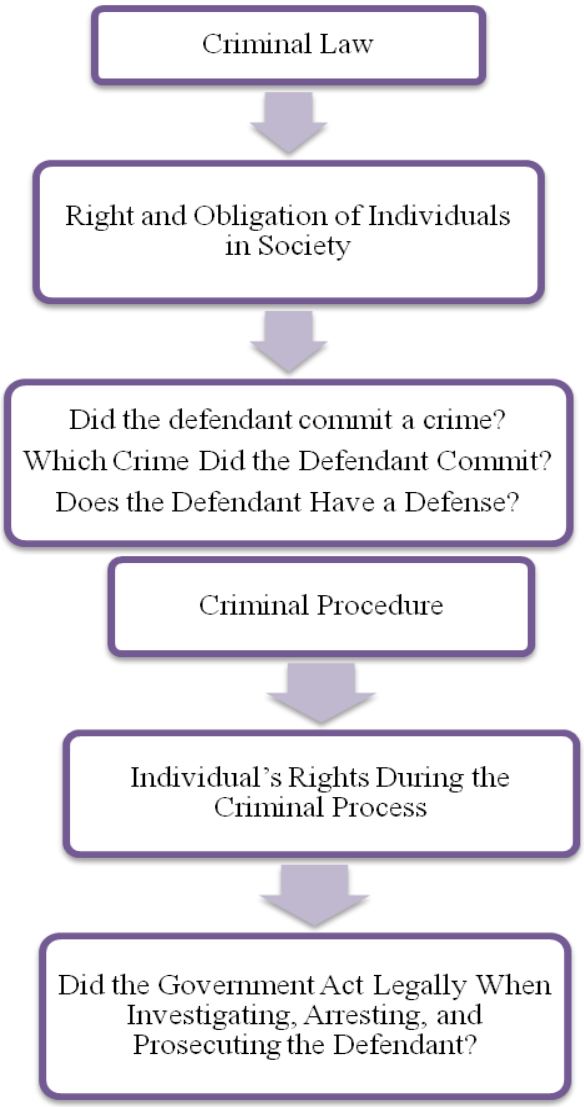


Figure 1.1 Criminal Law and Criminal Procedure

2. Criminal Law and Criminal Procedure

This lecture focuses on criminal law, but it occasionally touches on issues of criminal procedure, so it is important to differentiate between the two.

Criminal law generally defines the *rights* and *obligations* of individuals in society. Some common issues in criminal law are the elements of specific crimes and the elements of various criminal defenses. Criminal procedure generally concerns the *enforcement* of individuals' rights during the criminal process. Examples of procedural issues are individuals' rights during law enforcement investigation, arrest, filing of charges, trial, and appeal

Key Takeaway

- Criminal law generally defines the rights and obligations of individuals in society. Criminal procedure generally concerns the enforcement of individuals' rights during the criminal process

3. The Difference between Civil and Criminal Law

Law can be classified in a variety of ways. One of the most general classifications divides law into civil and criminal. A basic definition of civil law is "the body of law having to do with the private rights of individuals. As this definition indicates, civil law is between individuals, not *the government*. Criminal law involves regulations enacted and enforced by government action, while civil law provides a remedy for individuals who need to enforce private rights against other individuals. Some examples of civil law are family law, wills and trusts, and contract law. If individuals need to resolve a *civil dispute*, this is called civil litigation, or a civil lawsuit. When the type of civil litigation involves an injury, the injury action is called a tort.

Characteristics of Civil Litigation

It is important to distinguish between civil litigation and criminal prosecution. Civil and criminal cases share the same courts, but they have very different goals, purposes, and results. Sometimes, one set of facts gives way to a civil lawsuit *and* a criminal prosecution. This does not violate double jeopardy and is actually quite common.

Goal of Civil Litigation

The *goal* of civil litigation is to *compensate the plaintiff* for any injuries and to put the plaintiff back in the position that person held before the injury occurred. This goal produces interesting results. It occasionally creates liability or an obligation to pay when there is no fault on behalf of the defendant. The goal is to make the plaintiff whole, not to punish, so *fault* is not really an issue. If the defendant has the resources to pay, sometimes the law requires the defendant to pay so that society does not bear the cost of the plaintiff's injury.

A defendant may be liable without fault in two situations. First, the law that the defendant violated may not require fault. Usually, this is referred to as strict liability. Strict liability torts do not require fault because they do not include an intent

component. Another situation where the defendant may be liable without fault is if the defendant did not actually commit any act but is associated with the acting defendant through a *special relationship*. The policy of holding a separate entity or individual liable for the defendant's action is called vicarious liability. An example of vicarious liability is employer-employee liability, also referred to as respondeat superior. If an employee injures a plaintiff while on the job, the *employer* may be liable for the plaintiff's injuries, whether or not the employer is at fault. Clearly, between the employer and the employee, the employer generally has the better ability to pay.

Example of Respondeat Superior

Chris begins the first day at his new job as a cashier at a local McDonald's restaurant. Chris attempts to multitask and pour hot coffee while simultaneously handing out change. He loses his grip on the coffee pot and spills steaming-hot coffee on his customer Geoff's hand. In this case, Geoff can sue *McDonald's and Chris* if he sustains injuries. McDonald's is not technically at fault, but it may be liable for Geoff's injuries under a theory of respondeat superior.

Harm Requirement

The goal of civil litigation is to compensate the plaintiff for injuries, so the plaintiff must be a bona fide **victim** that can prove **harm**. If there is no evidence of harm, the plaintiff has no basis for the civil litigation matter. An example would be when a defendant rear-ends a plaintiff in an automobile accident without causing damage to the vehicle (property damage) or physical injury. Even if the defendant is at fault for the automobile accident, the plaintiff cannot sue because the plaintiff does not need compensation for any injuries or losses.

Damages

Often the plaintiff sues the defendant for money rather than a different, performance-oriented remedy. In a civil litigation matter, any money the court awards to the plaintiff is called damages. Several kinds of damages may be appropriate. The plaintiff can sue for compensatory damages, which compensate for injuries, costs, which repay the lawsuit expenses, and in some cases, punitive damages. Punitive damages, also referred to as **exemplary damages**, are *not* designed to compensate the plaintiff but instead focus on *punishing* the defendant for causing the injury.

Characteristics of a Criminal Prosecution

A criminal prosecution takes place after a defendant violates a federal or state criminal statute, or in some jurisdictions, after a defendant commits a common-law crime.

Applicability of the Constitution in a Criminal Prosecution

The defendant in a criminal prosecution can be represented by a private attorney or a *free* attorney paid for by the state or federal government if he or she is *unable to afford attorney's fees* and *facing incarceration*. Attorneys provided by the government are called public defenders. This is a significant difference from a civil litigation matter, where both the plaintiff and the defendant must hire and pay for their own private attorneys. The court appoints a free attorney to represent the defendant in a criminal prosecution because *the Constitution is in effect* in any

criminal proceeding. The Constitution provides that *every* criminal defendant facing incarceration has the right to legal representation, regardless of wealth.

The presence of the Constitution at every phase of a criminal prosecution changes the proceedings significantly from the civil lawsuit. The criminal defendant receives many constitutional *protections*, including the right to remain silent, the right to due process of law, the freedom from double jeopardy, and the right to a jury trial, among others.

Goal of a Criminal Prosecution

Another substantial difference between civil litigation and criminal prosecution is the *goal*. Recall that the goal of civil litigation is to compensate the plaintiff for injuries. In contrast, the goal of a criminal prosecution is to *punish* the defendant.

One consequence of the goal of punishment in a criminal prosecution is that *fault* is almost always an element in any criminal proceeding. This is unlike civil litigation, where the ability to pay is a priority consideration. Clearly, it is unfair to punish a defendant who did nothing wrong.

Injury and a victim are *not* necessary components of a criminal prosecution because punishment is the objective, and there is no plaintiff. Thus behavior can be criminal even if it is essentially harmless. Society does not condone or pardon conduct simply because it fails to produce a tangible loss.

Examples of Victimless and Harmless Crimes

Steven is angry because his friend Bob broke his skateboard. Steven gets his gun, which has a silencer on it, and puts it in the glove compartment of his car. He then begins driving to Bob's house. While Steven is driving, he exceeds the speed limit on three different occasions. Steven arrives at Bob's house and then he hides in the bushes by the mailbox and waits. After an hour, Bob opens the front door and walks to the mailbox. Bob gets his mail, turns around, and begins walking back to the house. Steven shoots at Bob three different times but misses, and the bullets end up landing in the dirt. Bob does not notice the shots because of the silencer.

In this example, Steven has committed several crimes: (1) If Steven does not have a special permit to carry a concealed weapon, putting the gun in his glove compartment is probably a crime in most states. (2) If Steven does not have a special permit to own a silencer for his gun, this is probably a crime in most states. (3) If Steven does not put the gun in a locked container when he transports it, this is probably a crime in most states. (4) Steven committed a crime each time he exceeded the speed limit. (5) Each time Steven shot at Bob and missed, he probably committed the crime of attempted murder or assault with a deadly weapon in most states. Notice that none of the crimes Steven committed caused any discernible harm. However, common sense dictates that Steven should be punished so he does not commit a criminal act in the future that *may* result in harm.

Key Takeaways

- Civil law regulates the private rights of individuals. Criminal law regulates individuals' conduct to protect the public.
- Civil litigation is a legal action between individuals to resolve a civil dispute. Criminal prosecution is when the government prosecutes a defendant to punish illegal conduct.

4. Classification of Crimes

Crimes can be classified in many ways. Crimes also can be grouped by subject matter. For example, a "crime against the person" and a "crime against property." These classifications are basically for convenience and are not imperative to the study of criminal law.

More important and substantive is the classification of crimes according to the severity of punishment. This is called grading. Crimes are generally graded into four categories: felonies, misdemeanors, felony-misdemeanors, and infractions.

Felonies

Felonies are the *most serious* crimes. They are either supported by a heinous intent, like the intent to kill, or accompanied by an extremely serious result, such as loss of life, grievous injury, or destruction of property. Felonies are serious, so they are graded the highest, and all sentencing options are available. Depending on the jurisdiction and the crime, the sentence could be execution, prison time, a fine, or alternative sentencing such as probation, rehabilitation, and home confinement. Potential consequences of a felony conviction also include the inability to vote, own a weapon, or even participate in certain careers.

Misdemeanors

Misdemeanors are *less serious* than felonies, either because the intent requirement is of a lower level or because the result is less extreme. Misdemeanors are usually punishable by jail time of one year or less per misdemeanor, a fine, or alternative sentencing like probation, rehabilitation, or community service. Note that incarceration for a misdemeanor is in jail rather than prison. The difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons, depending on the crime. The restrictive nature of the confinement also differs between jail and prison. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.

Felony-Misdemeanors

Felony-misdemeanors are crimes that the government can prosecute and punish as *either* a felony or a misdemeanor, depending on the particular circumstances accompanying the offense. The discretion whether to prosecute the crime as a felony or misdemeanor usually belongs to the *judge*, but in some instances the *prosecutor* can make the decision.

Infractions

Infractions, which can also be called **violations**, are the least serious crimes and include minor offenses such as jaywalking and motor vehicle offenses that result in a simple traffic ticket. Infractions are generally punishable by a fine or alternative sentencing such as traffic school.

Figure 1.2 Diagram of Grading

Key Takeaways

- Grading is based on the severity of punishment.
- Malum in se crimes are evil in their nature, like murder. Malum prohibitum crimes are regulatory, like a failure to pay income taxes.
- Felonies are graded the highest. Punishment options for felonies include the following:
  - Execution
  - Prison time
  - Fines
  - Alternative sentencing such as probation, rehabilitation, and home confinement
- Misdemeanors are graded lower than felonies. Punishment options for misdemeanors include the following:
  - Jail time of one year or less per misdemeanor
  - Fines
  - Alternative sentencing such as probation, rehabilitation, and community service
- Felony-misdemeanors are punished as either a felony or a misdemeanor.
- Infractions, also called violations, are graded lower than misdemeanors and have less severe punishment options:
  - Fines

- Alternative sentencing, such as traffic school
- One difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons, depending on the crime. The restrictive nature of the confinement is another difference. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.

5. The Purposes of Punishment

Punishment has five recognized purposes: *deterrence*, *incapacitation*, *rehabilitation*, *retribution*, and *restitution*.

Specific and General Deterrence

Deterrence prevents future crime by frightening the *defendant* or the *public*. The two types of deterrence are specific and general deterrence. Specific deterrence applies to an *individual defendant*. When the government punishes an individual defendant, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment. General deterrence applies to the *public* at large. When the public learns of an individual defendant's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced. When the public learns, for example, that an individual defendant was severely punished by a sentence of life in prison or the death penalty, this knowledge can inspire a deep fear of criminal prosecution.

Incapacitation

Incapacitation prevents future crime by removing the defendant from society. Examples of incapacitation are incarceration, house arrest, or execution pursuant to the death penalty.

Rehabilitation

Rehabilitation prevents future crime by altering a defendant's behavior. Examples of rehabilitation include educational and vocational programs, treatment center placement, and counseling. The court can combine rehabilitation with incarceration or with probation or parole. In some states, for example, nonviolent drug offenders must participate in rehabilitation in combination with probation, rather than submitting to incarceration.

