

# **WHAT LAW IS ?**

## **An Introduction to Law**

### **Law in the perspective of Jurisprudence: Part I**

**Guidelines for Erasmus & International Students**  
**Plan para la internacionalización de la docencia universitaria UCM**  
**Docencia en inglés**

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## **Law is a formal mechanism of social control**

**It is possible to describe law as the body of official rules and regulations, generally found in constitutions, legislation, judicial opinions, and the like, that is used to govern a society and to control the behaviours of its members.**

**We can define **law** as a **set of rules** that societies have to follow in order to maintain the **social order****

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## **Law shapes society**

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- **Law impacts on every human activity undertaken within society**
- **From birth to death, law impacts our daily activities**

## **Law is shaped by society**

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- **Society performs the law based on cultural background and law is part of the cultural structure of society**

**Law is part of the structure of society: Law both shapes and is shaped by society**

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# WHAT **LAW** IS?

THE QUESTION FOR A **DEFINITION OF LAW**

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## **A lexical definition**

**A lexical definition of the term 'law' simply reports the sense in which the term law is understood within a language community**

**THE QUESTION FOR A DEFINITION OF LAW**

**Defining the term Law**

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## **A stipulative definition**

**Stipulative definitions are very common in legislations (Statutory law) and reports the sense in which the term law is stipulated in legal texts.**

**Stipulative definitions of law promotes **clarity** and **certainty**, which is to the public advantage.**

**THE QUESTION FOR A DEFINITION OF LAW**

**Defining the term Law**

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## ✓ A theoretical definition

**Assigns a meaning to the term law based on scientific assumptions.**

**A theoretical definition of law **justifies** the term 'law' by a scientific theory and **describes** 'what law is' from the point of view of this theory.**

**THE QUESTION FOR A DEFINITION OF LAW**

**Defining the term Law**

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- **There is no agreement what law is.**
- **Even if theoretical definitions of law give us a better understanding of fundamental aspects of law, they do not comprise the complexity of law as a social and cultural phenomenon.**
- **To define what is law IS fundamentally a philosophical enquiry. It is the main task of Jurisprudence.**
- **FIRST MEANING:** Jurisprudence may refer to a body of substantive legal rules, doctrines, interpretations and explanations that make up the **law of a country**. **JURISPRUDENCE = POSITIVE LAW / Derecho positivo**
- **SECOND MEANING:** Jurisprudence may refer to the **interpretation** of the law given by **courts**.
- **THIRD MEANING:** Jurisprudence consists of **scientific and philosophical investigation** of the phenomenon of law and justice.

# Is it possible to **define** Law ?

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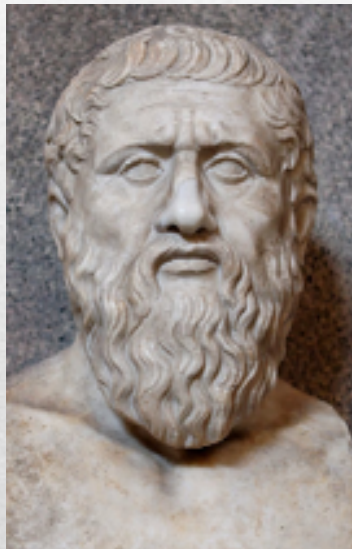


**“An embodiment of Reason”, whether in the individual  
or the community’**

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**Plato**

**(Greek philosopher born 427 BC)**

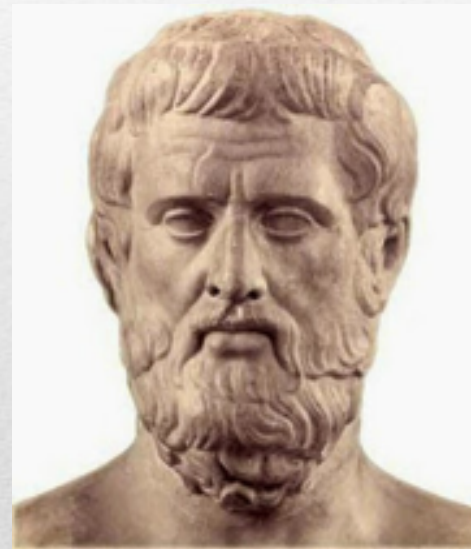


**The law is order and good law is good order**

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**Aristotle**

**(Greek philosopher born 304 BC)**



**THEORETICAL DEFINITIONS OF LAW**

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**Law is the formal glue that holds fundamentally disorganised societies together**

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**Thomas Hobbes**

**(English philosopher born 1588)**



**Nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated**

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**St Thomas Aquinas**

**(Italian philosopher born 1224)**



**THEORETICAL DEFINITIONS OF LAW**

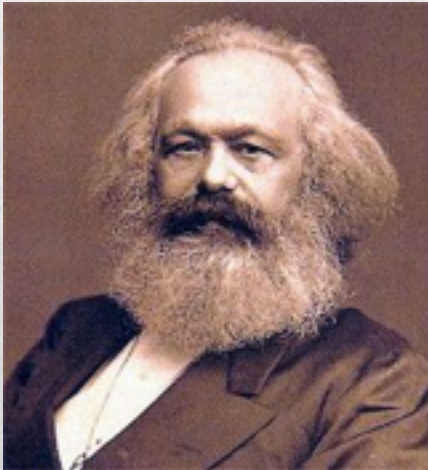
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## **Karl Marx**

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**Laws are always the product of human will and, more specifically, the arbitrary will of the ruling social class.**

**Law as a tool of oppression used by capitalists to control the proletariat**



## **Max Weber**

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**Law...exists if it is externally guaranteed by the probability of coercion (physical or psychological) to bring about conformity or avenge violation, and is applied by a staff of people holding themselves specially ready for that purpose.**



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**THEORETICAL DEFINITIONS OF LAW**

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## **John Austin**

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**Law as the commands of a political sovereign backed by sanctions**



## **Herbert Lionel Adolphus (H.L.A) Hart**

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**Law is a system of rules**



**THEORETICAL DEFINITIONS OF LAW**

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One way that jurisprudence contributes to a deeper understanding of law is by **reflecting** on the ideas that define the **nature of law** and on the assumptions that underlie **legal practices and institutions**.

- ✓ Jurisprudence asks questions about **where law fits into our lives** and our society.
- ✓ Jurisprudence gives us a general understanding of **the relation of law to other institutions making up our society**.
- ✓ Jurisprudence gives us a general understanding of **the meaning of law and the major concepts of the law**.
- ✓ Jurisprudences gives us a general understanding of **the structure of law**.

**What is the purpose of Jurisprudence?**

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Another way that jurisprudence contributes to a deeper understanding of law is by providing adequate **tools** to engage in **evaluation and criticism of existing law**.

