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Lecture notes on the introduction to private/civil law

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Gábor Péter Palásti (PhD, LL.M., dr.jur.) is a scholar from Hungary where he has been teaching and researching law at various law faculties since 1997. He has been affiliated with RGSL since 2007 as visiting lecturer. His main areas of interest are different parts of substantive private law, international commercial law and private international law. Over the years Dr. Palásti has been affiliated with a number of international organizations in different projects, such as the WIPO (Geneva), UNIDROIT (Rome), BIICL (London), IPR Verlag (Munich), University of Tokyo (Japan), Civic Education Project (VA, USA), NCPJ (VA, USA), etc. As author of over 50 law journal articles and book chapters, and speaker on about 25 different conferences and round tables, his works have been published or presented in more than 10 countries in Europe and Asia.

This present paper is the result of his experiences with RGSL students on the LL.B. in Law and Business program, and serves as the general introduction to all specific private-law based courses on this program

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FOREWORD

This present issue of *Riga Research Studies* contains the notes of the first lecture of the first *private law / civil law* course in the Law and Business BA program at the Riga Graduate School of Law. Whether this is the course in *Comparative Contract Law*, or *Comparative Personal, Family and Business Law*, or *Comparative Property Law*, or some other private law course, may vary from year to year. The main purpose of this paper is to serve as *study material* for first year BA students. It is tailored to the needs of the average first module BA student: an open-minded and interested 19-year-old freshly out of secondary school education, whose legal knowledge and thinking is yet to be developed. The main consideration was to keep this writing clear and simple; legal statements and conclusions are illustrated with easy to understand examples. The pedagogical objectives behind this paper clearly prevail over scientific and jurisprudential considerations, although the system of classification and characterization of private law that this paper suggests may be subject to jurisprudential discussion, just like any other system of categorization. As a general rule, this paper is overtly summational. With its objective in mind, it cannot be anything but summational.

The author decided to write this paper because there is no general introduction to private law in the BA in Law and Business curriculum before specific private law courses commence. Also, no paper has been available that would be tailored to the needs of the target group on this subject. Note, however, that this paper is not about the (codified) general part (common provisions) of private law. It is simply a general introduction to the most important conceptual characteristics of private law.

As lecture notes, this paper lacks references and citations; also, no footnotes are used. In a number of countries, lecture notes, as a specific form of legal publication, intentionally omit such references. The very particular purpose of lecture notes does not allow them. As is the case with most of its very general statements, such as that law can be divided into public and private, the amount of references to sources, even if only to the most well-known ones, would most probably by far exceed the length of the study itself. Since the main purpose of this paper is to help understanding and be used as preparation material for the course for the average first-module BA student, it would be pointless and most probably disturbing to

flood it out with countless references, citations, footnote-explanations about the different views that writers and commentators have taken on one or another specific subject over the centuries.

We hope that this paper will serve as a roadmap to the private law courses yet to come, and that students will find as much joy in reading and understanding it as the Author found when writing it.

Gábor Palásti, 2010, Riga, Latvia

LECTURE NOTES ON THE INTRODUCTION TO PRIVATE/CIVIL LAW

The courses Comparative Personal, Family and Inheritance Law, Comparative Contract Law, Comparative Property Law, Intellectual Property Law, and partly Banking and Securities Law focus on questions that fall under the notion of private law/civil law. Thereby, it is first necessary to briefly outline the major characteristics of private/civil law and place our subject matter within the system of private/civil law. This is what the first lecture will be about.

A preliminary remark must be made that the attempts to structure law in the way presented below and identify a separate body of *civil law* is shared in most *civil law* jurisdictions originating in continental Europe. However, these may not be reflected so much in the legal thinking of *common law* jurisdictions. Nevertheless, on the one hand the choice of our subject matter – personal, family and inheritance law – displays the characteristics of the civil law concept. On the other hand, common law thinking often comes to the same conclusions as civil law, even if through different lines of thought. It is, however, not the objective of this course to deal in detail with the underlying differences between common law and civil law, such as the source of law (judge-made law versus codified legislation); or the importance of the differences between public and private law rules within the same branch or field of law (whereas in common law the rules of both public and private law nature may mix within the same branch or legal field while civil law places a higher importance on the separation of these two kinds of norms in its structure of categorization), etc. These issues are to be discussed within other courses, such as legal history and comparative law. However, a short discussion of the civil law and common traditions through their *sources of law* will appear in the chapter explaining legal sources.