Retribution

Retribution prevents future crime by removing the desire for *personal* avengement (in the form of assault, battery, and criminal homicide, for example) against the defendant. When victims or society discover that the defendant has been adequately punished for a crime, they achieve a certain satisfaction that our criminal procedure is working effectively, which enhances faith in law enforcement and our government.

Restitution

Restitution prevents future crime by punishing the defendant *financially*. Restitution is when the court orders the criminal defendant to pay the victim for any harm and resembles a civil litigation damages award. Restitution can be for physical

injuries, loss of property or money, and rarely, emotional distress. It can also be a *fine* that covers some of the costs of the criminal prosecution and punishment.

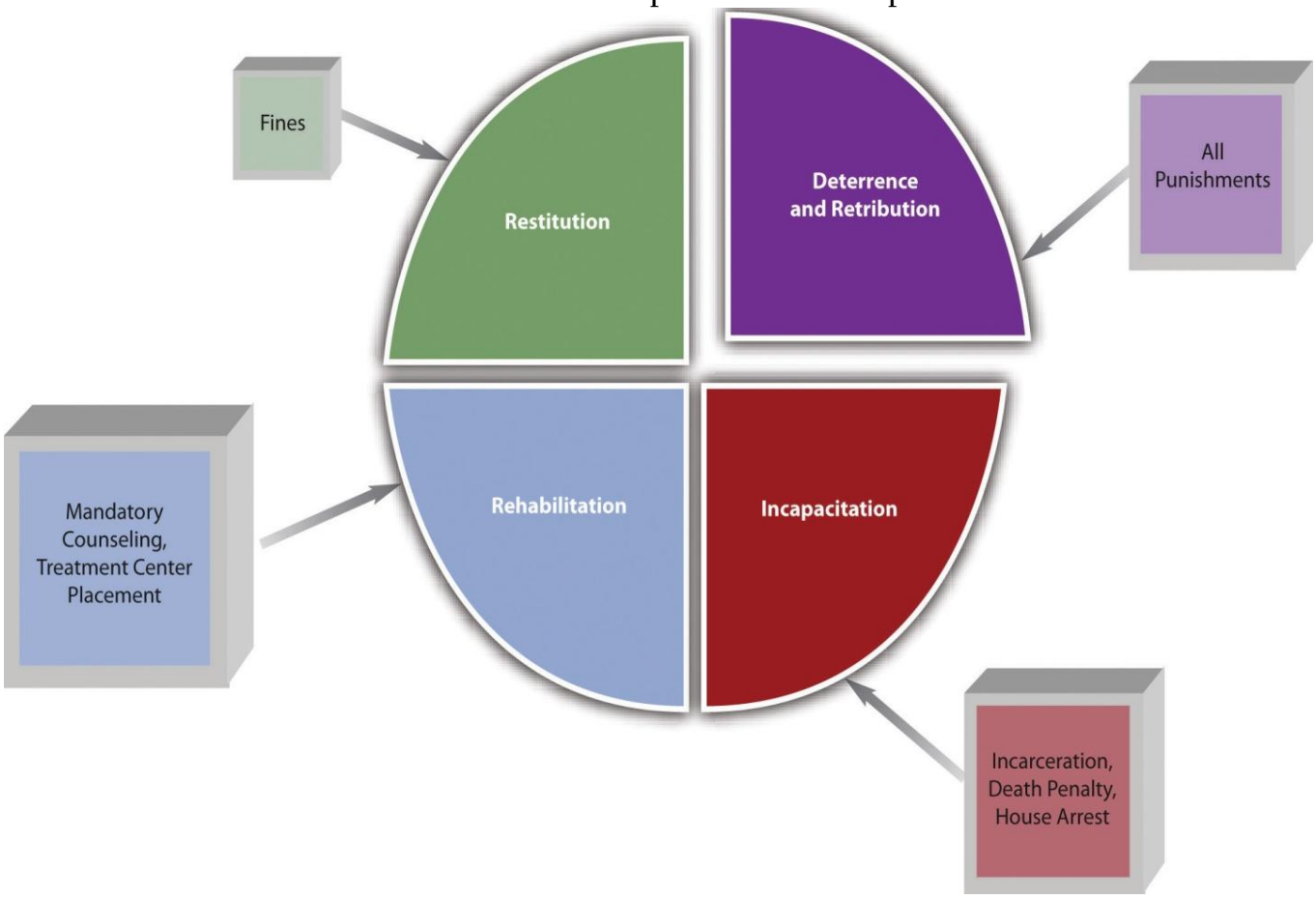


Figure 1.3 Different Punishments and Their Purpose

Key Takeaways

- Specific deterrence prevents crime by frightening an individual defendant with punishment. General deterrence prevents crime by frightening the public with the punishment of an individual defendant.
- Incapacitation prevents crime by removing a defendant from society.
- Rehabilitation prevents crime by altering a defendant's behavior.
- Retribution prevents crime by giving victims or society a feeling of avengement.
- Restitution prevents crime by punishing the defendant financially.

6. End-of-Chapter Material

Summary

A crime is action or inaction in violation of a criminal law. Criminal laws vary from state to state and from state to federal.

The study of criminal law defines crimes and defenses to crimes. The study of criminal procedure focuses on the enforcement of rights by individuals while submitting to government investigation, arrest, interrogation, trial, and appeal.

A civil lawsuit or civil litigation matter resolves a dispute between individuals, called a plaintiff (the injured party) and defendant (the alleged wrongdoer). Every civil litigation matter includes a victim (the plaintiff), which has suffered harm. The

goal of the civil litigation matter is to compensate the plaintiff for injury. The court can compensate the plaintiff by awarding money, which is called damages. Both parties in a civil litigation matter must represent themselves or hire private attorneys.

A criminal prosecution takes place when the government, represented by a prosecutor, takes legal action against the defendant (the alleged wrongdoer) for committing a crime. Some criminal prosecutions do not include a victim, or harm, because the goal of the criminal prosecution is punishment, not compensation. Every criminal prosecution involves the government, so the US and state constitutions provide the criminal defendant with extra protections not present in a civil lawsuit, such as free counsel when the defendant is indigent and facing incarceration.

Crimes can be classified according to the severity of punishment. The most serious crimes with the entire range of sentencing options available are felonies. Misdemeanors are less serious than felonies and have less severe sentencing options. Felony-misdemeanors can be prosecuted and punished as a felony or a misdemeanor, depending on the circumstances. Infractions, also called violations, are the least serious crimes and generally do not involve incarceration. The purposes of punishing a criminal defendant are both specific and general deterrence, incapacitation, rehabilitation, retribution, and restitution.

LECTURE 4 CIVIL LAW

1.Civil law history
2.Civil law
3. Your application for legal representation

1.Civil law history

Civil law or Continental law or Romano-Germanic law is the predominant system of law in the world. Civil law as a legal system is often compared with common law. The main difference that is usually drawn between the two systems is that common law draws abstract rules from specific cases, whereas civil law starts with abstract rules, which judges must then apply to the various cases before them. Civil law has its roots in Roman law, Canon law and the Enlightenment. The legal systems in many civil law countries are based around one or several codes of law, which set out the main principles that guide the law. The most famous example is perhaps the French Civil Code, although the German Gesetzbuch (or BGB) and the Swiss Civil Code are also landmark events in legal history. The civil law systems of Scotland and South Africa are uncodified, and the civil law systems of Scandinavian countries remain largely uncodified The civil law system is based on Roman law, especially the Corpus Juris Civilis of Emperor Justinian, as later developed by medieval legal scholars. The acceptance of Roman law had different characteristics in different countries. In some of them its effect resulted from legislative act, i.e. it became positive law, whereas in other ones it became accepted by way of its

processing by legal theorists. Consequently, Roman law did not completely dominate in Europe. Roman law was a secondary source, which was applied only as long as local customs and local laws lacked a pertinent provision on a particular matter. However, local rules too were interpreted primarily according to Roman law (it being a common European legal tradition of sorts), resulting in its influencing the main source of law also. A second characteristic, beyond Roman law foundations, is the extended codification of the adopted Roman law, i.e. its inclusion into civil codes.

The concept of codification developed especially during the 17th and 18th century, as an expression of both Natural Law and the ideas of the Enlightenment. The political ideal of that era was expressed by the concepts of democracy, protection of property and the rule of law. That ideal required the creation of certainty of law, through the recording of law and through its uniformity. So, the aforementioned mix of Roman law and customary and local law ceased to exist, and the road opened for law codification, which could contribute to the aims of the above mentioned political ideal. Another reason that contributed to codification was that the notion of the nation state, which was born during the 19th century, required the recording of the law that would be applicable to that state. Certainly, there was also reaction to the aim of law codification. The proponents of codification regarded it as conducive to certainty, unity and systematic recording of the law; whereas its opponents claimed that codification would result in the ossification of the law.

At the end, despite whatever resistance to codification, the codification of European private laws moved forward. The French Napoleonic Code (code civil) of 1804, the German civil code of 1900 and the Swiss codes were the most influential national civil codes.Because Germany was a rising power in the late 19th century and its legal system was well organized, when many Asian nations were developing the German Civil Code became the basis for the legal systems of Japan and South Korea. In China, the German Civil Code was introduced in the later years of the Qing Dynasty and formed the basis of the law of the Republic of China, which remains in force in Taiwan.

Some authors consider civil law to have served as the foundation for socialist law used in Communist countries, which in this view would basically be civil law with the addition of Marxist–Leninist ideas.

2. Civil law

Salmond defines civil law as the "law of the state, the law of the land, the law of the lawyers and the law of Courts."

Civil law has the following meanings

1. Civil law means Roman Civil Law— as distinguished from the law of the church— these were the two distinct legal systems which influenced the development of the law of European countries after the dark ages.
2. It also means the entire body of Roman law as distinguished from English Law.

3. Civil law is also used for a particular branch of the law of the land. It means the residue of the law of the state after certain special branches, such as criminal law and marshal law, have been taken away from it.

Certain substitute has been employed to convey the sense of the law of land on account of the ambiguity which riddled the whole discussion. These are:

1. Municipal law, but this is also unsatisfactory law, —the law relating to local bodies, such as municipal corporations.
2. Positive law, (the laws set by human agency as distinguished from uncreated law). But this is too wide term to be suitable. It contains other law besides the law of land, for example, international law.

Civil law, branch of law, dealing with disputes between organizations and/or individuals, which compensation may be given to the victim. Civil law courts provide a confabulation for deciding disputes involving torts (such as libel, accidents and negligence), contract disputes, property disputes, the probate of wills, trusts, commercial law, administrative law, and other private matters that involve private parties and organizations which include the government departments. An action by an individual against the attorney general is a civil matter, but if the state is represented by the attorney general, or other agent from the state and takes action against an individual, this is no longer civil law but instead this is now public law. Civil laws objective differs from other type of law. Civil law attempts to right a wrong, settle a dispute, or honor an agreement. The victim is being compensated by the person who is at fault, this becomes a legal alternative to, or civilized form of, revenge. There is often a pie of division and is allocated by the process of civil law, probably by invoking the doctrines of equity, in cases of an equity matter. Civil Law determines private rights and liabilities, whereas Criminal Law concerns offenses against the authority of the state. Civil lawsuit includes plaintiff, the defendant, and possibly third parties. Plaintiff allegedly suffered some legal wrongdoing at the hands of the defendant, the party that is responsible for infringing upon the plaintiff's right. The plaintiff files a lawsuit against the defendant, the court being used as the forum to argue that the defendant should be held responsible for the plaintiff's injuries and should compensate the plaintiff for its losses. Civil litigation that deals with private disputes between parties is subject to the rules of civil litigation, sometimes referred to as civil procedure.Criminal cases, deals with acts that are offenses against society as a whole, such as murder and robbery, as subject to the rules for criminal law, and is also known as the rules of criminal procedure. Sometimes the same act results in both a civil and a criminal action. Example, suppose that Faye Wood drives her car under the influence of alcohol. And then crushes into another vehicle and injures the driver of that car, Bill Smith. Faye Wood would be arrested for the crime of drunk driving, but Bill Smith might also sue civilly. The civil case (Smith vs. Wood) will proceed according to the rules of civil procedure. The government (in this case the state) would file an action against Faye Wood for the crime of drunk driving as a criminal case. If she were found guilty, the court could send her to jail or impose a fine payable to the state. While the civil case,

Bill Smith would sue Faye Wood for money to compensate him for his medical bills, his lost wages, and his pain and suffering. The same act may spawn both a civil and a criminal case, but the two legal cases are always kept separate. They will never be tried together. In part, this is because a different standard or burden of proof is required in criminal case. The standard of evidence used to judge the criminal case is higher than the standard applied in civil cases. Civil and criminal law may be further distinguished in terms of burdens of proof. In civil lawsuit, the plaintiff's case must be affirmed by a preponderance of evidence, meaning the plaintiff must persuade the judge or jury that his or her version of the facts is more likely than not and that he or she is entitled to judgment. This degree of proof is sometimes called presenting a prima facie case, or "crossing the 51 percent line", because the plaintiff must out prove the defendant by more than half the evidence. In some cases, such as those involving misrepresentation, fraud, intentional infliction of emotional distress, and probate contests, the plaintiff must prove his or her case by clear and convincing evidence, which is a higher standard and more difficult to meet that a mere preponderance.