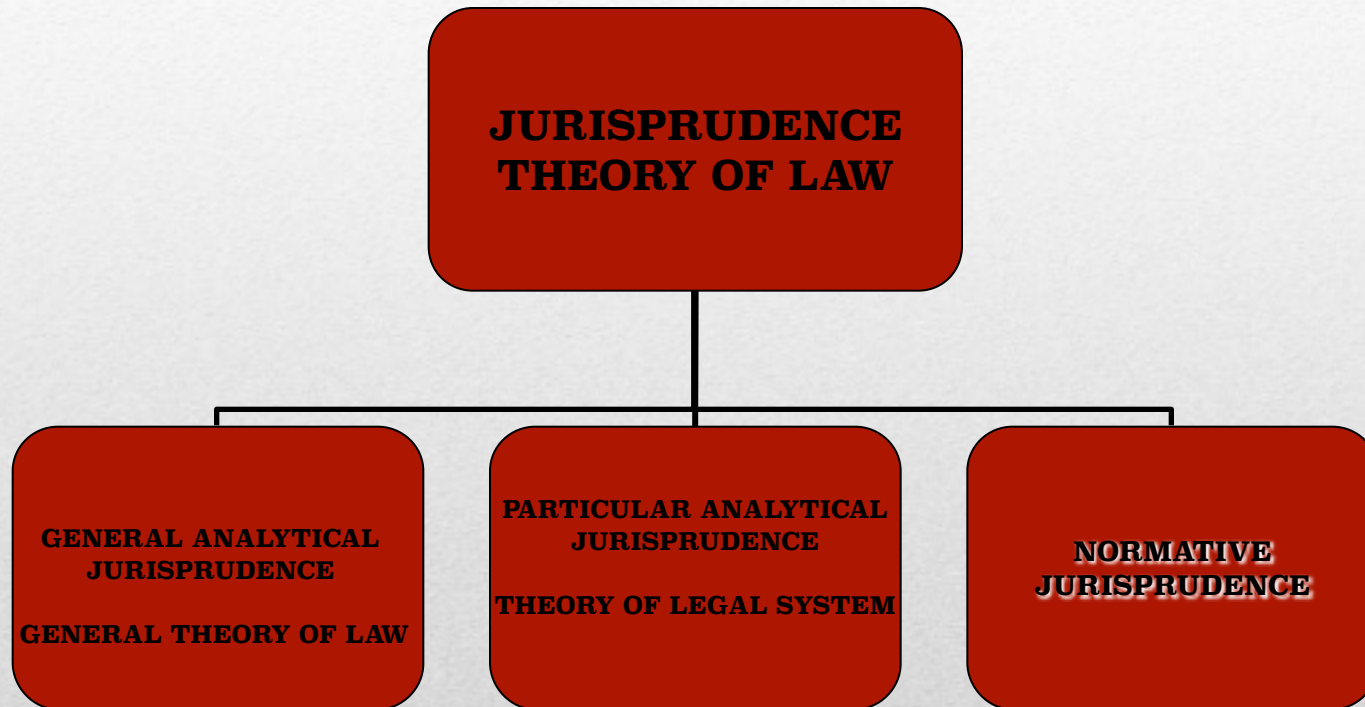
**Questions which focus on the evaluation and criticism of existing law are the following:**

- ✓ **Why should we obey the law?**
- ✓ **Does a citizen have a moral duty to always obey the law?**
- ✓ **What is the right balance between individual and collective interests?**
- ✓ **What is the relation between law and morality?**
- ✓ **What is the difference between legal rights and moral duties?**
- ✓ **Are laws necessarily good, in the sense of having a moral basis?**

**What is the purpose of Jurisprudence?**

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# **DIMENSIONS OF JURISPRUDENCE**



**All the questions concerning the **meaning of law** in general and of the major concepts of law are grouped within ANALYTICAL JURISPRUDENCE.**

**ANALYTICAL JURISPRUDENCE**  
**THEORY OF LAW**

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## **GENERAL ANALYTICAL JURISPRUDENCE** **GENERAL THEORY OF LAW**

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- It is focused on the concept of law generally.
- General Analytical Jurisprudence aims to find a **universal valid definition of law**.
- General Analytical Jurisprudence **distinguishes law** from all other types of **norms and social practices**.
- General Theory of Law accounts for **all occurrences** of law in all cultures and times.

## **PARTICULAR ANALYTICAL JURISPRUDENCE** **THEORY OF LEGAL SYSTEM**

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- It is focused on **basic concepts of law** that are common to most, if not all, legal systems
- By the observation of **commonalities** of legal systems, it intends to establish a **THEORY OF LEGAL SYSTEM**.

# **ANALYTICAL JURISPRUDENCE'S BRANCHES**

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# **All the questions focused on the moral dimensions of the law**

- ✓ **Why should we obey the law?**
- ✓ **Does a citizen have a moral duty to always obey the law?**
- ✓ **What is the right balance between individual and collective interests?**
- ✓ **What is the relation between law and morality?**
- ✓ **What is the difference between legal rights and moral duties?**
- ✓ **Are laws necessarily good, in the sense of having a moral basis?**

**NORMATIVE JURISPRUDENCE**

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**The three dimensions of Jurisprudence are deeply connected to the thematic contents of Part I of this course and in particular to the sections of study 1 & 2**

**THEMATIC CONTENTS: Part I**

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## **PRELIMINARY CONSIDERATIONS**

**Weeks 1 to 3**

### **SECTION 1: The institutionalization of law LAW AND ORDER & SOCIAL DIMENSIONS OF LAW**

**Week 4: What Law Does? The social function of law**

**Week 5: The Internal Structure of Positive Law**

### **SECTION 2: Procedural Law & Adjudication LAW AS IT IS**

**Week 6: Procedural Law & Adjudication (I): Generalities of Civil Trial**

**Week 7: Procedural Law & Adjudication (II): Criminal Law & Procedure**

**Week 8: Procedural Law & Adjudication (III): Responsibility & Legal Intent**

## **THEMATIC CONTENTS - PART I**

### **SECTIONS OF STUDY**

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**WHAT LAW IS ?**  
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**PRELIMINARY CONSIDERATIONS**  
**WEEKS 1 & 2**

**HISTORICAL LEGAL TRADITIONS**  
**Common Law vs. Civil Law: An overview**

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**Most nations today follow one of two major legal traditions: **Common law or civil law.****

**Legal traditions**

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## Codification

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- Sometimes the term is used in contrast to “common law” to refer to **the legal system that is based on a civil code.**

## Private

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- In its other sense, civil law refers to matters of **private law** as **opposed to public law**, and particularly to criminal law.

**The two meanings of the term **civil law****

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# **COMMON LAW VS CIVIL LAW**

## **From a Historical Point of view**

**Civil law:** The system of law that emerged in continental Europe in the Middle Ages and is based on **codified law** drawn from national legislations.

**Common law:** The system of law that emerged in England beginning in the Middle Ages and is based on **case law and precedent** rather than codified law.

**MAIN DIFFERENCE: COMMON LAW IS GENERALLY UNCODIFIED  
CIVIL LAW IS GENERALLY CODIFIED**

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## COMMON LAW SYSTEM

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- **Common law is generally UNCODIFIED:** There is no comprehensive compilation of legal rules and statutes.
- **Common Law is based on PRECEDENTS:** The judicial decisions that have already been made by courts & judges in similar cases.
- These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks (US-Canada) and reports (UK-Commonwealth).
- **In Common Law system, Judicial cases (Precedents) are regarded as the most important source of law, which gives judges an active role in developing rules.**
- **In a common law system, judges have an enormous role in shaping Law under Common Law systems.**

## CIVIL LAW SYSTEM

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- ✓ **Civil Law is generally CODIFIED:** Countries with civil law systems have comprehensive and continuously updated legal codes that specify all matters capable of being brought before a court.
- ✓ **Civil Law is based on STATUTE LAW:** Written law passed by legislatures. Statute laws are laws that are formally established to deal with specific situations, and written down in code books. These codes also specify the applicable legal procedures for each dispute and the appropriate punishment for each offense and case.
- ✓ **In a civil law system, the judge works within a framework established by a codified set of laws (Statute Law).** The judge's role is to establish the facts of the case and to apply the provisions of the applicable code book.
- ✓ **The judge's decision is consequently less crucial in shaping the law than the decisions of legislators.**