In this present lecture we will use the terms *private law* and *civil law* interchangeably, to conform students to both terms. Roughly speaking, civil law is the name of private law in civil law jurisdictions.

1 THE PRIVATE LAW – PUBLIC LAW DICHOTOMY

Since Roman law there has existed an understanding regarding the structure of the body of legal norms, in that legal relations between actors (so-called legal subjects) can mainly be of two kinds. One involves equality between the players: legal subjects are free to enter into the legal relations of their choice, and they have the power to mutually influence the contents of their relation: their rights and obligations. Eventually this happens when persons enter into legal relations with each other as private parties, within their private capacities.

> ***Example I.1***
>
> When Janis and Inga decide, that Janis will buy Inga's watch, they both have the option to decide whether or not Janis will buy and Inga will sell the watch – that is to say, whether to make the contract for the sale of Inga's watch. The same is true of the question of what the major conditions of the deal should be – price, time and place of performance, supplementing services such as whether or not Inga will provide Janis with extra batteries, etc. All these issues are decided by the parties mutually and either of the two parties can at any time say "no" to what the other party proposes. The same is true of other kinds of private relations, e.g. whether or not they will want to start dating each other and later on be married to each other.

Another, quite different set of cases is one in which this equality between the parties does not exist. In those cases one of the parties is subordinated to the other. One of the parties can compel the other to enter into a legal relationship with it and dictate the terms. For example, when Janis has to pay taxes to the tax authority of his country, he can not say "no, I do not want to pay taxes, i.e. I do not want to enter into a tax paying relationship with you". He cannot alter the terms of the relationship with the tax authorities either: he can not say "oh, I am willing to pay taxes, but less – or at a later time – than required". Or, if Janis suddenly were to kill someone and the police were to arrest him, then the prosecution to charge and finally the court to sentence him, he can not tell the police, the prosecutor or the court "leave me alone, I do not want to enter into a legal relationship with you". In both examples, the nature of the legal relationships – tax law, criminal law and criminal procedural law – is such that the legal subjects are not free to decide whether or not to enter into a legal relationship (pay taxes, be investigated, charged and sentenced) and to influence its content. It is easy to discover that in these examples the representatives of "the other side" – the tax authority officer, the policeman, the prosecutor, the judge – did not act in their private capacities like Inga when selling her watch to Janis. They acted in a capacity to represent the *interests of the public* rather than of the private individual. To the tax authority officer as a private person it

is likely not to matter whether Janis pays taxes or not; however, to the public interest of the community (the state) whom he represents, it is important that legal subjects pay their due taxes. The policeman may personally not care if Janis killed someone – perhaps for so long as it was nobody the policeman personally knew – but to the wider society it is of primary importance that killers be caught, brought to justice and punished. Thereby, in all these situations it is a *public interest* that overwrites the equality and freedom of the other party enjoyed in private relations. It is not difficult to recognize that the public interest that prevails over the autonomy of the private individual is represented *by the state*.

In legal relations where the parties act freely, they act *in their own private interests* as *private individuals* or in another word as *civilians*. Thereby, this area of law is named *private law* or *civil law*. In cases where one of the parties lacks this freedom whereas the other has a compelling power to bind the other party, it is usually for the interests of the public. Thereby, this area of law is named *public law*. Private or civil law covers such cases as company law, where relations are between private individuals who want to associate for a common business purpose and set up a company of their own to pursue a profit-making activity; contract law where equals are making deals between themselves; family law, where private individuals get together for the purposes of establishing a family through marriage, having children and taking care of and raising their children; copyright law, where one individual creates a piece in the literary, artistic or scientific domain for the use and enjoyment of all others in society, etc. Public law covers such areas as public international law, constitutional law, the law of public administration, criminal law, all procedural laws such as criminal procedure and civil procedure, financial law and tax law, etc. The course *Comparative administrative and constitutional law*, which students have had by the time they encounter their first private law courses, was a good example of public law fields.