Broadly speaking, civil law is all law that is not criminal law. Examples of matters that come under the heading 'civil law' are the law of negligence, family law and contract law. (The term 'civil law' also refers to the type of legal system that is found in many European, African and South American countries, in contrast with the 'common law' system of England, the United States and the British Commonwealth.) Civil law cases usually involve individuals, companies or government bodies taking legal action against other individuals, companies or government bodies, often for doing something that is alleged to be unfair, harmful, or contrary to an agreement. A person bringing a case is called a plaintiff or, sometimes, an applicant or complainant. A person against whom an action is taken is called a defendant or respondent.

Administrative law

Administrative law is a form of civil law that usually involves legal action between a person or company and a government agency, something that has become much more common in the last 30 years. Some administrative law actions seek review of a government decision, and others try to compel or prevent action by the government.The standard of proofIn civil law, the standard to which a person must prove their allegation is 'on the balance of probabilities', meaning it must be proved that something is more likely than not to have happened.

Court orders

In a civil case the plaintiff or applicant can seek an order for compensation (damages) from the defendant, or an order that some conduct of the defendant be required or stopped (an injunction). In administrative law, the court can order that a decision under review is afrmed, varied or set aside, or that a government agency must act or cease from acting in a certain way.

3. Your application for legal representation

Completing your application form

Fill in the form, answering all questions truthfully. You must tell us everything you know about your case in order for us to decide if we can assist you. It is a serious offence to make a false or misleading statement or not tell us something you know. You do not need a lawyer to apply for a Grant of Aid.

What if you disagree with the decision?

If you are unhappy with our decision you can write to us within 28 days, providing any additional information, to ask for a reconsideration. We will write to let you know our decision.

If you are still unhappy with the decision on reconsideration you should write to use within 28 days to ask for your application to be reviewed by an independent Review Committee. You may attend this review, and bring a friend, if you wish. It may take a number of weeks before your application will be reviewed. We will write to let you know the date and time of the review.

File storage and destruction policy

Legal Aid's file storage and destruction policy is in keeping with the State Records Management Practices. In the normal course, client files are kept for 7 years and then destroyed

Conditions of a grant of aid

Payment by you

Legal aid is not always free of charge. You may be asked to pay in full (or in part) your legal costs. The decision whether you can afford to pay for your legal help may be made at any time during your grant of aid (ie at the beginning, during or end of your matter).

If you and/or a financially associated person owns property, we may require a security over the property. The security makes sure that you pay back part or all of the costs of your case. We do not normally ask or force you to sell your house, but rather will wait until you decide to sell, transfer or refinance. At the end of your matter, we will write to you and advise the amount of your final contribution.

Debt Management Fee

A debt management fee will apply to all final contributions outstanding at 30 June each financial year. The debt management fee is calculated at 5% of the debt to Legal Aid WA. There is a minimum fee of $27 and a maximum fee of $270 per annum (these figures will be CPI indexed each year).

Money received on your behalf

If your lawyer receives any money on your behalf he/she must keep enough money to cover the cost of your grant of aid.

Change in circumstances

You or your lawyer must tell Legal Aid straight away of any change in your address, financial circumstances or any change in your circumstances that may affect your case.

Change of lawyer

You must get Legal Aid's permission to change your lawyer. A change is unlikely to be granted without good reason. If permission is granted you may have to pay the increase in costs resulting from changing your lawyer.

Legal costs

Your lawyer must bill Legal Aid (and not you) for all work covered by the grant of aid.

Non-acceptance of advice

You must follow the advice of your lawyer, otherwise your grant of aid may be terminated.

Failure to comply

Your grant of aid may be terminated if you do not comply with the conditions of a grant of aid.

Complaints

If you are concerned about any aspect of the work done on your behalf, please contact your assigned lawyer for assistance. He or she will be able to resolve most difficulties. If you need to make a formal complaint, this should be put in writing and addressed to the Director of Legal Aid. Nothing in the terms of this grant of aid affects any right to redress under the Legal Practitioners' Act.

LECTURE 5 SOURCES OF INTERNATIONAL LAW

1. *International regulation of sale agreements*
2. *Direct Sales to Customers Abroad*
3. *Licensing Technology to Manufacturers Abroad*
4. *.Legal Problems with Licensing Arrangements*

When a firm considers an international undertaking, it may face a very different environment from the one it confronted in its domestic operations. The parties to international transactions are much less likely to know each other well because they are separated by great distances. Further, it is more difficult to pursue remedies when multiple legal systems are involved. Finally currency differences and the multitude of restrictions that may constrain a company's right to remove funds from a particular country increase the complexity involved in carrying out international operations. The answers to the legal questions raised by international transactions come from a mix of the laws of our own country, those of the other country or countries involved and certain doctrines of international law.

1. International regulation of sale agreements

Countries have attempted to address some of the problems raised by international transactions through the drafting of compacts or codes that apply across national boundaries. Typically countries will agree to be bound by them, then adjust their internal laws, if necessary so they are in compliance with the laws laid out in the compact or code. While such codes have existed since the early part of this century it has only been in the last half of this century that they have gained many signatories. As the pace of international trade has increased, so has support for such agreements.

CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The wide variety of national approaches to contract law greatly impeded global trade. Business lawyers were required to spend a great deal of time researching the different legal schemes in order to draft agreements that would protect the parties' expectations throughout the world. Transactions often were delayed or otherwise burdened by disagreements between the parties over the selection of a particular choice of law provision within the contract. In an attempt to overcome these problems the **United Nations Convention on Contracts for the International Sale of Goods (CISG)** was created. The fundamental goal of the CISG is to unify and codify an international law of sales.

It provides rules governing the formation of international contracts and regulates the transfer of goods under those contracts. The CISG became effective January 1, 1988 for those countries that ratified it.

The Choice-of-Law Convention

The 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (Choice-of-Law Convention)-resulted from an attempt to harmonize choice-of-law rules with the CISG. It provides courts in the signatory countries with rules for determining which law applies to contracts for the sales of goods when those contracts involve parties from different countries. It allows contracting parties to specify which country's laws will apply to their transaction but also provides a way for the court to decide if the parties have not so chosen.

If both parties to a contract reside in countries that have adopted the CISG, those terms automatically will control the transaction unless the agreement contains a provision specifically rejecting its applicability. If the buyer and seller are not from countries that have adopted the CISG, it will not govern unless their contract specifically calls for its application. Otherwise, the governing law, when not specified in the contract, will be the law of the country in which the seller's place of business is located.

Private International Law

The conventions discussed above are only two of several that can apply to international transactions. Combined, they provide the framework for handling many of the problems that would arise in international contracts. However, many of the countries whose businesses routinely engage in international dealings are not signatories of the conventions; thus, they do not apply to a major portion of international transactions. In such situations, the parties either must shape their dealings in light of the uncertainties traditionally inherent in the international legal arena or establish through their contractual negotiations the body of rules that will govern their transaction.

Choice-of-Law and Forum Selection Clauses

To the extent that there is a difference between the contract law of the seller's nation and that of the buyer's country courts typically will respect the choice of the parties as to which law applies if the parties, as is usual, have included a choice-of-law clause in the agreement. Selecting the appropriate body of rules to govern the transaction is not enough, however. The parties frequently will wish to decide in advance on a suitable forum in which the dispute resolution should occur. Often this

may be a neutral location that offers no special advantage to either of the parties. Such provisions are likely to be honored by the courts if they are freely negotiated, not contrary to any public policy, and not severely inconvenient for either party. Thus, the parties may agree that their contract is to be governed by the CISG (choice-of-law) with disputes to be resolved in the courts.

The increasing volume of international trade, coupled with the complex nature of many of these relationships, has led to greater and greater reliance on arbitration to resolve contractual disputes. This settlement of disputes by a nonjudicial third party is increasingly called for in international contracts because it is cheaper, quicker, and more private than resolving disputes through litigation. Equally important, however, is the fact that it can take place in a neutral location. The increase in trade with countries such as China, Japan, and Korea, where mediation rather than litigation of disputes is traditional, has given added impetus to this trend.

The growing attractiveness of arbitration has resulted in the establishment of arbitration centers in world capitals such as London, Paris, Cairo, Hong Kong, and

2. Direct Sales to Customers Abroad

A direct sale to a customer abroad based simply on the customer's contractual promise to pay when goods arrive frequently does not provide the seller with sufficient assurance of payment. The seller may not know its overseas customer well enough to determine the customer's financial condition or any tendency of the customer to refuse payment by quibbling over the conformity of the goods with the contract if the customer no longer wants the goods when they arrive. If payment is not forthcoming for either of these reasons, the seller will find it difficult and expensive to pursue its legal rights under the contract. Even if the seller feels assured that the buyer will pay for the goods on arrival, the time required for shipping the goods will often mean that payment will not be received until months after shipment.

Documentary Exchanges

To solve these problems$_2$ the seller frequently insists on structuring the sale as a documentary irrevocable letter of credit transaction. The transaction usually has two parties in addition to the seller and its foreign customer: an issuing bank located in the customer's country, with which the customer typically has close banking relations, and a confirming bank located in the United States that is well known to the seller. In this type of transaction, the issuing bank, under an agreement with the buyer, issues a letter of credit agreeing to pay a stated amount when it is presented with a bill of lading and any other documents called for in the letter. The bill of lading is a document issued by a carrier acknowledging that the seller has delivered particular goods to it—for example, eight tractors of a certain model—and entitling the holder to receive these goods at the place of destination. The confirming bank promises to pay the seller on the letter of credit. The confirmation thus performs a function similar to that performed by the endorsement of a note. The confirmation is needed because the seller, unlike the confirming bank, may not know any more about the financial integrity of the issuing bank than it knows about that of the buyer.

The first step in this type of transaction is a simple sales contract between the seller and the buyer that conditions shipment of the goods by the seller on the seller’s

receipt of a letter of credit and its confirmation. If everything works as planned, the seller delivers the goods to the carrier and is issued a bill of lading, which it presents to the confirming bank in return for payment. The confirming bank sends the bill of lading to the issuing bank for reimbursement. The issuing bank, which by that time will have received payment from the customer (unless the issuing bank and the buyer have entered into special credit arrangements between themselves), will deliver the bill of lading to the customer for use in obtaining the goods on their arrival.

This arrangement solves the various problems confronting sellers in direct sales to customers abroad. The seller has a promise of immediate payment from an entity it knows to be financially solvent (the confirming bank). Since payment is made to the seller well before the goods arrive, the buyer cannot claim that the goods are defective and refuse to accept delivery and pay for them, leaving the seller with the burden of suing. (Of course, if the goods are truly defective on arrival, the customer can commence an action for damages against the seller based on their original sales contract.)

The laws governing letters of credit generally insist that the promises made by the issuing and confirming banks are independent of the underlying sales contract between the seller and the customer. The confirming bank's only responsibility is to make sure that the bill of lading covers the goods identified in the letter of credit and that any other documents called for in the letter strictly conform to its requirements. If so, the confirming bank is required to pay the seller. It is no defense that the customer has refused to pay the issuing bank or even, generally that the customer claims to know that the goods are defective.

Countertrade

With global demand for credit on the increase and many banks hesitant to finance international sales, more and more exporters are forced to resort to less desirable options. Countertrade is one such option. In general it involves the linking of two or more trade obligations using some form of product-for-product exchange. Thus, the seller, in order to secure a contract with the buyer, may agree to purchase goods designated by the buyer. In reality, there is no single form of countertrade transaction; instead the parties usually will individualize their contract by combining different types of countertrading techniques. And while numerous nations themselves practice countertrade, there is no uniform national or international legislation governing its use. In fact, in 1979 the United Nations Commission on International Trade Law (UNC1TRAL) adopted the position that countertrade took too many different forms to be fit for uniform international regulation.

The risks accompanying a countertrade arrangement extend well beyond those associated with normal commercial transactions. With countertrade there may be three or more interrelated agreements involving as many or more different parties. Not only must the parties concern themselves with the content of each contract for the purchase of goods, but they also most carefully define the linkages between each set of agreements.

Sales Abroad through a Distributor

If a U.S. firm believes that there is a substantial market for its product in some area abroad, it may find that appointing a distributor located in that country is a more

effective and efficient way to exploit the market than selling directly to customers. If so, it will sign a distribution agreement—a contract between the seller and the distributor that sets forth a wide range of conditions of the distributorship. The interpretation and enforceability of most of these terms—such as price, method of payment, currency of payment, product warranties, guaranties of supply availability, and guaranties of minimum purchases—primarily involve contract law.

International Franchising

There are several advantages that a U.S. firm may derive from establishing a franchise system for distributing its products in the world market beyond those inherent in the basic concept of franchising. First, when the franchisee is a native of the target country, the operation will not be troubled by as many problems stemming from language or cultural differences. Second, the franchisee will be more likely to understand local regulations affecting the business. Third, through the use of a foreign-owned franchise, the company may be able to avoid local restrictions on foreign investment. Finally, the local franchisee may be less threatened by political instability (e.g., the threat of expropriation) than would a foreign company.

The effectiveness of the franchise relationship often will turn on the ability of the parties to reach a comprehensive franchise agreement. In the absence of an agreement to the contrary, the laws of the franchisee's country generally will govern the relationship. And in some matters—patents, trademarks, and antitrust—those laws will apply regardless of the agreement. Many countries will not permit franchise agreements to stand unless the parties agree to the jurisdiction of the local courts. Accordingly the political stability of the target country is vitally important in the long-term success of a franchising relationship.