## DIFFERENCES: Common law vs. Civil law

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## **SOURCES OF LAW IN CIVIL LAW**

**A1. PRIMARY: STATUTES (WRITTEN LAW)  
ENACTED BY LEGISLATIVE POWER ARE THE  
PRINCIPAL SOURCE OF LAW.**

**A2. TWO SUBSIDIARY SOURCES OF LAW:**

**A2.1 ADMINISTRATIVE REGULATIONS**

**A.2.2 CUSTOMS**

## **SOURCES OF LAW IN COMMON LAW**

**B1. TWO PRIMARY SOURCES OF LAW:**

**B.1. STATUTORY LAW, which includes:**

**B.1.1. 1 LEGISLATION**

**B.1.1. 2 DELEGATED LEGISLATION**

**B2. JUDICIAL PRECEDENT (JUDGE-MADE  
LAW / CASE LAW)**

**B2. TWO SUBSIDIARY SOURCES OF LAW:  
CUSTOMS AND BOOKS OF AUTHORITY**

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When the **legislature** makes a law, it is considered **STATUTORY LAW**.

## **Legislature\***

- *An officially elected or otherwise selected body of people vested with the responsibility and power to make laws for a political unit, such as a state or nation.*
- *A deliberative body of persons, usu. elective, who are empowered to make, change, or repeal the laws of a country or state.*
- *The branch of government having the power to make laws, as distinguished from the executive and judiciary.*

\*Random House Kernerman Webster's College Dictionary, 2010

# **Statutory Law: LEGISLATION**

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## **LEGISLATION = STATUTES (WRITTEN LAW) ENACTED BY LEGISLATIVE POWER**

- **In Civil law tradition the legislative power is by definition the lawmaking power. ONLY THE LEGISLATURE (as the only representative, directly elected branch of the government) COULD MAKE LAW.**
- **The Common Law doctrine of STARE DECISIS (i.e. the power and obligation of courts to base decisions on prior decisions) is formally rejected by Civil law tradition. In Civil Law tradition, CASE LAW AND PRECEDENT DO NOT CREATE LAW**

**LEGISLATION: Primary Source of Law**

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**DELEGATED LEGISLATION AND ADMINISTRATIVE REGULATIONS ARE LAW ONLY  
WITHIN THE LIMITS OF THE POWER DELEGATED BY THE LEGISLATURE**

**Statues cannot possibly cover every situation and are not always completely clear. It is very common that the Parliaments debate and enact (promulgan) general statutory provisions which are to be filled out by government's agencies.**

**As a result, the legislature can delegate the power to promulgate regulations having the force of law to the administrative organs and agencies of the government. These agencies and administrative organs must interpret any statutes by understanding the legislature's intent behind the statute.**

**DELEGATED LEGISLATION: Secondary source of Law**

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**National Parliaments sometimes have to delegate to governments departments and agencies the task of preparing STATUTORY INSTRUMENTS which contain detailed provisions.**

**There are two main reasons why parliaments delegate:**

- Regulations related to detailed and technical matters require constant and further amendment.**
- Sometimes governments need to respond quickly and effectively to an emergency situation.**

**DELEGATED LEGISLATION: Secondary source of Law**

**Customs are never enforced by the legislature**  
**UNWRITTEN LAW / UNENACTED LAW**

**Customs don't come from the State but the society: Customs need the existence of a social practice.**

**Customs needs the existence of an opinio iuris: The general conviction about the obligatory character of a customary rule.**

**Customs are only applicable by a judge if there is no applicable law in a case**

**When a person acts in accordance with a custom under the assumption that it represents the law, his action will be legally accepted as long as there is no applicable statute or administrative regulation (delegated legislation) to the country.**

**CUSTOMS: Secondary source of Law**

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- **The Theory of sources of law in the Civil law tradition recognizes only Statutes (Legislation), Administrative regulations (Delegated Legislation) and Customs as Sources of law.**
- **The Theory of Sources in Civil law tradition is arranged in descending order of authority:**
  - **A statute prevails over a contrary administrative regulation**
  - **Both a statute and an administrative regulation prevail over an inconsistent custom.**
  - **Customs do not have the force of law and they only appear in absence of statutes and administrative regulations.**
- **The law which emerges from the courts, known as **CASE LAW** is a complementary source of interoperation and application of the law in Civil law tradition. The function of the judge within countries of Civil Law tradition is to interpret and apply the law.**
- **LEGAL DOCTRINE:** Legal doctrine just provides an interpretation or clarification about the other sources of law in Civil law tradition.

## **Theory of Sources of Law in Civil Law tradition**



As stated in **art. 1 of the Spanish Civil Code (Cc)** the Spanish sources of law are the following:

- **LAW as a Preeminent Source:** It must be understood in the sense of Statutory Law & Administrative regulations: any written rule of law enacted and created by the State.
- **CUSTOMS as a Secondary Source in absence of Law.** It's only applicable if there is no applicable Statutory law and can not be contrary to morals or public law (art. 1 Cc). Custom against legislation (contra legem) is forbidden by the art.1 Cc.
- **GENERAL PRINCIPLES OF LAW as a Secondary Source in absence of Law and/or Custom.** General principles of law are the basic rules reflecting the convictions of a community in respect its organization. General principles of law permeate the legal system, for instance art 1.1. SC and they also inform other sources.

**Spanish Legal System: A peculiar case in the Civil Law tradition**

**WHAT LAW IS ?**  
**An Introduction to Law**

**PRELIMINARY CONSIDERATIONS**  
**WEEK 3**

**JUDGE MADE LAW**  
**CASE LAW & STARE DECISIS DOCTRINE**

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One of the most fundamental ways in which the two historical legal traditions diverged is in the establishment of **LEGISLATIVE DECISIONS** as the basis of civil law legal system and **JUDICIAL DECISIONS** as the basis of common law legal system.

## **Case Law vs. Civil Law**

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## Legislative decisions

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In jurisdictions where civil law is the method of justice:

✓ Judges enforce the law strictly as it is given.

✓ Judges are often described as “investigators.” They generally take the lead in the judicial proceedings by establishing facts through description or examination and applying remedies found in legal codes.

✓ Judges are specially trained for their role. They are **PROFESSIONAL JUDGES**. A person who is interested in becoming a judge must first go through the process of getting the education required to become a lawyer and then get access to the judiciary school.

## Judicial decisions

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In jurisdictions where common law is the method of justice

• Judges make decisions, which are then used as precedents for future cases.

• Judges do not need to be trained for their role.

• They are **PRACTICIONEERS JUDGES**. A person who is interested in becoming a judge must first go through the process of getting the education required to become a lawyer. The next step in the process is to practice for a number of years before being elected or appointed to the bench.