Note that the dichotomy of private and public law does not cover the entire legal system, albeit it fairly well covers the overwhelming majority of legal relations. For example the branch of *private international law* (*conflict of laws*) deals with situations in which the subjects of the legal relationship are not the state and subordinated legal subjects such as taxpayers, criminal offenders, etc., as in public law, or private persons acting in theoretically equal positions such as in private law, but *legal systems* between which a choice has to be made because the case is factually connected to more than one legal system. (See more later.)

There is much discussion nowadays about *consumer protection* and how consumer contracts are not made between equals, but rather between a consumer who is in a *weaker position* and a trader who is in a *strong bargaining position* towards the consumer; and how consumer contracts are not between persons of equal capacities and opportunities. Nevertheless, the structure of a consumer relationship is the same as of any private law relationship, even if the bargaining power of one of the parties exceeds the bargaining power of the other.

Example I.2

When Janis goes to the local shop to buy a kilo of bread, he may not start bargaining over its price at the cashier desk and say that he will not give 30 Santims for it, only 15 at best. He will most probably be laughed at and sent away. The terms of the contract are mostly dictated upon the consumer (Janis) by the trader. Nevertheless, Janis still has the option to say "no" and enjoys the autonomy to decide whether or not to enter into a legal relationship. He may go to another store, or bake his own bread at home from flour in one of these bread baking machines for home use, or buy rice or potato instead, etc. Note that this discretion – not to enter into the legal relationship at all – is *missing* from public law relationships.

Thereby, even if consumers are in a weaker position towards the trader, consumer contracts remain private law/civil law instruments, primarily falling in the field of contract law.

It also needs to be clarified that the state, too, has roles in private/civil law, at least *in two different senses*. Firstly, the state acts as *legislator*: it provides the necessary legal framework for private relations by compulsory (cogent) and non-compulsory (dispositive) norms. In the latter case the parties may freely change the rules applicable to their relationship, so that the provisions offered by the lawmaker are simply options. For example in contract law many provisions in the law apply just in case the parties did not provide for a different setting in their contract. The same is true of marriage contracts in family law or contracts over personal maintenance and inheritance in inheritance law. The reason is that when concluding a contract the parties are often unable to foresee specific possibilities about which they may provide (which fall under their so-called freedom of contract), and these cases are automatically covered by the provisions of the law. As another example, the same is true in company law: often the legislator provides examples of how the founding documentation or internal laws of a company can regulate certain matters, from which the founders of the company are nevertheless free to deviate. In civil law the compulsory nature of each norm has to be examined separately.

The fact that the state acts as lawmaker and has the power to regulate the private relationships of legal subjects even with compulsory norms *does not change the fact* that the legal relationship is theoretically between persons of equal capacity. In this sense the legislator is *not part* of the legal relationship. The legal relationship remains between the private parties: the marriage is between wife and husband and not between the married couple and the state, even though the state provided the normative rules of marriage. A sale of goods contract is between the seller and buyer, even though the state has the power to regulate specific contracts, etc.

Secondly, the state, through its organs, may *become a party* to some private law relationships. For example a ministry of the government may need to purchase office furniture for its offices and thus make a contract for the sale of goods. Or the state may inherit if some individual names it as beneficiary or in cases where there is no beneficiary or heir to an estate. Or the state, through the improper actions of its organs, may cause damage to private individuals and thus be financially liable in a non-contractual liability (tort) case. In all these situations the state acts in a capacity *not different from that of any private individual* (natural person, private company, other legal persons). To all these cases the body of private/civil law applies but as if the legal relationship were between regular private entities. However, since it is the same state acting in private relations that otherwise has all regular state powers (such as to legislate, enforce its legislation and to adjudicate), the law has to specifically safeguard that *the state does not abuse its powers* in private law situations. For example that the state does not pass laws in its legislative capacity, that in all government purchases the buyer (the state organ) can determine the price unilaterally, and then, in a private capacity a ministry is knocking on the door of a furniture shop to "purchase" furniture for free because with reference to the laws allowing it to do so, it determines the price at "0". The body of laws that is aimed at preventing the state from abusing its state powers in private relations is of a *public law nature* and applies to the state and its organs; an example of these laws is regulation of public procurement.