The Documentary Credit

1.The buyer and seller enter into the underlying contract

2.Buyer applies for a letter of credit from issuing bank. (Buyer may pay for the letter now or later, depending on its credit standing.)

3.Issuing bank instructs confirming bank to pay seller on the letter of credit on seller's presentation of required documents to confirming bank.

4.Confirming bank pay seller and sends documents to issuing bank.

5.Issuing bank presents documents to buyer.

6.Buyer presents documents (bill of lading) to shipper in exchange for goals.

Figure 3

Advantages of International Franchising
1. Franchisee has advantage of franchisor's expertise on numerous matters intimately related to the goods or services
2. Franchisor does not need vast sums of capital to establish distribution network
3. Local management better acquainted with language and culture
4. Local franchisees more in tune with laws of foreign government
5. Franchisee less threatened by political bias against foreigners
6. Avoids the need for detailed supervision of distributors who are many miles away

3. Licensing Technology to Manufacturers Abroad

A firm can exploit the world market by licensing its technology to a foreign Manufacturer. The technology may be embodied in the product (a **product innovation),** giving it superior features, or it may be used in the manufacture of the product (a **process innovation),** lowering the cost of production and permitting a more competitive price for the product.

Patents

Some of the technology that a firm develops is patentable. If a firm acquires a valid patent in a particular country based on a process innovation, it can prohibit the use of the technology in that country in the manufacture of any product other than its own. If the patent is based on a product innovation, sales in that country of a product other than the firm's own product, wherever manufactured, are prohibited as well. It is not difficult for a firm to acquire **parallel patents** in each of the major countries maintaining a patent system. Many such countries are parties to the International Convention for the Protection of Industrial Property Rights. This results in a certain degree of uniformity in their patent laws and in a recognition of the date of the first filing in any of the countries as the filing date for all. Once having established such a worldwide position, a firm can, in return for an agreement to pay royalties, license a manufacturer abroad to manufacture and, if a product innovation is involved, to sell the product within a particular territory.

Trade Secrets

Other technology may not be patented, either because it is not patentable or because a firm makes a business decision not to patent it. If the technology is a process innovation, the firm that developed it may still be able to control its use abroad by keeping it a secret. The firm can license the know-how to a particular manufacturer for use in a defined territory in return for promises to pay royalties and to keep the know-how confidential. Such an arrangement is more likely to be workable where considerable technical assistance from the licensor (in the form of plant design or employee skill training) is necessary in order to transfer the technology to the licensee.

4. Legal Problems with Licensing Arrangements

Antitrust Concerns

International licensing of technology, if done on an exclusive basis, can give rise to the same kinds of antitrust questions under the laws of the foreign country or countries constituting the territory as do exclusive distributorships. An exclusive license of a product innovation means that no one other than the licensee, not even the licensor, can manufacture or sell the product in the designated territory. Thus, competition among products using the same technology is limited.

Gray Market Goods

A domestic manufacturer may transfer its trademark rights to a foreign company to use overseas pursuant to a licensing arrangement. One risk of such a transfer is that the goods that are legally manufactured overseas may find their way back into this country in competition with the holder of the trademark. This phenomenon is known as the **gray market.** A gray market good is a genuine product

bearing a valid U.S. trademark that is bought outside the United States and then resold in this country by unauthorized importers and distributors. U.S. trademark holders may challenge the importation of gray market goods on trademark infringement grounds where there is the likelihood of confusion to consumers. Further, the U.S. trademark holder may attempt to have U.S. Customs prohibit importation of the gray market goods.

Limitations on Trade

The focus of this chapter so far has been on ways foreign sales could be structured, and general problems raised by the choice of direct sales, distributorships, licensing, or investment abroad. There are also many governmentally imposed barriers to trade that can have an impact on the international sale of goods. Some of these are imposed by the United States and some by the countries where the goods are to be sold. They include tariffs and import and export controls.

Tariffs

A **tariff** is a tax or duty assessed on goods, generally when they are imported into a country. Through the use of tariffs, governments can restrict imports and protect domestic sales. A sufficiently high tariff will make the product so expensive that most consumers will refuse to buy it; they will do without or turn to domestically produced equivalents. Tariffs have been the most common barrier to free trade and are something that many governments are cooperating to control or eliminate.

One of the most comprehensive efforts at cooperation has been the World Trade Organization (WTO), subscribed to by more than 100 governments. The focus of the WTO is much broader than tariff reduction, however; its purpose is to reduce all trade barriers and promote a stable world trade environment. Among other ways, it attempts to do this through a "most favored nation clause" that requires a treaty country such as the United States to offer all other treaty countries treatment as favorable as that granted by the United States to any individual signatory country Thus, with some exceptions, discrimination among countries on the basis of import duties is eliminated.

Caribbean Basin Initiative

The United States also provides duty-free status for most imports from approximately 24 countries and territories in the Caribbean Sea under the Caribbean Basin Initiative. The actual list of beneficiary nations is subject to change over the life of the program. The eligibility requirements for preferential rates are similar to those that govern the Generalized System of Preferences.

Dumping

Many countries impose tariffs to counteract dumping and subsidized goods. **Dumping** is the selling of exported products at a price lower than the goods are sold in the exporter's home market. The selling of exports at these low prices means that manufacturers in the dumped market cannot effectively compete with them. Thus, duties are imposed on the goods to offset the difference between the unfair price and the price at which the government of the import country determines they should be sold. In the United States, dumping is regulated by the Trade Agreement Act of 1979. When dumping is charged, the claim is investigated by the International Trade Association of the Department of Commerce to determine if the goods are being sold

at less than fair value. If the claim is determined to be true, and if the International.

Lecture 6 INTERNET LAW

1. *Jurisdiction*
2. *Cyber-torts*
3. *Computers and Privacy*
4. *Trademarks in Cyberspace*

Introduction

The internet has been described as a global communications medium that links people and all types of institutions throughout the world. It was first created as a research network for scientists and academics. However, with the advent of the World Wide Web in the 1990s, businesses and consumers discovered its many advantages, and its growth soared. It has been estimated that no more than 300 computers were linked to the Internet in 1981. Fifteen years later, almost 10 million computers were linked.

In reality, the Internet is a decentralized system of links among computers and computer networks. The information available through these links is as diverse as the millions of computer users and it may be transmitted almost simultaneously, and often anonymously, throughout the world. No entity controls the Internet. In fact, its decentralized and chaotic nature seems to preclude effective control in many instances.

1. Jurisdiction

A court may not decide a legal dispute unless it has **personal jurisdiction** over the defendant. Personal jurisdiction generally does not exist unless the defendant has some close connection with the territory where the suit is brought.

Minimum Contacts

There seldom is a personal jurisdiction problem if the defendant is a resident of the territory where the court is located. Similarly personal jurisdiction is likely to exist if a nonresident defendant is physically present in that territory However, the situation is more uncertain in cases where a lawsuit is filed against a nonresident who was not physically present in the territory served by the court. In those instances, the court is unlikely to have personal jurisdiction unless it can be shown that the nonresident defendant has certain minimum contacts (close connection) with the territory where the suit is brought. The minimum contacts requirement generally is met if the defendant intentionally conducts business in the territory or was served process (notification of the suit) while physically present in the territory.

Jurisdiction over On-line Activities

Legal rules against online misconduct are difficult to enforce without the assistance of the courts. However, courts cannot hear cases unless they have personal jurisdiction over the defendant. Thus, it is important to understand when a court has

jurisdiction over a nonresident computer user.

Courts have developed a three-part test to determine if they have jurisdiction over nonresident defendants. First, the nonresident defendant must do some act or consummate some transaction within the territory or perform some act by which she purposefully avails herself of the privilege of conducting activities within the territory. Second, the claim that is the basis of the lawsuit must be one which arises out of or results from the nonresident defendant's territory related activities. Third, the exercise of jurisdiction must be reasonable. Using this test, courts have never held that an Internet advertisement alone is sufficient to subject an advertiser to jurisdiction in the plaintiff's home state. They require that the nonresident defendant have purposefully availed himself of business in the forum state.

First Amendment Issues

The First Amendment and its protection of the freedom of expression may provide the most important source of legal rights on the Internet. After all, the World Wide Web permits people and organizations to instantaneously communicate with one another on any number of topics through electronic mail (e-mail), mailing list services (listservs), newsgroups, and chat rooms. In fact, the Web may be likened to a vast library containing millions of indexed publications that are readily available to readers. Simultaneously it offers a worldwide shopping mall offering access to a wide variety of goods and services. For these reasons, attempts to regulate on-line activities are bound to implicate First Amendment issues.

Government regulation of commercial speech

On-line advertising is a form of commercial speech. As such, it is entitled to less First Amendment protection than is noncommercial speech. For example, false, misleading, or deceptive advertisements are entitled to no First Amendment protection at all. And in order, to regulate even truthful advertisement, the government need only show that it is pursuing a substantial interest.

On-line Advertising

Electronic bulletin boards and Web sites permit computer users to interact with businesses around the world without ever leaving their homes or workplaces. This promises to revolutionize the ways in which businesses advertise their goods and service. In particular, this technology opens the door for more creative ways to customize advertisements to the wants and needs of individual consumers.

Computer Junk Mail

As more and more people .have moved on-line, there has been a corresponding rise in the number of complaints about computer junk mail. Mass advertisers have developed automated programs that compile the e-mail addresses of Internet users. They then bombard the networks with millions of ads to e-mail users. Private on-line companies complain that these mass e-mailings, known as spam, overload theirs servers and threaten to severely disrupt the Internet.

There are several remedies, short of demanding government regulation, that are available to deal with spam. First, the on-line companies may take private action to block mass mailings from access to the system. Second, a variety of computer makers are now marketing software that will automatically eliminate all advertising from Web pages. Finally, the on-line companies may sue advertisers who make

unauthorized mass e-mailings for trespass.

Government Regulation of Noncommercial Speech

Governmental regulation of on-line expression is permitted when it meets certain constitutional standards. For instance, the government may not regulate the content of noncommercial messages unless the restriction (1) is furthering a compelling governmental interest and (2) interferes with the expression no more than necessary to advance the government's interest.

2. Cyber-torts

Defamation is not the only intentional tort for which computer users might be found liable for damages in a civil action. Internet service providers are beginning to bring trespass actions against spam distributors who flood the Internet with unsolicited advertisements. This practice of mailing unsolicited bulk e-mail causes serious problems for the service providers. Because many of the bulk e-mail lists are outdated and contain a large percentage of invalid or nonexistent e-mail addresses, they severely increase the load on servers, as the servers first attempt to deliver the message and then, if unsuccessful, return the undelivered message to the sender. Additional strain is placed on the server when the sender falsifies the origin of e-mail with a false address, as the server will unsuccessfully try for hours and sometimes days to return the undelivered e-mail to the invalid sender. Consider the following case where an on-line service company convinces the court that a spam distributor has committed the intentional tort of trespass.

3. Computers and Privacy

Privacy issues are a matter of growing concern among government and business leaders as they seek to expand electronic commerce. At present, there are few privacy guarantees on the Internet. Many employees do not realize that the e-mail messages they receive on their employers' computers may belong to the employer and, as such may be read by the employer.

The privacy concerns arise in other areas as well. For instance, it is now quite common to read news stories reporting incidents of computer hackers infiltrating e-mail files and accessing confidential information. Further, sometimes the simple act of visiting a Web site may result in private information about the users being sold to marketers. It has been quite common for Web sites to give out users names, addresses and social security numbers to interested merchants.

Cyber-crime

Legislation currently exists at both the state and federal level prohibiting unauthorized access to, or use of, a computer. It also is a crime for people to access the services of commercial service providers without paying their fees. And it is illegal for computer hackers to alter or destroy data stored in another person's computer. In fact, there exist numerous criminal statutes outlawing a range of on-line activities such as theft, distribution of obscene materials, destruction of property and trespass.

Intellectual Property Rights

Intellectual property law governs the ownership of text, photographs, and other

original materials. Because computer technology permits people to transform such material into digital form so that it can be transmitted and downloaded into its original form, on-line communications sometimes trigger intellectual property analysis. The areas where intellectual property questions in cyberspace most often occur seem to be copyrights, trademarks, and domain names.

Copyrights in Cyberspace

Copyright owners possess the exclusive right to: (1) reproduce the copyrighted work, (2) prepare adaptations based on the original copyrighted material, (3) sell or otherwise transfer copies of the copyrighted material, and (4) publicly display the copyrighted material. Nobody else is permitted to exercise these rights without the consent of the copyright owner.

Copyright Infringement

A person will not succeed in a copyright infringement lawsuit unless she proves two things. First, she must establish her ownership of a valid copyright. Second, she must show that the defendant copied constituent elements of her protected works. If these two steps are met, the copyright owner will succeed in her infringement suit if she proves that the defendant exercised any of the ownership rights listed in the previous paragraph.

The Fair Use Doctrine

A defendant in an on-line copyright infringement suit may avoid liability if he can establish that his use of copyrighted material fell within the **fair use** doctrine. Courts look at four factors when deciding if this defense applies: (1) if the copyrighted material is used for noncommercial purposes; (2) if the copyrighted material is informational rather than creative; (3) if there are substantial differences between the copyrighted work and the derivative work; and (4) if the use does not diminish the value or marketability of the original copyrighted work.