## Case Law vs. Civil Law

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**In common law jurisdictions, judges state a principle of law, also known as PRECEDENT**

**The DETERMINATION of the case before a judge renders the matter RES JUDICATA.**

*This means that the issue cannot be reopened in any further legal proceedings. The decision of the judge may be appealed against but once any appeal has been determined, the case is settled once and for all.*

**The judges in their reasoning create a legal principle: PRECEDENT.**

*The binding force of a judicial precedent depends on two aspects:*

- *A judge is only bound by precedent if the case is similar to the one he/she is urged to follow.*
- *The status of the court which made the judicial precedent.*

**The system by which one judicial decisions stands as a precedent for later courts is known as the SYSTEM OF STARE DECISIS (the decision stands) and the principle of law which emerges from the case is know as the RATIO DECIDENDI of the case.**

**GENERAL RULE:** As a general principle a court is only bound by a precedent of another court is that other court has superior status. In conclusion, there cannot be conflicting judicial decisions of courts of unequal status, as the decision of the superior court would always prevail. If there are conflicting judicial decisions of courts of equal status, a judge in an inferior court may choose which precedent he wishes to follow.

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**Case-Law made judge**

## COMMON LAW VS. CIVIL LAW

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**The main disadvantage of the common law system comparing to the civil law system is commonly said to be FLEXIBILITY, PRACTICABILITY AND ADAPTABILITY**

*Legislators produce imperfect law. Long-standing legal rules are inefficient given social & cultural changes. By using Case Law, the courts can provide effective justice in individual cases.*

**The main disadvantage of the common law system comparing to the civil law system is commonly said to be COMPLEXITY.**

*In the common law system, judicial precedents are discovered case by case. There is no index to all judicial precedents contained in yearbooks or lawreports.*

## CIVIL LAW VS. COMMON LAW

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**The main disadvantage of the civil law system comparing to the common law system is commonly said to be CERTAINTY.**

*Statutory law provides some degree of certainty upon which individuals can rely in the basis of a static system and orderly development of legal rules.*

**The main disadvantage of the civil law system comparing to the common law system is commonly said to be RIGIDITY.**

*In Civil law, judges have little discretion when determining cases.*

## ADVANTAGES AND DISADVANTAGES OF CODIFIED CIVIL LAW SYSTEM VS. COMMON LAW SYSTEM

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**WHAT LAW IS ?  
An Introduction to Law**

**SECTION 1  
LAW AND ORDER & SOCIAL DIMENSIONS OF LAW**

**WEEK 4.1  
THE SOCIAL FUNCTION OF LAW: An Introduction**

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**One of the main tasks to undertake in the project to construct a general jurisprudence is to come up with a characterization of the relationship between Law and Society. This relationship is too complex and can be approached from too many different perspectives.**

**We can distinguish two basic components in the relationship between law and society:**

- The first component consists of the idea that law is a mirror of society: **The mirror thesis****
- The second component consists on the **Tripartite Representation of the Law-Society Relationship****

# **Law & Society**

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- **The mirror thesis assumes law's identity with society and also assumes its key function within society: the function of law is to maintain social order. The fact that law is a reflection of society is what renders it effective in the maintenance of social order. This first idea that law is a reflection or a mirror of society is generally asserted and entertained by the majority of social and legal theorists.**
- **The second idea assumes that law maintains social order by establishing and enforcing the rules of social intercourse and by resolving disputes. This idea assumes the key function of law within societies.**

### **Aristotle**

*Law is order*

### **Benjamin Cardozo**

*Law is the expression of the principle of order to which men must conform in their conduct and relations as members of society*

## **First component: The mirror thesis**

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**An outline of the Law-Society Relationship can be represent in a scheme organized in a set of three basic elements:**

- ✓ **ELEMENT A: CUSTOM**
- ✓ **ELEMENT B: MORALITY**
- ✓ **ELEMENT C: POSITIVE LAW**

**Tripartite Representation**  
**Law-Society Relationship**

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**ELEMENT A:** Custom refers to the customs, usages, habits, and practices of a society. Customs represent the cultural beliefs or convictions of a vast majority of people of a certain community or group.

**ELEMENT B: Morality\***

*The term “morality” can be used either descriptively to refer to some codes of conduct put forward by a society or, some other group, such as a religion, or accepted by an individual for her own behavior or normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational persons.*

*\*Stanford Encyclopedia of Philosophy*

# **Tripartite Representation** **Law-Society Relationship**

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## DESCRIPTIVE SENSE OF MORALITY

When “morality” is used simply to refer to a **code of conduct put forward by any actual group, including a society, whether it is distinguished from etiquette, law, and religion**, then it is being used in a descriptive sense.

(A) **Etiquette / Manners** is distinguished from morality because it applies to norms that are considered less serious than the kinds of norms for behavior that are part of morality in the basic sense. From this point of view, morality is a guide to conduct in society, “[...] **those qualities of mankind that concern their living together in peace and unity.**” (THOMAS HOBBS, Leviathan)

(B) **Law or a legal system** is distinguished from morality by having explicit written rules, penalties, and officials who interpret the laws and apply the penalties.

(C) **Religion** differs from morality in that it **includes stories about events in the past, usually about supernatural beings, that are used to explain or justify the behavior that it prohibits or requires.**

**Tripartite Representation**  
**Law-Society Relationship**

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## **ELEMENT C: Positive Law**

- In general terms, **Positive Law** refers to rules articulated and enforced by an institutionalized authority; in other words, “what law is in a given context” .
- **Positive Law represents power and authority:** What law is in a given context is a question of fact relating to the activities of legal officials and institutions.
- **Positive Law refers to any forms of public authorized, institutionalized enforcement of laws** (B. Tamanaha).

**Tripartite Representation**  
**Law-Society Relationship**

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## **RELATION BETWEEN ELEMENT A (CUSTOMS) AND ELEMENT C (POSITIVE LAW)**

- **We have to consider two main aspects regarding the interconnection between Customs and Positive Law:**

- ✓ **From a **historical** point of view, positive law evolved out from a social order controlled mostly by customs and social habits.**

- ✓ **From a **legal** point of view, the content of legal norms contained in positive law are the product of customs and practices.**

## **INTERCONNECTION 1: COSTUMS VS. LAW**

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## **RELATION BETWEEN ELEMENT A (CUSTOMS) AND ELEMENT C (POSITIVE LAW)**

- **Customs require a widespread agreement - Just as laws do**
- **Customs regulate external actions and they deal with matters of everyday life - Just as laws do**
- **Customs require general acceptance - Just as laws do: They are only present in a community as soon and as long as they are exercised.**
- **Customs are not legal in the sense that there is no procedure of authoritative generation. Since there is no superior force telling the people what has to be customary, the content of customs can only be what a vast majority of people (within territorial limits) consider necessary and viable.**

## **Interconection 1 : LAW VS. CUSTOMS**

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## **RELATION BETWEEN ELEMENT B (MORALITY) AND ELEMENT C (POSITIVE LAW)**

- ✓ From a **historical** point of view, the development of positive law is the mark of civilization as a moral, reason-based way of ordering society.
- ✓ From a **legal** point of view, morality could be a source of positive law's norms.
- According to some legal theories, acting in conformity with the positive law could be considered a morally correct conduct. Indeed, according to certain schools of natural law, positive laws which are inconsistent with morality are illegitimated, invalid and not legal.