From the different aims and nature of public and private/civil law it also follows that the *structure and nature of available legal consequences / sanctions / remedies* differs considerably. The sanctions of public law are enforced against the individual towards *the state* and usually serve the purpose of *prevention and punishment*. Examples are fines or penalties that will need

to be paid to state authorities, or (forced) public work or imprisonment that need to be served under the command of state entities. The sanctions of private/civil law are enforced towards *the other private party* (the injured private party) and primarily serve the purpose of *doing justice to the injured party* (restoring the financial balance between the two parties) rather than prevention or punishment.

Most sanctions in private/civil law are of a *pecuniary / monetary nature* in which case the party in breach of the law has to pay some amount of money to the injured party and not to the state. These private law / civil law categories of sanctions include

1) Restitution (*in integrum restitutio*), in which case the original state of matters has to be restored as if the breach had not taken place, so that the party in breach has to pay the amount that the injured party would have if the breach had not taken place.
2) Another category is when a party is in some specific breach of an obligation and the value of that obligation can be determined: e.g. the contractual price or a share in an estate was refused to be paid at all; or less was paid; or the party is in late payment, etc. In this case sanctions may not go beyond what would be due under the specific instrument (e.g. contract or estate).
3) A third category is returning enrichment, in which case the party in breach has to return the profit that it gained from the breach, even if that amount would not have been due to the other party (note that this sanction does serve preventive purposes as well.)
4) The "queen" of all private/civil law sanctions is damages: the amount that has to be paid if damage is caused to the other party, including not just the actual damage that occurred but lost profit and all costs in relation to the damage, too. (Note that contemporary legal developments in common law jurisdictions seem to put some emphasis on punishment and prevention in private law, too, within the form of *punitive damages* as well, which are in excess of actual damage, lost profit and costs.) The English word "damage" applies to the value of the loss suffered while the word "damages" refers to the amount of compensation to be paid.
5) Another sanction is that when none of the above works, unjust enrichment may still need to be paid.
6) Finally, all these payments may be accompanied by a rate of interest.

The law specifically sets forth the application of all these categories of remedy: it describes the situation in which one or another kind of remedy is available and the conditions upon which the remedies may be awarded to the injured party.

Example I.3

Imagine that a travel agency obtains an "illegal copy" of specific database software designed for travel agencies. The term "illegal copy" here refers to the fact that it was obtained without the permission of the company bearing copyrights over the software and no copyright fee was paid. Imagine that the software company that licenses the use of its programs detects this program on the travel agency's server. The amount that would be due under copyright law is the copyright fee that was unpaid (category no. 2 above). Since that fee would have been due upon purchasing the copy of the software, interest has to be paid from that date.

If complete restitution (category no. 1 above) is applicable, the software company has to be placed in a situation as if it had received the copyright fee on time. Imagine that the software company purchases from all the copyright fees it receives stocks in the same corporation. From these stocks it has earned a profit of 7% on its investment in the period between when the copyright fee would have been due and when it was finally paid. In this case this 7% extra of the copyright fee has to be paid because if the copyright fee had been paid on time, the software company would have earned an extra 7% by investing it in stocks. Thereby, in a restitution case this 7% has to be paid as well. Note that this item also falls under the category of damages as lost profit. On the other hand, this 7% was not due under copyright law, thereby it does not fall under the category of due payments. At the same token, the copyright fee in itself does not fall under the category of damages, because it is not a head of damage but rather non-payment of a copyright fee.

If the software company had any costs in relation to the damage suffered (e.g. it had to hire the services of a third company to detect software theft), that is due under damages (as costs affiliated in connection with damage) but not under the restitution theory, since the company would have hired the company detecting theft of its software anyway, irrespective of the illegal use of software by the travel agency.