4. Trademarks in Cyberspace

Any word, name, symbol, device, or combination thereof used by a manufacturer or seller to identify its products and to distinguish them from the products of its competitors is a **trademark.** Similar words or devices used to identify and distinguish services are called **service marks.** The Lanham Act provides trademark and service mark owners with legal protection against users in order to help purchasers properly identify favored products or services. Further, sellers and manufacturers would have less incentive to innovate and strive for quality if their products and services could be easily confused with those of their competitors.

Because trademark and service mark protection was primarily designed to protect against confusion, the Lanham Act traditionally permitted more than one business to use the same mark if they did not compete in the same area or line of business. However, in recent years **trademark dilution** laws have been used to protect "distinctive" or "famous" marks from unauthorized use even when confusion was unlikely. Instead of focusing on consumer protection, the trademark dilution laws are designed to protect the investment of trademark owners.

Domain Names

Web site addresses on the Internet are based on a **domain name** system. The

domain name identifies the person, business, or other organization that owns a Web site. They are important because they assist consumers or other interested persons in quickly locating a particular Web site. Naturally, a business generally would prefer to use its trademark or service mark as its domain name because of the consumer recognition that accompanies such marks. Problems arise because frequently more than one business may own the trademark or service mark, yet only one of them may register that mark as its domain name.

In recent years, courts have been confronting more and more cases involving cyber-squatters. These are people who register another's trademark or service mark as their own domain name and then attempt to sell it to the mark's original owner. As the following case indicates, courts sometimes use trademark infringement or dilution laws to punish cyber-squatters.

Cyber-Contracts

Electronic contracting is becoming more and more commonplace. More and more people are purchasing goods and services they find advertised on Web site and agreements frequently are made through an exchange of e-mail messages. In large part, most electronic contracting issues may be resolved through a familiarity with traditional contract rules. Further, an Article 2B of the Uniform Commercial Code rules being drafted that will adapt the traditional Uniform Commercial Code cyberspace.

General Contract Rules

Web sites, like newspaper advertisements, generally will be treated as invitations to buyers to make an offer rather than as offers themselves. Thus, when a computer user orders goods or services he finds advertised on a Web site, the user is offering to buy the goods or services at the advertised terms. The Web site owner is then free to accept or reject this offer. However, the timing of the acceptance is likely to differ from traditional contract law. Rather than having an authorized acceptance taking effect upon dispatch, courts are likely to hold that an electronic acceptance is not effective until it is actually received by the offeror.

Writing issues are not likely to be serious impediments to on-line contracting. Most oral contracts are enforceable. Further, even when a writing is required by contract law, this requirement should be easy to satisfy since most electronic messages can be printed out into a tangible form.

Lecture 7 ADMINISTRATIVE LAW

1. *What is "administrative law"?*
2. *Challenging administrative decisions*
3. *The development of administrative procedure law*
4. *Judicial review of agency actions*
5. *Principles of administrative law*

1. What is "administrative law"?

Administrative law *is the body of law that allows for the creation of public regulatory agencies and contains all of the statutes, judicial decisions, and regulations that govern them. It is created by administrative agencies to implement their powers and duties in the form of rules, regulations, orders, and decisions.* Administrative procedure *constitutes the methods and processes before administrative agencies, as distinguished from judicial procedure, which applies to courts.* The fundamental challenge of administrative law is in designing a system of checks that will minimize the risks of bureaucratic arbitrariness and overreaching, while preserving for the agencies the flexibility that they need in order to act effectively. Administrative law thus seeks to limit the powers and actions of agencies and to fix their place in our scheme of government and law. Administrative law is an area of law that you will need to rely on if you wish to challenge a decision or action of a government official, department or authority. Administrative law may also apply when the person whose decision you wish to challenge is not a government officer but is exercising "public power" (e.g. a power granted to a person by a statute). Decisions or actions governed by administrative law are called (in this chapter) "administrative decisions". Administrative law usually only enables decisions (or actions) that are "administrative" in nature to be challenged. This means that there are other types of "decisions" made in government but nor governed by administrative law. The following are examples of decisions that may not be governed by administrative law:

- legislative "decisions" (e.g. the making of laws; however, *delegated legislation* may be reviewable on a similar basis to administrative decisions);
- broad policy decisions (e.g. deciding to reduce a grants program);
- employment decisions (e.g. decisions to hire an employee; however, administrative law may apply to public service misconduct decisions);
- criminal cases (e.g. decisions to prosecute; however, it does apply to investigations); and
- contract decisions (e.g. decisions by government to enter into a contract; however, *tender* processes may be subject to some administrative law principles).
- Examples of administrative decisions that you may be able to challenge under administrative law principles and mechanisms include:
- a decision by a Council to compulsorily acquire land;
- a decision by ASIC to declare a person not fit and proper to hold a financial services licence;
- a decision by a Minister not to grant a visa;
- a decision of Centrelink to cease paying a benefit; and

- a decision to impose conditions on a licence.

Administrative decisions are usually made by government officers, but may also be made by people who are not government officers. If the decision involves "statutory power" then it is likely to be regulated by administrative law.

2. Challenging Administrative Decisions

There are four main types of "review" of administrative decisions:

1. a reconsideration by the original decision-maker;
2. a specific statutory right to review of the decision "on the merits" (internally or by a *tribunal* such as the Victorian Civil and Administrative Tribunal);
3. judicial review by a court; or
4. complaint to the relevant Ombudsman.

There are also *appeal* mechanisms in administrative law. For example, an appeal from a tribunal decision on a question of law may be made to a court if the legislation allows for it, or a tribunal may conduct a form of appeal. Always check the legislation for the specific type of review or appeal that may be available.

Reconsideration

As long as the original decision-maker has not "exhausted" their power, they may be able to reconsider their decision. Always consider this option first. If you are not sure, you may ask the decision-maker whether they are prepared to reconsider the matter. Generally speaking, if more than one person's "rights" are at stake, reconsideration may not be possible (for example, if a licence has been granted to someone else instead of you, reconsideration of your matter might impact on their right to that licence)

Review on the merits

A review "on the merits" generally means that a person will look again at a decision that has been made and make what they think is the "correct and preferable" decision instead. (Check the relevant legislation for the limits of the merits review.) The person conducting the review will usually be able to consider any additional *material* you wish to provide to them and come to their own decision about the facts of the case. They will then be able to substitute their own decision for the decision originally made. You will only have a *right* to a review of an administrative decision "on the merits" if an Act or Regulation gives you that right. A right of review "on the merits" can be a very valuable right. If you are unhappy with an administrative decision or action you should carefully read the Act or Regulation under which the decision was made to see if it gives you an express right of review. Some laws give wide rights of merits review, while others give none. The right of review may be to a higher official, a Minister, a specialist *tribunal* (within or outside the departmental framework), or to an independent general tribunal,

Judicial review

Judicial review is brought before a court, and the court determines whether the decision complained about is unlawful and of no effect. The court then exercises its *discretion* regarding whether or not to grant relief. The court usually has no power to review the decision "on its merits" and determine whether or not it was the decision the court would have made. The court only has the power to review the decision to

see whether the decision-maker made the decision *lawfully*. However, some of the "grounds of review" do require some consideration of the merits of the case (for example, if the decision-maker took into account an irrelevant consideration, or if the decision is manifestly unreasonable). And occasionally, when jurisdictional error is *alleged*, the court may need to make findings of fact.

JUDICIAL REVIEW VS MERITS REVIEW EXPLAINED

One of the most difficult things to understand in administrative law is the difference *between judicial* review and merits review. It is important to understand this difference when analyzing the decision you wish to challenge, and the potential basis for such a challenge. In *Administrative Power and the La* , the difference has been explained by way of analogy as follows:

The decision maker stands poised to make an administrative decision. Before making the decision, they must embark on a journey down a path which leads to an orchard. Trees from within the orchard's boundaries contain a variety of fruits. Any fruit may be picked - any decision may be made - as long as it is from a tree planted within the boundaries of the orchard. There is only one lawful path to the orchard. If the decision maker digresses, strays off the path, and picks some fruit from a tree outside the path, it will not be fruit from a tree in the orchard... If the decision maker strays off the path, they will not be making a lawful decision... What if a fruit from a tree outside the orchard is picked? If challenged, the reviewer (whether a court or tribunal) may throw away the fruit (set aside or quash the decision). The court can only throw it away if it is unlawful (outside the orchard). The merits review decision maker can throw it away for any reason (i.e fruits from inside and outside the orchard may be discarded). The merits review decision maker… may select a new fruit for consumption, after walking down the path to the orchard in order to find it. If the reviewer is a judicial review decision maker, that is, a court, they may order another decision maker to start the process again and choose a new fruit. The court on judicial review will generally not stand in the shoes of the decision maker and walk down the path in order to choose a new fruit.

Complaint to the Ombudsman

In addition to the above forms of review, you can complain to the relevant Ombudsman. However, the Ombudsman is usually a last resort - you should exhaust other merits *or judicial review* options first. The Ombudsman investigates complaints about decisions of government officers and agencies, and has a *discretion* as to whether or not any complaint should be investigated. It is best to try to solve the problem directly with the relevant agency first before approaching the Ombudsman. After the investigation, the Ombudsman will make a report but cannot directly overturn the original decision or substitute their decision for that under review.

Separation of Powers

The Constitution establishes a three-part system of government consisting of the Legislative Branch, which makes the laws, the Executive Branch, which carries out or enforces the laws, and the Judicial Branch, which interprets the laws. This system of checks and balances is designed to keep any one branch from exercising too much power. Administrative agencies do not fit neatly into any of the three branches. They are frequently created by the legislature and are sometimes placed in

the Executive Branch, but their functions reach into all three areas of government. For example, the Securities and Exchange Commission (SEC) administers laws governing the registration, offering, and sale of Securities, like stocks and bonds. The SEC formulates laws like a legislature by writing rules that spell out what disclosures must be made in a prospectus that describes shares of stock that will be offered for sale! The SEC enforces its rules in the way that the Executive Branch of government does, by prosecuting violators. It can bring disciplinary actions against broker-dealers, or it can issue stop orders against corporate issuers of securities. The SEC acts as judge and jury when it conducts adjudicatory hearings to determine violations or to prescribe punishment. Although SEC commissioners are appointed by the president subject to the approval of the Senate, the SEC is an independent agency. It is not part of Congress, nor is it part of any executive department. Combining the three functions of government allows an agency to tackle a problem and to get the job done most efficiently, but this combination has not been accepted without a struggle. Some observers have taken the position that the basic structure of the administrative law system is an unconstitutional violation of the principle of the Separation of Powers.

Delegation of Authority

The first issue that is encountered in the study of administrative law concerns the way in which Congress can effectively delegate its legislative power to an Administrative Agency. Constitution provides that all legislative power is vested in Constitution. The delegation of legislative authority sets clear standards for the administration of the duties in order to limit the scope of agency discretion. With this basic principle as their guide, courts have invalidated laws that grant too much legislative power to an administrative agency.

Due Process of Law

Administrative law will not deprive a person of his or her life, liberty, or property without Due Process of Law. An administrative agency thus may not deprive anyone of life, liberty, or property without a reasonable opportunity, appropriate under the circumstances, to challenge the agency's action. People must be given fair warning of the limits that an agency will place on their actions. Federal courts routinely uphold very broad delegations of authority. When reviewing administrative agency actions, courts ask whether the agency afforded those under its jurisdiction due process of law as guaranteed in constitution

Political Controls Over Agency Action—Legislative and Executive Oversight

Government institutions that set and enforce public policy must be politically accountable to the electorate. When the legislature delegates broad lawmaking powers to an administrative agency, the popular control provided by direct election of decision makers is absent—but this does not mean that administrative agencies are free from political accountability. In many areas, policy oversight by elected officials in the legislature or the Executive Branch is a more important check on agency power than is Judicial Review. Federal agencies are dependent upon Congress and the president for their budgets and operating authority. An agency that loses the support of these bodies or oversteps the bounds of political acceptability may be subjected to radical restructuring .Public opinion is another forceful weapon against unbridled

agency action. Some jurisdictions of the Law have created special public offices to investigate complaints about administrative misconduct. Investigators holding these offices, called OMBUDSMEN, usually have broad authority to evaluate individual complaints, to intercede on behalf of beleaguered victims of red tape, and to make reports or recommendations.

3. The Development of Administrative Procedure Law

Administrative agencies were established to do the government's work in a simpler and more direct manner than the legislature could do by enacting a law, and than the courts could do by applying that law in various cases. Because they pursue their actions less formally, agencies do not follow the Civil Procedure that is set up for courts. Instead, the law of administrative procedure has developed to ensure that agencies do not abuse their authority even though they use simplified procedures. Although administrative agencies have existed since the founding of the United States, the early twentieth century saw a growth in the number of agencies that were designed to address new problems. During the Great Depression, a host of new agencies sprang up to meet economic challenges. Antagonism toward bureaucracy increased as existing dissatisfactions were multiplied by the number of new bureaucrats.

Judicial review of agency action furnishes an important set of controls on administrative behavior. Unlike the political oversight controls, which generally influence entire programs or basic policies, judicial review regularly operates to provide relief for the individual person who is harmed by a particular agency decision. Judicial review has evolved over a period of years into a complex system of statutory, constitutional, and judicial doctrines that, define the proper boundaries of this system of oversight. The trend of judicial decisions and the Administrative Procedure Act is to make judicial review more widely and easily available.