## **INTERCONNECTION 2 : MORALITY VS. LAW**

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- **LAW regulates only THE EXTERNAL CONDUCT of a human action. However, MORALITY concerns the MOTIVES OF THE ACTION.**

**From a legal point of view, the motives for an lawful action are basically irrelevant. From a moral point of view, it does matter why you comply with legal norms.**

- **LAW requires GENERAL ACCEPTANCE in the application: Laws are only present in a community as soon and as long as they are exercised.**
- **IN MORALITY there is no procedure of authoritative generation. Legal norms are enforceable, whereas moral norms are not (MAIN DIFFERENCE BETWEEN LAW & MORALITY)**

## **Interconection 2 : MORALITY VS. LAW**

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# **HETERONOMY - LAW VS. AUTONOMY - MORALITY**

**A kantian distinction**

**Legal norms are 'heteronomous'**

**Moral norms are 'autonomous'**

**In Morality:** You do not owe moral behaviour to another agent but to yourself. Moral norms vary from agent to agent and logically you can not enforce a claim against yourself

**In Law:** A legal obligation is necessarily directed to another agent and corresponds to his rights. Legal norms are imposed by the legislator/the judge (An Authority) on all agents.

**Interconection 2 : MORALITY VS. LAW**

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## **RELATIONS BETWEEN ELEMENTS A, B AND C**

**The relations between Element A (Customs) and Element B (Morality) and ELEMENT C (Positive Law) is not accidental and it is not unidirectional.**

**Elements A (Customs) and B (Morality) are called upon to serve the same purpose:**

**✓ To provide a standard with which to legitimize Positive law in its relation to Society. Indeed, the fact that CUSTOMS and MORALITY serve as standards of legitimacy for POSITIVE LAW puts them in a position of potential conflict in order to define the degree of conformity of Positive Law to customs and morality. The degree of conformity of Positive Law to Customs and Morality is what confers its legitimacy.**

**✓ To dictate the terms of the content of Statutory Law and Positive law.**

**The relations between Element A (Customs) and Element B (Morality) and Positive Law is functional. Indeed, there is a connection between these three elements based on their functional equivalence: the equivalence is based upon their contribution to the maintenance of social order. These three elements can be considered types of mechanics of social control.**

**The degree of conformity of Positive Law to Customs and Morality is what confers its legitimacy.**

## **Interconnection 3 : Law / Customs / Morality**

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**There is a connection between these three elements and the history of Western legal theory:**

- **According to certain schools of Jurisprudence, laws which are inconsistent with morality and/or customs are illegitimated, invalid and not legal.** This positions aligns the philosophical tradition of Natural Law **(Natural Law School)** which has had several periods of dominance from medieval period (16<sup>th</sup> century) through 18<sup>th</sup> century.
- **According to some modern and contemporary legal theories, acting in conformity with the positive law may be unjust or morally incorrect, but it remains legal and valid.** From this point of view 'Law may be unjust (summum jus – summa injuria), but it is law simply because its meaning is to be just' (Radbruch). As long as the legislator makes an effort to adopt laws according to this goal the legal norms are valid, regardless of how unjust they actually are. This position is associated with the **Analytical tradition and Positivism**, which has had its greatest influence in 19<sup>th</sup> and 20<sup>th</sup> centuries.

## **Interconnection 3 : Law / Customs / Morality**

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**WHAT LAW IS ?  
An Introduction to Law**

**SECTION 1  
LAW AND ORDER & SOCIAL DIMENSIONS OF LAW**

**WEEK 4.2  
LAW AS SOCIAL ORDER: The representations of law**

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**Law is an artificial mechanism designed to channel human behavior into the directions society wants (Anthony D'Amato)**

**Law as mechanism consists of three elements:**

- **Words and other signs and symbols** that contain the language of law. This group of signs and symbols is what we normally call the law itself.
- A Setup of **authoritative interpreters and appliers** of the law (for instance, courts and judges).
- A Setup of **enforcers of the law** (for instance, police and prison systems)

When the words of the law **tell us to do something or refrain from doing something**, we react to those words. Law uses ordinary language and ordinary words have a signaling power to humans. This means that words are signal to the human minds and our bodies respond to those signals.

**LAW AS SOCIAL CONTROL**

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**Law channels our behavior in a social group** in many ways other than the simple one of telling us to refrain from doing certain things.

**Legal rule can be presented like this: What must I do or avoid doing, in order to stay within the law?**

**Laws come in three different forms:**

- **As prohibitions**
- **As prescriptions**
- **As powers**

**The representation of Law**

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**•As a prohibition:** When law channels our behavior telling us to refrain from doing certain things.

When words of the law tell us to do something or refrain from doing something, those words signal to us that unless we do what is described in the legal rule, certain unpleasant consequences are likely to befall us.

*For example, the words KEEP OFF THE GRASS inform a person that unpleasant consequences, such as being stopped by police, might attend walking across the grass.*

**•As a prescription:** When law requires us to act.

*For example, the requirement that we pay taxes on our income.*

**•As a conditional statement:** There are rules of law that come to us in the form of conditional law that empower us to do certain things without requiring us to do them.

*For example, the law of wills. There is no legal obligation to leave a will, but if you want to succeed in transferring your property after you die, you have to execute the will according to law.*

## The representation of Law

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**WHAT LAW IS ?  
An Introduction to Law**

**SECTION 1  
LAW AND ORDER & SOCIAL DIMENSIONS OF LAW**

**WEEK 5  
An Introduction to the Internal Structure of Positive Law  
AREAS OF LAW**

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- **Private law** governs relationships between individuals (such as citizens and companies).
- **Public law** governs the relationship between individuals (such as citizens and companies) and the state

*Example: Smoking indoors is a classic example of public vs private law regulation. As a public law, smoking indoors is prohibited in certain countries. However, people formed membership clubs where the agreement between the members is covered by private law. The members are then allowed to smoke indoors.*

## **DEFINITIONS: Areas of law**

### **PUBLIC LAW VS. PRIVATE LAW**

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• **Civil Law:** A body of rules that delineate private rights and remedies, and govern disputes between individuals in such areas as contracts, property, torts and family relationships

• **Labor law:** A body of rules that governs the employer-employee relationship. This area of private law includes individual employment contracts, contract doctrines, and a large group of statutory instruments on issues such as the right to organize and negotiate collective agreements, protection from discrimination and health and safety in work.

• **Commercial law:** A body of rules that govern business transactions in domestic and foreign trade, in particular, transactions between business entities. This area of private law includes all aspects of business, including advertising and marketing, and trade in general.

## **Internal Structure of Private Law**

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• **Constitutional law:** A body of rules that governs the relationship between the state and the individual and between different branches of the state.

• **Administrative law:** A body of rule that governs bureaucratic procedures and defines powers of administrative & governmental agencies

• **Criminal law:** A body of rules that defines conduct prohibited by the government because it harms public safety and social welfare. The state establishes punishment to be imposed for the commission of such acts.

## **Internal Structure of Public Law**

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- The term Positive Law refers to **Substantive law** and also to **Procedural Law**.
- **Substantive law** and **procedural law** work together to ensure that in a public or private legal case, the appropriate laws are applied and the proper procedures are followed to bring a case to trial.
- We have to distinguish between:
  - ✓ **PROCEDURAL CIVIL LAW / PROCEDURAL CRIMINAL LAW**
  - ✓ **SUBSTANTIVE CIVIL LAW / SUBSTANTIVE CRIMINAL LAW**

## **The internal structure of **Civil Law** & **Criminal Law****

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**Substantive law** consists of statutory rules. There are elements of substantive law in both criminal and civil law.

- **In civil law:** These rules define our rights and responsibilities as citizens.
- **In criminal law:** These rules define crimes and set the adequate punishments. Substantive law is used to determine whether a crime has been committed, define what charges may apply and decide whether the evidence supports the charges.

## **Substantive Law**

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**Procedural law** governs the steps to process a case. Procedural law adheres to due process.