How far can a court go in examining an agency decision? The reviewing court may be completely precluded from testing the merits of an agency action, or it may be free to decide the issues de novo, that is, without deference to the agency's determination. In general, administrative agencies make either formal or informal decisions, and courts have different standards for reviewing each type.

Informal Agency Action Most of the work done by agencies is accomplished with informal procedures. For example, a person who applies for a driver's license does not need or want a full trial in court in order to be found qualified. So long as the motor vehicle department follows standard, fair procedures, and processes the application promptly, most people will be happy.

Agencies take informal action in a variety of settings. The Social Security Administration reviews over four million claims for benefits annually, holding hearings or answering challenges to their decisions in only a small number of cases. Most transmitter applications before the Federal Communications Commission are approved or. It also will provide informal opinions to help people avoid making costly mistakes in their financial planning.

Anyone who objects to the informal decisions made by a government agency can invoke more formal procedures. Someone may believe that standards are unclear

and that they should be promulgated through formal agency rule making. Or someone may feel that the decision in a particular case is unfair and may demand a formal adjudicatory hearing. If one of these formal procedures does not satisfy a party, the agency's decision may be challenged in court.

Formal Agency Action Most formal action taken by administrative agencies consists of rule making or adjudication. Rule making is the agency's formulation of policy that will apply in the future to everyone who is affected by the agency's activities. Adjudication is for the agency what a trial is for the courts: It applies the agency's policies to some act that already has been done, so that an order is issued for or against a party who appears for a decision. Rule making looks to the future; adjudication looks at the past. Where either of these formal procedures is used, the agency will usually give interested or affected persons notice and an opportunity to be heard before a final rule or order is issued.

Rule making Administrative agencies promulgate three types of rules: procedural, interpretative, and legislative. Procedural rules identify the agency's organization and methods of operation. Interpretative rules are issued to show how the agency intends to apply the law. They range from informal policy statements announced in a press release to authoritative rules that bind the agency in the future and are issued only after the agency has given the public an opportunity to be heard on the subject. Legislative rules are like statutes enacted by a legislature.

Agencies can promulgate legislative rules only if the legislature has given them this authority.

The Administrative Procedure Act sets up the procedures to be followed for administrative rule making. Before adopting a rule, an agency generally must publish advance notice in the *Federal Register,* the government's daily publication for federal agencies. This practice gives those who have an interest in, or are affected by, a proposed rule the opportunity to participate in the decision making by submitting written data or by offering views or arguments orally or in writing. Before a rule is adopted in its final form, and 30 days before its effective date, the agency must publish it in the Federal Register. Formally adopted rules are published in the *Code of Federal Regulations,* a set of paperback books that the government publishes each year so that rules are readily available to the public.

Adjudication The procedures that administrative agencies use to adjudicate individual claims or cases are extremely diverse. Like trials, these hearings resolve disputed QUESTIONS OF FACT, determining policy in a specific factual setting and ordering compliance with laws and regulations. Although often not as formal as courtroom trials, administrative hearings are extremely important. Far more hearings are held before agencies every year than are trials in courts. Adjudicative hearings concern a variety of subjects, such as individual claims for worker's compensation, welfare, or Social Security benefits, in addition to multimillion-dollar disputes about whether business mergers will violate antitrust rulings. These proceedings may be called hearings, adjudications, or adjudicatory proceedings. Their final disposition is called an administrative order.

Many administrative proceedings appear to be just like courtroom trials. Most are open to the public and are conducted in an orderly and dignified manner.

Typically, a proceeding begins with a complaint filed by the agency, much as a civil trial begins with a complaint prepared by the plaintiff. After the respondent answers, each side may conduct discovery of the other's evidence and prehearing conferences. A Hearing Examiner, sometimes called an administrative law judge (ALJ), presides over the hearing, giving rulings in response to a party's applications for a particular type of relief. The agency presents its evidence, usually through counsel, either by a written report or in the question-and-answer style of a trial, and then the respondent offers his or her case. Witnesses may be called and cross-examined

Because administrative hearings do not use juries, an ALJ makes both factual determinations and legal decisions based upon the evidence presented and the law governing the dispute. The specific duties of an ALJ in an individual agency depend upon the powers delegated to the agency in the respective enabling statute and procedural regulations promulgated by the agency. ALJ may make a number of decisions regarding the submission of evidence or the examination of witnesses; rule on motions and other procedural matters; and render a Summary Judgment where appropriate. However, the ALJ may not rule as invalid a federal statutory or regulatory provision, enjoin agency officials, or review discretionary acts by the inspector general. An ALJ's decision is often subject to review by a board or commission of the entire agency before parties may appeal the decision to a federal court. Unlike a trial, an administrative hearing has no jury. The hearing examiner, or administrative law judge, is usually an expert in the field involved and is likely to be more concerned with overall policies than with the particular merits of one party's case. The Administrative Procedure Act affords parties who appear in administrative hearings involving federal agencies the right to notice of the issues and proceedings, the Right to Counsel, and the right to confront and cross-examine witnesses.

4. Judicial Review of Agency Actions

When someone believes that she or he has been the victim of administrative error or wrongdoing and seeks to have the actions of the responsible agency reviewed in a court of law, the reviewing court is faced with two questions: Does the court have a right to review the agency action? And if it does, what is the scope of that court's review?

The **Right to Have a Court Review an** Agency's **Decision** Whether someone has the right to ask a court to review the action taken by an agency depends on the answers to several questions. The first question is whether the person bringing the action has standing, or the legal right to bring the suit, the Court said that for the plaintiff to have standing to seek judicial review of administrative action, two questions must be answered affirmatively: (1) Has the complainant alleged an "injury in fact"?; and (2) Is the interest that the complainant seeks to protect "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"?

Even though an agency's decision is reviewable and the plaintiff has standing to litigate, the plaintiff still may be unable to obtain judicial review if he or she has brought the action at the wrong time. The aggrieved person must exhaust all other avenues of relief before the dispute is ripe for judicial determination. The doctrines of

Exhaustion of Remedies and Ripeness require a person who deals with an agency to follow patiently all of the available steps within the agency's procedures before resorting to court action. These rules are essential to prevent overloading the courts with questions that might not even be disputes by the time the agencies determine what their final orders or rulings will be.

The Scope of a Court's Review If an aggrieved party can convince a court that he or she has standing, that all available administrative remedies have been exhausted, and that the case, is ripe for judicial review, the court will hear the case, but the scope of its review is limited. The law seeks to give agencies enough freedom of action to do their work, while ensuring that individual rights will be protected. The Administrative Procedure Act provides that courts may not second-guess agencies when the agencies are exercising discretion that has been granted to them by statute. A court is generally limited to asking whether the agency went outside the authority granted to it; whether it followed proper procedures in reaching its decision; and whether the decision is so clearly wrong that it must be set aside. The court also may set aside an agency decision that is clearly wrong.

The court usually will accept the agency's findings of fact, but it is free to determine how the law will be applied to those facts. It will look at the whole record of the administrative proceeding and will take into account the agency's expertise in the matter. The court will not upset agency decisions for harmless errors that do not change the outcome of the case. If the question at issue has been committed to agency discretion, the court may consider whether the agency has exercised its discretion. If the agency has not done so, then the court may order the agency to look at the situation and make a decision. The Administrative Procedure Act allows courts to overrule an agency action that is found to be "arbitrary, capricious, an Abuse of Discretion, or otherwise not in accordance with law."

5. Principles of administrative law

Administrative law is the body of law that governs the activities of administrative agencies of government. Government agency action can include rulemaking, adjudication, or the enforcement of a specific regulatory agenda. Administrative law is considered a branch of public law. As a body of **law,** administrative law deals with the decision-making of administrative units of government (for example, tribunals, boards or commissions) that are part of a national regulatory scheme in such areas as police law, international trade, manufacturing, the environment, taxation, broadcasting, immigration and transport. Administrative law expanded greatly during the twentieth century, as legislative bodies worldwide created more government agencies **to** regulate the increasingly complex social, economic and political spheres of human interaction.

Civil law countries often have specialized courts, administrative courts that review these decisions. The plurality of administrative decisions contested in administrative courts are related to taxation.

Generally speaking, most countries that follow the principles of common law have developed procedures for judicial review that limit the reviewability of decisions made by **administrative law** bodies. Often these procedures are coupled

with legislation or **other** common law doctrines that establish standards for proper rulemaking. Administrative law may also apply to review of decisions of so-called semi-public bodies, such as non-profit corporations, disciplinary boards, and other decision-making bodies that affect the legal rights of members of a particular group or entity.

While administrative decision-making bodies are often controlled by larger governmental units, their decisions could be reviewed by a court of general jurisdiction under some principle of judicial review based upon due process (United States) or fundamental justice (Canada). Judicial review of administrative decisions is different from an administrative appeal. When sitting in review of a decision, the Court will only look at the method in which the decision was arrived at, whereas in an administrative appeal the correctness of the decision itself will be examined, usually by a higher body in the agency This difference is vital in appreciating **administrative law in common law countries.**

Administrative decisions are usually made by government officers, but may also be made by people who are not government officers. If the decision involves "statutory power" then it is likely to be regulated by administrative law.

Quite apart from the constitutional analysis, the summary review procedures for those persons who wish to contest a notice of a parking infraction must be carefully scrutinized to ensure that the imposition of AMPS and its review, accord with the principles of procedural fairness as enunciated in Baker v. Canada (Minister of Citizenship and immigration). In this regard, consideration must be paid to the following non-exhaustive factors:

A. the proximity of the administrative process to the judicial process;
B the nature of the legislative scheme;
C. the impact of the decision on the person affected;
D the legitimate expectations of the person affected;
E. the deference to be paid to the decision- maker.

Examining each factor in order, the following analysis and conclusions emerge:

A. The proximity of the administrative process to the judicial process

There is no doubt that the administrative process for reviewing an AMP is distinct from that which would be applied by a court in a provincial offence. As described above, the reviewing officers - that is, the Screening Officer and the Hearing Officer are not judicial officials and under the Regulations they are appointed by the municipality. The first stage of review by a Screening Officer does not require any form of hearing and the City of Vaughan has approached this Regulatory provision by allowing the recipient of the penalty to attend a meeting with the Screening Officer. Since the Enforcement Officer is not required to attend, the process is not adversarial as in a court, but more in the nature of a mediation. The second stage of review according to the Regulations does require that the Hearings Officer grant the requester an opportunity to be heard. However, the rules of evidence are not those of a court and the hearings process is less formal.

One resemblance between the AMPS enacted for parking infractions in Ontario and a judicial proceeding is the apparently open-ended discretion given to the

reviewing authorities in determining the penalty that is actually imposed, albeit within the very small range of up to $100. It is difficult however, to conclude that this resemblance should be determinative when there is no indication that traditional sentencing principles -i.e. specific and general deterrence, rehabilitation, the nature of the act under consideration, for example, would all be weighed to the exclusion of any other factors, as it would in a court proceeding. The authors of a 2008 discussion paper prepared by the Administrative Justice Office of the Ministry of the Attorney General for British Columbia concluded that an AMP scheme may give a statutory decision maker discretion as to whether to impose a penalty and/or a discretion about the amount of the penalty to be imposed.

B. The nature of the legislative scheme

As indicated above, the express legislative purpose in the Regulations implementing the AMPS is to help the municipalities to control traffic and land use by promoting compliance with parking by-laws, not to punish wrongdoing.

C. The Impact of the decision to impose the amp on the person affected

This indicator is by no means determinative of whether decision makers have any obligation to act judicially and the extent of their obligation if one exists. [80] This is exemplified by more recent cases such as Martineau in which a forfeiture order of $315,000 was not sufficient to invoke the Charter protection against self-incrimination .In Lavallee a maximum AMP of one million dollars as well as non-monetary sanctions such as life- time trading bans were not sufficient to invoke any obligation to apply the laws of evidence applicable to judicial proceedings. Had the criminal sanction of imprisonment been available, there would, on the other hand, have been an obligation to act judicially. The AMPS for parking infractions have relatively small maximum monetary penalties as well as the potential to withhold driving privileges if the penalties are not paid. The Law Reform Commission of Saskatchewan in a Consultation Paper on Administrative Penalties in June of 2009 concluded from the case law that since stringent procedural safeguards were reserved when matters of serious import were at stake, "...close scrutiny and appeal rights may not be necessary or appropriate if the penalty is small."

D. The legitimate expectations of the person affected

There are a number of reasons why vehicle owners and operators may wish to contest an AMP The AMP Regulations 333/07 and 611/06 leave the grounds for cancellation or reduction of the AMP to the municipal by-law. The Vaughan By-Law 156-2009 includes two grounds for cancellation or reduction- negating on a balance of probabilities the allegation in the penalty notice and undue hardship. The City of Brampton Committee of Council in their report earlier this year, recognized that parking violations could be legitimately challenged on a number of grounds outside of the accuracy of the allegations in a penalty notice. These grounds included:

Failure on the part of a municipality to keep a record of a valid application for an overnight parking pass :

Road construction forcing vehicle owners and operators, for lack of alternatives, to park in contravention of parking by-laws.

To this list one could add other legitimate reasons for reduction or cancelation which would not qualify as grounds for cancellation or penalty reduction under the

Vaughan By-Law. These would include a broken parking meter which would not accept payment. The vehicle would, as the allegation in the notice alleged, be parked in a location in which a valid ticket for that time was not in effect, but there would be some extenuating circumstances explaining the noncompliance. Similarly, if someone had an injured or pregnant person in need of urgent medical attention, the last thing that the vehicle operator would be thinking about when stopping in front of a hospital or clinic would be whether he/she was stopping in compliance with the parking sign The City of Toronto has recently placed on its website a previously confidential set of guidelines for cancelling parking tickets. Some of the additional grounds for cancellation include:

1. Vehicles on delivery;
2. Official vehicles including city or municipal vehicles;
3. Utility vehicles such as Canada Post, Bell Canada, public utilities;
4. Security companies and armored cars;
5. Tour buses;
6. Religious observance;
7. Stolen vehicles

Legitimate expectations should include the ability to challenge AMPS for all the above grounds and because not all grounds can be anticipated in advance, a penalty recipient should be permitted to raise any grounds. If the law is applied blindly without any consideration of mitigating circumstances, drivers may lose respect for it. The challenge to the AMP however, may not deserve a full cancellation of the penalty. After all, traffic and land use control may demand that in densely populated locations if, for example, the parking meter isn't working, or construction or maintenance of a transmission line or light fixture is underway, the driver should find an alternative location to park. The law recognizes that drivers in particular, assume additional regulatory responsibilities when they apply for their license. This was explained by Mr. Justice Cory in the Wholesale Travel case[89], where he cited with approval an article from Professor Webb[90]:

Before a regulator will authorize a regulate to engage in controlled activities, the regulate must agree to abide by a set of rules, and must be found fit to carry out the regulated activity. A driver's license is a good example of such an arrangement. In effect, this arrangement establishes and certifies that the regulate knows the standards which he or she must meet, is capable of meeting them, and accepts that should his or her conduct fall below these standards, he or she may be subject to administrative actions and penalties prescribed in legislation, according to procedures which take into account the special knowledge of the regulate. The fact that an accused is participating in a regulated activity and has met the initial "entrance requirements" leads to a legally imposed or assumed awareness on his or her part of the risks associated with that activity.

E. Deference to be paid to the decision- maker

This particular criterion has limited application to AMPS as the municipal enforcement officer and reviewing authorities have no particular expertise which would warrant any additional flexibility in the procedural safeguards.

Lecture 8 LAND LAW

1. *What is Land law?*
2. *Land Law of Ukraine. Land Law regulate the possession, use and disposal of land*
3. *Land privatization*
4. *Allocation of land from the lands of state and municipal property within the limits of free privatization*
5. *Privatization of land plots which are used by citizens*

1. What is Land law?

Land law - the branch of the legal system, which consists of legal rules implementing legal regulation of certain social relations in public management, use and protection of land in order to ensure sustainable use of land resources.

Land law is the branch of law which governs relationship associated with possession, use (for creation of recreation areas, in agriculture, for construction) and administration (selling, transfer by gift) of land. The subjects of land law relations include individuals and legal entities, local authorities and government bodies. The objects of land law relationship are lands in the territory of Ukraine, land plots and property rights to land plots, including rights to land shares.

The subject of land law is the social relations, governed by land legislation, the subject of which is the land as the foundation of people's life. In this context, the land is:

- natural object,
- natural resource
- the principal means of production in forestry and agriculture,
- a spatial basis for other production activity.

A land as a natural object is organically linked with the other natural objects - forests, mineral resources, water resources, flora and fauna - that defines the interrelationship of relations governed by the land law, with other social relations related to the rational use and protection of natural resources, that, in turn, stipulates the organic connection between the land law with legislation of other natural resource sectors - environmental, forest, water, mineral resources, etc.

The land uniqueness as natural object is expressed in its properties: unmovability, irreplaceability, spatial limitation and the possibility of increasing the soil fertility like some valuable quality that is crucial for agriculture and forestry, as well as for society.

The land law subject specifics determine the specificity of the land law method, which can be named imperative-optional with dominance of imperative principles. The relations in land protection sphere are governed by the imperative: the participants have no right not to protect the land. Relations on land use along with general imperatives (e.g. the need to use land for specific purposes) have optional principles, like the ability to select a permitted use of land.

The rules of land law can be divided on:

- general and specific (special), which are included into the general and specific parts of the land law;
- mandatory and optional (with predominance of the first ones);
- protective, governing relations in the land protection area, and "non-protective", governing relations in the land use;
- legislative and rules in other sources of the land law.

What is registered land?

Registered land means that the title is registered and can be looked up in the register. A particular title number is assigned. The Law of Property Act 1925 and the Land Registration Act 2002 deal with registered land.

What is unregistered land?

This means that the land is not registered. The title is found in title deeds.

What are important registration principles?

The insurance principle, mirror principle and curtain principle.

What is the mirror principle?

The mirror principle means that the register accurately reflects ownership titles and requires all rights to be registered and rights, which do not need registration, result in the mirror principle being undermined.

What is the insurance principle?

The insurance principle means that the register will be amended if it is not accurate and those affected by this can seek compensation.

What is the curtain principle?

The curtain principle means that the purchaser does not have to find out more than what is shown in the register, e.g. the purchaser does not have to ascertain whether there are trusts.

2. Land Law of Ukraine. Land Law regulate the possession, use and disposal of land

Especially land relations in Ukraine is that they arise and are implemented through laws that determine the intended use of land, first as an object of natural complex, and secondly, as a territory that is the basis of administrative - territorial division of the state; Third, as real estate, which is the main method of agricultural market production.

The system of land law of Ukraine consists of general and special parts. The rules governing the general part of all relationships that are the subject of land law in general. In particular, this relationship relating to government regulation of land relations, the partition of the land by category of legal regulation, management of land use in the industry, including committing land management, land monitoring, the state land cadastre.

Land Law establishes the legal forms of land use, including land ownership, land use rights, the right of the land easement. Determine the competence of government bodies and local authorities in the field of regulation of land relations. Special attention is paid to the legal regulation of contracts, the object of which is land.

Land Law establishes the procedure for settlement of disputes, sets out procedures for the protection of the rights of citizens and legal persons on the ground, compensation to owners of land and land users, the violation of land legislation.

3. Land privatization

A special part of the land rights are norms that regulate relations connected with the legal regimes of land for various purposes. In particular, distinguished institutions of the legal regime of land agricultural purposes, residential and public buildings, natural reserves and other conservation purpose, health, recreation, historical and cultural destination, Forestry, Water Fund, etc.

Land law - it is rather difficult category. Legal practice has shown that often in this industry is not easy to understand even lawyers, lawyers and judges who have certain skills. So if you have any questions in this industry better to seek assistance from practitioners in the field of land relations, rather than trying to solve the problem situation itself

Land privatization — the transfer of citizens to private ownership of land plots for frequent farms, construction and maintenance of a dwelling house and outbuildings (infield), gardening, cottage and garage construction of the lands of state and municipal property.

Free transfer of land plots (privatization of land) the property of citizens is available in the following cases:

1.If the land is in your enjoyment;

2.Receipt of land by State and municipal agricultural enterprises, institutions and organizations, as well as retirees from their number in the process of privatization of these enterprises, institutions and organizations;

3.Allocation of land plots from state and municipal property within the limits of free privatization.

Land Code of Ukraine establishes standards of free privatization — the size of the boundary of land for each type of special purpose land within which the possible privatization of the free.

These standards are:

-For farming — in the amount of land share, for certain members of agricultural enterprises, which are located in rural, village, city council, where the farm;

-For personal agriculture — not more than 2 hectares;

-To maintain gardening — no more than 0.12 ha;

-For construction and maintenance of residential homes, commercial buildings and structures (yard):

-In the villages — no more than 0.25 ha;

-In the villages — no more than 0.15 ha;

- In the cities — not more than 0.10 ha.

-For individual country construction — no more than 0.10 ha;

-For the construction of individual garages — no more than 0.01 ha.

Transfer of land for free in the property of the citizens within the above norms held once for each type of land use.

The decision to transfer land to the property of citizens taken by the executive or local authority.

Despite the fact that the law on privatization and privatization procedures are regulated by the Land Code and some other special regulations in practice — the procedure of privatization of land a long and troublesome and may take a lot of time and effort in wanting to acquire their own land.

If the land is used by a person, that person has a priority right to receive part of the property.

To get free land, which is in use, a simplified procedure for privatization — without the development of the project of land allocation.

In this case, use can be:

-Legally, as evidenced by relevant title documents (eg: lease, as well as other documents which are foreseen no longer existing legislation — an extract from the land-corded, Roster of the book, the public act on the right of land use, etc.) .

-Without those reasons — if a citizen in good faith, openly and continuously uses his land for 15 years.

The main stage of privatization of land is to obtain a decision of local authorities on the transfer of land ownership.

But a decision not to become full owner of the land. An equally important step is to design a state act of ownership on the basis of decisions of local authorities on the transfer of land ownership.

Documents required for the privatization of land that is you have to use:

•documents of title to land (lease, the public act on the right to use the land, the removal of land-corded, Roster of the book);

•documents that prove the actual use of the land (an inventory of land materials, data bureau of technical inventory);

•technical documentation for land management or project land allotment (if any);

•documents on ownership of buildings and structures that are placed on the land (if available).

4. Allocation of land from the lands of state and municipal property within the limits of free privatization

Under the provisions of the Land Code , every citizen of Ukraine has the right to free transfer of his land from the lands of state and communal property.

Plot sizes, which can be transferred to private ownership, limited by the norms of free privatization (Article 121 of the Land Code of Ukraine).

These standards are:

-For farming — in the amount of land share, for certain members of agricultural enterprises, which are located in rural, village, city council, where the farm;

-For personal agriculture — not more than 2 hectares;

-To maintain gardening — no more than 0.12 ha;

-For construction and maintenance of residential homes, commercial buildings and structures (yard):

•in rural areas — not greater than 0.25 ha;

•in the villages — no more than 0.15 ha;

•in urban areas — not greater than 0.10 ha.

-For individual country construction — no more than 0.10 ha;

-For the construction of individual garages — no more than 0.01 ha.

Transfer of land for free in the property of the citizens within the above norms held once for each type of land use.

Allocation of land from the lands of state and municipal property within the limits of free privatization is lengthy, but quite a feasible procedure and involves the following steps:

1.For permission to develop the draft ROW land;

2.ROW project development and approval by the Commission to consider issues relating to the harmonization of documentation of Land Management;

3.Adoption of the draft land allocation and transfer of land ownership.

Before starting the privatization process must be defined with the following issues: purpose and approximate size of the desired land, as well as the alleged location of his.

Documents required for allocation of land from the lands of state and communal property privatization:

•a declaration;

•the project ROW (in preparation of the project organization, which has a license).

6. Privatization of land plots which are used by citizens

If the land is used by a person, that person has a priority right to receive part of the property.

To get free land, which is in use, a simplified procedure for privatization — without the development of the project of land allocation.

In this case, use can be:

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•documents on ownership of buildings and structures that are placed on the land (if available).

LECTURE 9 PROPERTY LAW

1. *Definition*
2. *Theory*
3. *Property rights and contractual rights*
4. *Property rights and personal rights*
5. *Classification*

Introduction

Property law is the area of law that governs the various forms of ownership in real property (land as distinct from personal or movable possessions) and in personal property, within the common law legal system. In the civil law system, there is a division between movable and immovable property. Movable property roughly corresponds to personal property, while immovable property corresponds to real estate or real property, and the associated rights and obligations thereon.

The concept, idea or philosophy of property underlies all property law. In some jurisdictions, historically all property was owned by the monarch and it devolved through feudal land tenure or other feudal systems of loyalty and fealty.

Though the Napoleonic code was among the first government acts of modern times to introduce the notion of absolute ownership into statute, protection of personal property rights was present in medieval Islamic law and jurisprudence, and in more feudalist forms in the common law courts of medieval and early modern England.

1. Definition

In Roman law, property was defined as follows: ius utendi et abutendi re sua, quatenus iuris ratio patitur, 'the right to use and abuse a thing, within the limits of the law'.

One modern textbook on property law states:

When a layman is asked to define "property," he is likely to say that "property" is something tangible "owned" by a natural person (or persons), a corporation, or a unit of government. But such a response is inaccurate from a lawyer's viewpoint for at least two reasons: (1) it confuses "property" with the various subjects of "property," and (2) it fails to recognize that even the subjects of property may be intangible. For a lawyer, "property" is not a "thing" at all, although "things" are the

subject of property. Rather, as Jeremy Bentham asserted, property is a legally protected "expectation * * * of being able to draw such or such an advantage from the thing" in question

Black's Law Dictionary (5th ed. 1979) states that "n the strict legal sense, property is an aggregate of rights which are guaranteed and protected by the government" and that the term property "includes not only ownership and possession but also the right of use and enjoyment for lawful purposes."

By contrast, Barron's Law Dictionary (2d ed. 1984) defines property as "one's exclusive right to possess, use, and dispose of a thing" "as well as the object, benefit, or prerogative which constitutes the subject matter of that right."

Property law, in systems derived from English common law, is divided into personal and real property. Gray & Gray (1998) describe the definition of property in the modern sense as oscillating between 'competing models of property as a fact, property as a right, and property as a responsibility' Declared ownership in and of itself is insufficient to constitute property in a legal sense. Rather, the notion of property arises where one can have his/her right to land or chattels respected and enforced by a court of law. Therefore to possess good title (and thus enforceable rights) on property one must acquire it legitimately, according to the laws of the jurisdiction in which one seeks enforcement.