**Due process** refers to the legal rights owed to a person in criminal and civil actions.

In the case of an arrest, the due process clause applies to the degree that one can be charged with a crime but still has rights to a speedy, fair and impartial trial.

# Procedural Law

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- **The term “Adjudication” refers to the determination of disputes according to the law, that is to say, determining the true facts in dispute in the light of the rules of evidence, and applying the law to the facts.**
- **Adjudication is the principal and proper function of the JUDICIARY (Judges are known collectively as Judiciary).**
- **The rules of Substantive & Procedural Law govern matters such as how a case is to be framed, in what court it shall lie, when it is to be tried.**
- **The cases which the courts have to try may be divided into two main types:**
  - **Civil cases – Civil action**
  - **Criminal cases – Criminal process**

# **Adjudication**

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**WHAT LAW IS ?  
An Introduction to Law**

**SECTION 2  
LAW AS IT IS**

**WEEK 6  
Procedural Law & Adjudication (I)  
CIVIL TRAIL: Generalities**

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## **In a civil action:**

- **One party (PLAINTIFF) makes a claim against another party (DEFENDANT)**
- **One party (PLAINTIFF) seeks a determination of his/her rights in respect of another party (DEFENDANT)**

## **Civil trial**

- **A civil trial is a legal procedure that is available to the parties who have been otherwise unable to resolve their differences through any kind of negotiations.**
- **The duty of the Court in a Civil trial is to determine and declare the rights of the parties and, where necessary, to grant appropriate remedies for securing them.**

# **Civil action**

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## **STEP 1**

### **The triggering event**

The first step in civil litigation involves an event that injures the plaintiff or damages his/her property.

## **STEP 2**

### **The informal discovery**

The period between the event that gives rise to the suit and the filing of a complaint is known as the informal discovery period.

During this time, the plaintiff contacts an attorney and describes the circumstances that led to the injury or damage. The attorney discusses in general terms the legal alternatives available and asks for an opportunity to conduct an independent investigation to assess the value of the claim. This meeting is known as an exploratory conversation.

- After the exploratory conversation, the attorney presents an evaluation of the case in terms of legal remedies available and the probability of a favorable verdict. At this point, the plaintiff decides to retain the attorney as a representative in the judicial proceeding that are likely to follow.

## **STEP 3**

### **Settlement conferences**

When the plaintiff's lawyer is officially retained, the defendant is informed. This information puts the defendant on notice that the plaintiff is preparing to seek an adjudicative settlement of the claim. The attorneys meet, with or without their clients, to discuss a reasonable settlement. These discussions are referred to as settlement conferences. If these conferences prove unsuccessful, the trial starts.

**Sketch of the course of proceedings before a civil trial**

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- ◆ **STAGE 1: THE PLEADING STAGE**
- ◆ **STAGE 2: THE DISCOVERY STAGE**
- ◆ **STAGE 3: THE CIVIL TRIAL ITSELF**
- ◆ **STAGE 4: THE DECISION**

**CIVIL TRIAL**  
**Stages & Formal structure**

---

## **PLEADING STAGE**

**The pleading stage begins after the plaintiff has chosen an attorney and decides to bring suit.**

**PLEADINGS are the documents which define the issues to be tried and establish the basis of the litigation.**

**PLEADINGS consist of:**

- **Statement of Claim:** The plaintiff's complaint
- **A writ of summons**
- **Defense & Counter-claim:** The defendants answer.

## **CIVIL TRIAL**

**Proceeding & Formal structure**

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## **The Statement of Claim**

**It is a written document that contains the plaintiff's complaint. It is a summary statement of the material facts upon which the plaintiff proposes to base his/her case.**

- It contains the **description of the facts** that entitle the plaintiff to relief from the defendant.**
- The plaintiff's complaint is filed with the court and served on the defendant with a writ of summons.**

**CIVIL TRIAL**

**FIRST STAGE: Pleadings**

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## **The writ of summons**

**The writ of summons warns the defendant that a default judicial decision can be awarded unless the defendant responds with a DEFENSE & COUNTER-CLAIM within a stated period of time.**

- **The writ of summons must be served to the defendant in time for the person to take action in defense. This right is constitutionally guaranteed by the due process clauses.**
- **There are several methods to serve the summons and it depends on the legislation. Some jurisdictions require to have the summons personally served on a defendant, but some others permit service by certified mail with a return request requested.**

## **CIVIL TRIAL**

### **FIRST STAGE: Pleadings**

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## **Defense & counter-claim**

- **Within a limited time (often between 20 to 45 days) the defendant must in turn deliver his answer.**
- **The answer is a responsive document in which the defendant makes admissions or denials, asserts legal defenses and raises counter-claims.**
- ✓ **An admission:** means that there is no need to prove a fact during the trial.
- ✓ **A denial:** creates a factual issue to be proven. It means that there is a need to prove a fact during the trial.
- ✓ **A counter-claim:** A counter-claim is appropriated when the defendant has a cause of action against a plaintiff arising out of essentially the same set of events that gave rise to the plaintiff's claim.

## **CIVIL TRIAL**

### **FIRST STAGE: Pleadings**

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The second stage of the civil litigation involves **the discovery of relevant facts**.

To prevent surprise at the trial, each party is provided with **tools of discovery** before the trial in order to identify the relevant facts concerning the case.

**Discovery** is based on the premise that prior to a civil action, each party is entitled to information in the possessions of others. This includes the identity and location of persons, the location of documents, known facts and opinions of experts.

## **CIVIL TRIAL**

### **SECOND STAGE: The discovery stage**

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## The tools of discovery are:

- ✓ **Oral depositions:** In an oral deposition a witness is examined before an official of the court. The party wishing the deposition must give notice to the other party in order to provide a person to be present to cross-examine the witness.
- ✓ **Written depositions / Written interrogatories to the parties:** An attorney may prepare a list of questions to be answered by witness or the parties.
- ✓ **Inspection / Examination of documents:** One party may compel the production of documents in the possession of the other party for inspection.
- ✓ **Physical /Mental examinations:** When the mental or physical condition of a party is an issue, a court may order the party to submit to an examination by a physician.
- ✓ **Request for admissions or denials:** One party may send to the other party a request for admissions or denials to certain specified facts or to the genuineness of certain documents.

## CIVIL TRIAL

### SECOND STAGE: The discovery stage

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**A trial** is a legal procedure that is available to the parties who have been otherwise unable to resolve their differences through negotiation.

Trials involve a confrontation between the plaintiff and the defendant as contradicting witnesses and arguments collide in a courtroom in accordance with **evidences** (evidentiary rules).

- In **Common law** systems, the parties can present their evidence **to a jury** – **Jury trials** or to a **judge** – **Bench trials**.
- In **Civil law** systems, the evidence can only be presented to judges.

In the case of a Jury trials, “Jurors” are selected at random from a fair cross section of a community.