2. Theory

Early American theory

James Wilson, U.S. Supreme Court Justice and professor of law at the University of Pennsylvania, in 1790 and 1791, undertook a survey of the philosophical grounds of American property law. He proceeds from two premises: “Every crime includes an injury: every injury includes a violation of a right.” (Lectures, III, ii.) The government’s role in protecting property depends upon an idea of right. Wilson traces the history of property in his essay On the History of Property. In his lecture, “Of the natural rights of individuals,” (Lectures II, xii) he articulates related contemporary theory.

That theory was brought to a focus on the question of whether man exists for the sake of government, or government for the sake of man – a distinction which may derive from, or lead to, the question of natural and absolute rights, and whether property is one of them. While he doubts this is so, he nonetheless states: “In his unrelated state, man has a natural right to his property, to his character, to liberty, and to safety.” James Wilson asks whether “the primary and principal object in the institution of government… was… to acquire new rights by human establishment? Or was it, by a human establishment, to acquire a new security for the possession or the recovery of those rights….?” He indicates a preference for the latter.

In the opening sentence of On the History of Property, he states quite clearly: “Property is the right or lawful power, which a person has to a thing.” He then divides the right into three degrees: possession, the lowest; possession and use; and, possession, use, and disposition – the highest. Further, he states: “Man is intended for action. Useful and skilful industry is the soul of an active life. But industry should

have her just reward. That reward is property, for of useful and active industry, property is the natural result." From this simple reasoning he is able to present the conclusion that exclusive, as opposed to communal property, is to be preferred. Wilson does, however, give a survey of communal property arrangements in history, not only in colonial Virginia but also ancient Sparta.

3. Property rights and contractual rights

Property rights are rights over things enforceable against other persons. By contrast, contractual rights are rights enforceable against particular persons. Property rights, however, may arise from a contract, so there is an overlap between the two systems of rights. In relation to the sale of land, for example, two sets of legal relationships exist alongside one another: the personal right to sue for damages on the contract, and the proprietary right exercisable over the thing.

A separate distinction is evident where rights granted are insufficiently substantial to confer on the non-owner a definable interest right in the thing. The clearest example of these rights is the license. In general, even if licenses are created by a binding contract, they do not give rise to proprietary interests.

4. Property rights and personal rights

Property rights are also distinguished from personal rights. Practically all contemporary societies acknowledge this basic ontological and ethical distinction. In the past, groups lacking political power have often been disqualified from the benefits of property. In an extreme form this has meant that persons have become "objects" of property right, legally "things", or chattels - see slavery. More commonly, marginalized groups have been denied legal rights to own property. These include Jews in England and married women in Western societies until the late 19th century.

The dividing line between personal rights and property rights is not always easy to draw. For instance, is one's reputation property which can be commercially exploited by affording property rights to it? The question of the proprietary character of personal rights is particularly relevant in the case of rights over human tissue, organs and other body parts.

There have been recent cases of women being subordinated to the fetus, through the imposition of unwanted caesarian sections. English judges have recently made the point that such women lack the right to exclusive control over their own bodies, formerly considered a fundamental common law right. In the United States, a "quasi-property" interest has been explicitly declared in the dead body. Also in the United States, it has been recognized that people have an alienable proprietary "right of publicity" over their "persona". The patenting of biotechnological processes and products based upon human genetic material may be characterized as creating property in human life.

5. Classification

Property law is characterized by a great deal of historical continuity and technical terminology. The basic distinction in common law systems is between real property (land) and personal property (chattels).

Before the mid-19th century, the principles governing the devolution of real property and personal property on an intestacy were quite different. Though this dichotomy does not have the same significance anymore, the distinction is still fundamental because of the essential differences between the two categories. An obvious example is the fact that land is immovable, and thus the rules that govern its use must differ. A further reason for the distinction is that legislation is often drafted employing the traditional terminology.

The division of land and chattels has been criticized as being not satisfactory as a basis for categorizing the principles of property law since it concentrates attention not on the proprietary interests themselves but on the objects of those interests. Moreover, in the case of fixtures, chattels which are affixed to or placed on land may become part of the land.

Real property is generally sub-classified into:

1. corporeal hereditaments - tangible real property (land)
2. incorporeal hereditaments - intangible real property such as an easement of way

Possession

The concept of possession developed from a legal system whose principal concern was to avoid civil disorder. The general principle is that a person in possession of land or goods, even as a wrongdoer, is entitled to take action against anyone interfering with the possession unless the person interfering is able to demonstrate a superior right to do so.

In the United Kingdom, the Torts (Interference with Goods) Act 1977 has significantly amended the law relating to wrongful interference with goods and abolished some longstanding remedies and doctrines.

Transfer of property

The most usual way of acquiring an interest in property is as the result of a consensual transaction with the previous owner, for example, a sale or a gift. Dispositions by will may also be regarded as consensual transactions, since the effect of a will is to provide for the distribution of the deceased person's property to nominated beneficiaries. A person may also obtain an interest in property under a trust established for his or her benefit by the owner of the property.

It is also possible for property to pass from one person to another independently of the consent of the property owner. For example, this occurs when a person dies intestate, goes bankrupt, or has the property taken in execution of a court judgment.

Priority

Different parties may claim an interest in property by mistake or fraud, with the claims being inconsistent of each other. For example, the party creating or transferring an interest may have a valid title, but intentionally or negligently creates several interests wholly or partially inconsistent with each other. A court resolves the dispute by adjudicating the priorities of the interests.

Lease

Historically, leases served many purposes, and the regulation varied according to intended purposes and the economic conditions of the time. Leaseholds, for

example, were mainly granted for agriculture until the late eighteenth century and early nineteenth century, when the growth of cities made the leasehold an important form of landholding in urban areas.

The modern law of landlord and tenant in common law jurisdictions retains the influence of the common law and, particularly, the laissez-faire philosophy that dominated the law of contract and the law of property in the 19th century. With the growth of consumerism, the law of consumer protection recognized that common law principles assuming equal bargaining power between parties may cause unfairness. Consequently, reformers have emphasized the need to assess residential tenancy laws in terms of protection they provide to tenants. Legislation to protect tenants is now common.

LAW DICTIONARY

Appeal 1. Ask a higher court to review the actions of a lower court in order to correct mistakes or injustice. 2. The process in no. 1 is called "an appeal." An appeal may also be taken from a lower level of an administrative agency to a higher level or from an agency to a court.

Appellant The person who appeals a case to a higher court. Compare with appellee.

Appellate Refers to a higher court that can hear appeals from a lower court or refers to an appeal.

Appellate jurisdiction The power and authority of a higher court to take up cases that have already been in a lower court and the power to make decisions about these cases. The process is called appellate review. Also, a trial court may have appellate jurisdiction over cases from an administrative agency.

Appellee The person against whom an appeal is taken (usually, but not always, the winner in the lower court). Compare with appellant.

Attorney 1. Lawyer ("attorney at law"). 2. Any person who acts formally for another person ("attorney in fact ").

Capacity 1. Ability to do something, such as the mental ability to make a rational decision. 2. Legal right to do something. 3. Legal ability to do something. For example, a child of four lacks the capacity to commit a crime or make a contract.

Case 1. Lawsuit; a dispute that goes to court. 2. The judge's opinion in a lawsuit. 3. The evidence and arguments presented by each side in a lawsuit. 4. Short for trespass on the case, an old form of lawsuit seeking recovery for indirect injury. 5. A criminal investigation, proceeding, suspect, defendant, or convict.

Constitutional law The study of the law that applies to the organization, bstructure, and functions of the government, the basic principles of government, and the validity (or constitutionality) of laws and actions when tested against the requirements of the Constitution.

Constitution 1. A document that sets out the basic principles and most general laws of a country, state, or organization. 2. The U.S. Constitution is the basic law of the country, on which most other laws are based, and to which all other laws must yield. Often abbreviated "Const." or "Con."

Consideration The reason or main cause for a person to make a contract; something of value received or promised to induce (convince) a person to make a deal. For example, if Ann and Sue make a deal for Ann to buy a car from Sue, Ann's promise to pay a thousand dollars is consideration for Sue's promise to hand over the car and vice versa. Without consideration a contract is not valid. The concept of consideration has two parts: valuable (can be valued in money) and good (legally sufficient). Ann and Sue's deal is an example of both parts of the concept. Consideration for a valid contract between close relatives, however, can be good even if not valuable because their "love and affection" may be legally sufficient even if it cannot be valued in money.

Court 1. The place where judges work. 2. A judge at work. For example, a judge might say, "the court (meaning 'I') will consider this matter." 3. All the judges in a particular area.

Damages 1. Money that a court orders paid to a person who has suffered damage (a loss or harm) by the person who caused the injury (the violation of the person's rights). See injury for a more complete comparison of damage, damages, and injury. 2. A plaintiff's claim in a legal pleading for the money defined in definition no. 1. Damages may be actual and compensatory (directly related to the amount of the loss) or they may be, in addition, exemplary and punitive (extra money given to punish the defendant and to help keep a particularly bad act from happening again). Also, merely nominal damages may be given (a tiny sum when the loss suffered is either very small or of unproved amount). 3. For other types of damages (such as consequential, future, incidental, liquidated, speculative or treble), see the individual words.

Defendant The person against whom a legal action is brought. This legal action may be civil or criminal.

Jurisdiction 1. The geographical area within which a court (or a public official) has the right and power to operate. 2. The persons about whom and the subject matters about which a court has the right and power to make decisions that are legally binding. For types of jurisdiction, such as ancillary, appellate, in personam, in rem, etc., see those words.

Juristic person A person for legal purposes. This includes both natural persons (individuals) and artificial persons (corporations), but sometimes refers only to corporations.

Juror A person who is a member of a jury.

Jury A group of persons selected by law and sworn in to consider certain facts and determine the truth. The two most common types of juries are a grand jury (persons who receive complaints and accusations of crime, hear preliminary evidence on the complaining side, and make formal accusations or indictments) and a petit jury or trial jury (usually twelve, but sometimes as few as six persons who decide questions of fact in many trials). There are also coroner's juries, advisory juries, and other types.

Law 1. That which must be obeyed. 2. A statute; an act of the legislature. 3. The whole body of principles, standards, and rules put out by a government. 4. The principles, standards, and rules that apply to a particular type of situation; for example, "juvenile law." 5. See fact for the difference between fact and law. 6. For the many different types of law, such as caselaw, constitutional law, military law, substantive law, etc., see those words.

Law of the land 1. A law or rule that is in force throughout the country or, sometimes, throughout a geographical area. 2. A country's customs, which gradually become as important legally as written law. 3. The fundamental rights of persons, and the laws that protect those rights, such as due process of law and equal protection of laws.

Lawsuit A civil action. A court proceeding to enforce a right between persons (rather than to convict a criminal).

Lawyer A person licensed to practice law. Other words for "lawyer" include:attorney, counsel, solicitor, and barrister.

Legislation 1. The process of thinking about and passing or refusing to pass bills into law (statutes, ordinances, etc.). 2. Statutes, ordinances,etc.

Plaintiff A person who brings (starts) a lawsuit against another person.

Preventive law Legal help and information designed to help persons to avoid future legal problems rather than to solve existing legal problems.

Private attorney general A private individual who goes to court to enforce a public right for all affected citizens.

Private law 1. A statute passed to affect one person or group, rather than the general public. This is also called a private bill. 2. The law of relationships among persons and groups (such as the law of contracts, divorce, etc.) as opposed to public law, which concerns relationships between individuals and the government or the operation of government.

Procedural law The rules of carrying on a civil lawsuit or a criminal case (how to enforce rights in court) as opposed to substantive law (the law of the rights and duties themselves).

Prosecute 1. Formally start and pursue a civil lawsuit. 2. Charge a person with a crime and bring that person to trial. The process is called prosecution, the person who was harmed by the crime or who made the complaint is a prosecuting witness, and the public official who presents the government's case is called a prosecutor. 3. Start and carry out any plan or action. For example, to prosecute a patent is to apply for one and follow through on the application until a patent is granted. This application process is documented in a prosecution history (also called a file wrapper).

Prosecutor 1. A public official who presents the government's case against a person accused of a crime and who asks the court to convict that person. 2. The private individual who accuses a person of a crime is sometimes called the private prosecutor.

Prosecutorial discretion The power of the prosecutor to decide whether or not to prosecute a charge against a person, how serious a charge to press, how large a penalty to request, what kind of a plea bargaining agreement to accept, etc.

Third party (or person) A person unconnected with a deal, lawsuit, or occurrence, but who may be affected by it. For example, a third party beneficiary is a person who is not part of a contract, but for whose direct benefit the contract was made. A third party complaint is a complaint brought by a defendant in a lawsuit against someone not in the lawsuit. It brings that person into the lawsuit because that person may be liable for all or part of what the plaintiff is trying to get from the defendant.

Treaty A formal agreement between countries on a major political subject. The treaty clause of the U.S. Constitution requires the approval of two-thirds of the Senate for any treaty made by the president.

Sumptuary laws Laws controlling the sale or use of certain socially undesirable, wasteful, and harmful products.

Sunset law A law that puts an administrative agency automatically outof-business unless the law is renewed after a careful reexamination of the agency by the legislature.