## **CIVIL TRIAL**

### **THIRD STAGE: The trial**

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**The duty of the judge in a trial is to make sure that:**

- **Due process conditions required for a fair trial are satisfied**
- **The admissibility of evidence is guaranteed**
- **The rules of procedure are followed by the parties**
- **The judgement is awarded in accordance with the law**

**CIVIL TRIAL**

**THIRD STAGE: The trial**

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## **OPENING STATEMENTS**

**The trial begins with an opening statement of the plaintiff's lawyer explaining the case in general, the lawyer's legal theories and what the plaintiff's lawyer intends to prove. The defendant's lawyer may also presents an opening statement.**

**CIVIL TRIAL - Step 1: Opening Statements**

**THIRD STAGE: The trial**

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**In order for the plaintiff to win the case, the allegations of the complaint must be proven by presenting **EVIDENCE** and by **EXAMINATING** the proofs.**

****EVIDENCE** is the means by which facts are proven. They tend to prove or disprove some issue of consequence that is in dispute at the trial.**

**Evidence is admissible only if it is relevant to the cause of the trial.**

**CIVIL TRIAL - Step 2: Evidence & Examination**  
**THIRD STAGE**

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**EVIDENCE** is designed to determine four main **QUESTIONS**

### **WHO IS TO ASSUME THE BURDEN OF PROVING FACTS**

- In general terms, the burden of proving any facts which are advanced in support of any proposition lies upon the person who advances it.

### **WHAT FACTS MUST BE PROVEN**

- As a general rule, a party must give proof of all material facts upon which he/she relies to establish his/her case.

### **WHAT FACTS MUST BE EXCLUDED FROM THE RECOGNITION OF THE COURT**

- English law only permits proof of facts **WHICH ARE IN ISSUE** and facts **WHICH ARE RELEVANT TO THE ISSUE**.
- **FACTS IN ISSUE:** These are the facts which are in dispute upon the pleading of the process.
- **FACTS RELEVANT TO THE ISSUE:** These are the facts which serve to explain a fact in issue.

### **HOW PROOF IS TO BE EFFECTED**

- English law recognizes three kind of proof:
  - **TESTIMONY OR ORAL EVIDENCE:** which is given by witnesses usually upon affirmation.
  - **REAL EVIDENCE OR PHYSICAL EVIDENCE:** which is afforded by the inspection of physical objects by the court or the jury.
  - **DEMONSTRATIVE EVIDENCE OR DOCUMENTARY EVIDENCE:** which is contained in documents.

## **CIVIL TRIAL - Step 2: Evidence**

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## **EXAMINATION**

❖ **DIRECT EXAMINATION:** Both lawyers (plaintiff's lawyer / defendant's lawyer) introduce their own witness and evidences.

❖ **CROSS-EXAMINATION:** The opposing lawyer cross-examines the witnesses after the direct examination is completed. The principal object of cross-examination is to test the accuracy of the evidence given by the witness.

❖ **RE-DIRECT EXAMINATION OR RE-EXAMINATION:** The principal object of re-examination is to re-establish evidence which has been shaken in cross-examination.

**CIVIL TRIAL - Step 2: Examination**  
**THIRD STAGE**

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**WHAT LAW IS ?**  
**An Introduction to Law**

**SECTION 2**  
**LAW AS IT IS**

**WEEK 7**  
**Procedural Law & Adjudication (II)**  
**CRIMINAL LAW & PROCEDURE: Generalities**

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## **In criminal cases, THE GOVERNMENT BRINGS THE ACTION**

**Because the general public is injured when a crime is committed, as well as the person who was the perpetrator's victim, the government not the victim has the primary responsibility to initiate a response.**

## **CRIMINAL PROSECUTION IS PUBLIC**

**It means that independently of the victim's financial condition, the government not the victim will pay the cost of the action. The government not the victim will pay for the investigation of the crime and for the prosecutors.**

## **The aim of criminal action is PUNISHMENT AND / OR REFORMATION OF THE OFFENDER**

**The aim of criminal proceeding is to determine whether an offence has been committed and to make such order as may be necessary for the punishment or reformation of the offender.**

# **Criminal Law & Procedure**

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- **Criminal proceedings normally start either with the arrest of the offender with or without a warrant or with the laying of an information.**
- **An information:** It is a statement made before a JUSTICE accusing some person of a crime.
  
- **After the ARREST OF THE OFFENDER or after the INFORMATION has been laid, the justice must determine how the presence of the offender is to be secured for trial:**
  - **By summons** (if the criminal offence is not serious and the offender is likely to appear if required) or
  - **By warrant** (as a command addressed to the police, ordering the person to whom it is addressed to secure the offender).

## **Criminal Law & Procedure: STAGE 1**

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**Criminal offenses traditionally consist of the following basic components:**

- **THE WRONFUL ACT**
- **THE GUILTY MIND**
- **CRIMINAL RESPONSIBILITY: THE CONCURRENCE OF ACT AND INTEND**
- **IN SOME CRIMES, CAUSATION**

**BASIC COMPONENTS OF  
A CRIMINAL OFFENSE**

---

**The law makes a distinction between:**

- Acts that are classified as **voluntary**
- Acts that are classified as **not voluntary**

**According to criminal law, a person is not guilty of an offense unless:**

- ✓ His liability is based on conduct which includes a voluntary act **OR**
- ✓ The omission to perform an act of which he/she is physically capable.

**Liability** for the commission of a **CRIMINAL OFFENSE** may not be based on an omission unless:

- (i) the omission is expressly made sufficient by the law defining the offense **OR**
- (ii) a duty to perform the omitted act is otherwise imposed by law.

**EXAMPLE: DUTY TO RESCUE**

**First component**  
**The wrongful act**

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## **A voluntary act**

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- **A voluntary act occurs when a person causes his or her body to move in a manner that produces prohibited conduct.**

## **A not voluntary act**

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**Acts that are classified as not voluntary, that they are result from:**

- **A reflex or a convulsion**
- **A body's movement during unconsciousness or sleep**
- **A conduct during hypnosis**

**First component**  
**The wrongful act**

---

- **The second requirement of a criminal offense is that the offender posses a **CRIMINAL STATE OF MIND** at the time of the commission of the wrongful act.**
- **IN CRIMINAL LAW, The concept of criminal intent has been called **MENS REA****
- **MENS REA refers to a criminal or wrongful purpose.**
- **If a person innocently causes harm, then she or he lacks mens rea and, under this concept, should not be criminally prosecuted.**

## **Second component**

### **The Guilty Mind**

---

**In a Criminal action, the concurrence of a wrongful act with a wrongful state of mind is required.**

**In Criminal law, offenses require proof of criminal intent.**

## **THERE IS A GENERAL RULE**

- **Before a person can be convicted of a crime, it is required not merely an “actus reus” (a guilty act) but also “mens rea” (guilty mind”)**

**Third component  
CRIMINAL RESPONSABILITY  
ACTUS REUS & MENS REA**

---



- **INTENT**

*Mental desire and will to act in a particular way, including wishing not to participate (Oxford Dictionnary)*

- Intent is a crucial element in Law, in general and in Criminal law, in particular.
- **Intent is a mental attitude** with which an individual acts, and therefore it cannot ordinarily be directly proved but must be inferred from surrounding facts and circumstances. Occasionally a judge may find if "there was an intent" or if "there was no intent".
- **Intent refers only to the state of mind with which the act is done or omitted.** It differs from motive, which is what prompts a person to act or to fail to act.

**Third component**  
**CRIMINAL RESPONSABILITY**  
**ACTUS REUS & MENS REA**

---

**LAW has attempted to clarify the CONCEPT OF INTENT by creating a distinction between three categories:**

- **GENERAL INTENT**
- **SPECIFIC INTENT**
- **CRIMINAL NEGLIGENCE**

\* Further explanation: **WEEK 8 - Procedural Law & Adjudication (III): Intent & Legal Responsibility**

**CRIMINAL RESPONSABILITY**  
**Intentionality & the Law**

---

- **There are some criminal offenses that require **proof that the defendant's conduct caused a given result.****
- **For example: In a homicide case, the prosecution must prove that the defendant's conduct causes the death.**

## **FOURTH COMPONENT CAUSATION**

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**WHAT LAW IS ?**  
**An Introduction to Law**

**SECTION 2**  
**LAW AS IT IS**

**WEEK 8**  
**Procedural Law & Adjudication (III)**  
**INTEND AND LEGAL RESPONSABILITY**

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**CRIMINAL RESPONSABILITY**  
**Intentionality & the Law**

---

## **GENERAL INTENT**

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**GENERAL INTENT** refers to a general state of mind to do that which the law prohibits. The offender seeks to accomplish the precise act that the law prohibits **AND THE RESULT / CONSEQUENCES OF IT.**

**RESPONSABILIDAD SUBJETIVA DE PRIMER GRADO / ACTUACIÓN DOLOSA**

## **SPECIFIC INTENT**

---

**SPECIFIC INTENT** refers to a particular state of mind to do an act against the law. The offender seeks to accomplish the precise act that the law prohibits **BUT NOT THE RESULT/CONSEQUENCES OF IT.**

**RESPONSABILIDAD SUBJETIVA DE SEGUNDO GRADO / ACTUACIÓN CULPOSA**

## **GENERAL INTENT VS. SPECIFIC INTENT**

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**CRIMINAL NEGLIGENCE: It results from unconscious risk creation.**

*For example: A driver who unconsciously takes his/her eyes off the road to take care of a crying infant is in fact creating risks for other drivers and pedestrians.*

**The two branches of law Criminal law and Civil law share the concept of TRANSFERRED INTENT. Under the doctrine of transferred intent, the intent is considered to follow the act regardless of who turns out to be the victim.**

*For example: If A shoots a gun at B, intending to strike B, but the bullet hits C, the intent to strike is transferred to the act of shooting C.*

**CRIMINAL NEGLIGENCE**  
**TRANSFERRED INTENT**

---

**TO BE CIVIL RESPONSIBLE OR CRIMINAL CULPABLE, THE LAW REQUIRE FOUR DEGREES OF INTENTION**

- **First:** FULLY INTENTIONAL ACTS
- **Second:** PARTIALLY INTENTIONAL ACTS
- **Third:** Acts that we do RECKLESSLY
- **Fourth:** Acts that we do NEGLIGENCELY
- **Fifth:** Acts that we DO NOT INTEND AT ALL

**INTENTION IN LAW**

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## **FULLY INTENTIONAL ACTS**

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- Acts that are clearly intended, that means acts that we clearly and rationally decide to do. **IT REFERS TO GENERAL INTENT**
- **A PERSON ACTS PURPOSELY** when he or she has a conscious desire to produce a prohibited result or harm

## **PARTIALLY INTENTIONAL ACTS**

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- A person acts knowingly when he/she is aware that a prohibited result or harm is very likely to occur, but nevertheless does not consciously intend the specific consequences that result from the act.
- **IT REFERS TO SPECIFIC INTENT**

## **FULLY VS. PARTIALLY INTENTIONAL ACTS**

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## **A RECKLESS ACT**

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A **reckless act** is an act that falls short of clear and deliberate intentionality.

A person acts recklessly when she or he consciously disregards the welfare of others and creates a significant and unjustifiable risk.

**IT REFERS TO TRANSFERRED INTENT AND/OR CRIMINAL NEGLIGENCE**

**Example:** A driver acts recklessly if he or she consciously takes his or her eyes off the road to take care of a crying infant.

## **A NEGLIGENT ACT**

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Negligence is a legal term that comprises **REFERS TO CRIMINAL & TECHNICAL NEGLIGENCE**

## **RECKLESS VS. NEGLIGENT ACT**

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# ACTS OF STRICT LIABILITY

It means liability in total absent of intent.

- **A strict liability offense represents a major exception in Criminal Law to the general requirement that there must be a concurrence between the criminal act and criminal intent.**
- **In this type of acts, the prosecution needs only prove the actus reus to convict the accused; there is no intent element.**

**Example:** *A liquor store's owner who sells alcohol to minors.*

# STRICT LIABILITY

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# **MISTAKE**

**It will usually be a defense to a criminal charge or civil liability for the accused to prove that he/she acted under the influence of a mistake of fact.**

**This rule is subject to three limitations:**

- MISTAKE IS NOT DEFENCE AS IGNORANCE OF LAW IS NO EXCUSE:** The general rule is that no man is permitted to excuse himself by asserting that he thought his unlawful act was lawful.
- MISTAKE MUST BE GENUINE, POSSIBLE AND REALISTIC**
- MISTAKE WILL ONLY AFFORD A DEFENCE WHERE THE ALLEGED ERROR RELATEDS TO SOME FACT OR FACTS ESSENTIAL TO THE CHARGE.**

# **LIABILITY**

**Exemptions of Legal responsibility**

---

## **DURESS**

**The use of force, false imprisonment or threats (and possibly psychological torture or "brainwashing") to compel someone to act contrary to his/her wishes or interests.**

**Duress also encompasses the same harm OR threats exercised upon the affected individual's spouse, child, or parents.**

### **DURESS IN CIVIL RESPONSABILITY**

- Duress also exists where a person is coerced by the wrongful conduct or threat of another to enter into a contract under circumstances that deprive the individual of his or her volition/ intent.**
- If duress is used to get someone to sign an agreement or execute a will, a court may find them null and void.**

### **DURESS IN CASE OF CRIMINAL PROSECUTION**

- A defendant in a criminal prosecution may raise the defense that others used duress to force him/her to take part in a crime.**

## **LIABILITY**

### **Exemptions of Legal responsibility**

---

## **LEGAL CAPACITY**

**It is the attribute of a person who can acquire new rights, or transfer rights, or assume duties, according to the mere dictates of his own will without any restraint arising from his status or legal condition.**

**The legal capacity defines the legal status of persons (natural or artificial) and enables them to perform civil acts, as capacity to hold lands, capacity to devise etc.**

## **INCAPACITY**

**The legal definition of “incapacity” or “incompetency” is important because it defines the circumstances under which the LAW may restrict an adult’s decision-making authority by appointing a guardian or legal representative (tutor ) to make personal or financial decisions for him or her.**

## **LIABILITY**

### **Exemptions of Legal responsibility**

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## **COMPONENTS OF LEGAL INCAPACITY**

Today, most adult guardianship laws define “incapacity” through a combination of two or more of the following components:

- ✓ **A MEDICAL COMPONENT** that requires that the incapacity of a person has been caused by a diagnosed medical condition or identified mental or physical impairment, such as mental illness, developmental disability, or chronic intoxication-
- ✓ **A FUNCTIONAL COMPONENT** that requires that the incapacity of the person limits his or her ability to manage his or her own affairs or property or to care for his or her essential personal needs such as medical care, food, clothing, shelter, and safety.
- ✓ **A COGNITIVE COMPONENT** that requires that the incapacity of the person involves a mental or physical condition that limits his or her ability to make or communicate “rational” decisions.
- ✓ **A NECESSITY COMPONENT** that requires that the incapacity endangers the respondent’s person or property to such an extent that appointment of a guardian or legal tutor is necessary and in the respondent’s best interest.

## **LIABILITY**

### **Exemptions of Legal responsibility**

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