Finally, imagine that the travel agency could release one of its secretaries because the database software rendered her employment needless: it could do everything that the secretary had to. If returning enrichment is also due to the injured party, the software company can also claim the salary of the secretary thus spared by the travel agency (minus the licensing fee of the software itself), because by releasing the secretary the travel agency realized a profit. The profit earned by the travel agency by releasing the secretary is neither a copyright fee nor damage on the side of the software company. Thereby it is only payable if the law specifically entitles return of enrichment in addition to either restitution or damages.

Note that the above are the major categories of private/civil law pecuniary sanctions / remedies; the laws of specific countries may contain additional categories or may not know every one of those described above.

In most Western jurisdictions, quite seldom private / civil law may prescribe that a sanction may be of a non-pecuniary nature: this is called remedies *in kind*. In these situations it is not payment of a sum that is claimed but rather that the other party should specifically

do something or give up doing something. One such example is divorce in family law, when some specific aspects of a divorce order – such as physical separation of the couple – cannot be performed through financial means. Another example is that the court may rule that the unlawful possessor of some movable property should serve the object on the lawful owner; or that an unlawful possessor of a real estate should vacate the land or house. Or that a trespasser should stop trespassing on the land of another. Or that an item of ancillary property of the estate of a deceased person be served in kind to the heir rather than transferring its value in the form of money. Or that someone who publicly made some defamatory remark about another, and thus negatively affected their reputation in the public eye, should publicly apologize or withdraw the remark. Nevertheless, even if these sanctions are not followed voluntarily, the ultimate means of enforcing them are, more often than not, of a pecuniary nature. It is very rare nowadays that law enforcement in civil law really means that an officer will compel a private individual to comply with an order in kind personally. Rather, in case of ultimate non-compliance pecuniary sanctions are usually enforced. Rare exceptions may be separation orders in family law or vacating orders for real property.

Historically, however, personal performance of civil law sanctions did prevail in ancient, medieval and even in early industrial societies. In these cases a wrongdoer causing harm had to personally serve the injured party until the value of the services compensated the loss. Or a party in debt in a contract was ordered to personally serve the creditor to cover their debt. These forms of in-kind sanctions actually were often forms of personal in-debt slavery. The fact that they do not prevail nowadays is at least as much due to the influence of human rights on civil law as the improvement of the general financial conditions of society.

Most often public law and private law touch upon different aspects of *the same policy considerations* and *same fact patterns*. Remedies in public and in civil law serve different purposes in the same case. Thereby, they can be applied cumulatively.

Example I.4

If a driver drives when drunk and causes an accident in which a pedestrian is injured, under criminal law the state will punish the driver: he may have to go to prison. The primary objectives of the driver's imprisonment are punishment and prevention (specific prevention of the driver: while he is in prison he cannot commit the same crime again; and his imprisonment may make him think twice if he wants to drink before driving in the future; general protection of society: others may learn from the

example of the driver and may think twice before drinking and driving). Another public law sanction may be that in administrative law his driving license may be temporarily or permanently withdrawn. This sanction serves the same purposes as above. However, the situation of the injured party is little affected by these remedies. At best he may feel emotionally relieved that the driver had to go to prison, but it does not mend his personal position. He may still have to pay for medical treatment, he may be out of a job, he may suffer physical and emotional stress, he may have to cancel commitments he had made earlier, etc. All these interests will be protected by and the loss compensated by private/civil law remedies. Damages will be paid to the injured pedestrian and not to the state and he will have the chance to add all the loss and negative consequences suffered as a result of the accident when calculating his damages claim.

THE BASIC STRUCTURE OF PRIVATE/CIVIL LAW

Private/civil law can well be systemized, focusing on the possible *subject matters* of different civil law relations. Tracing back to the analytical works of jurists in the ancient Roman Empire and later further sophisticated by German legal schools of thought, it has been realized that the separate fields of civil law relations can be grouped in different categories. These categories help to deal with the massive amount of rules that would otherwise look like a jungle of provisions difficult to handle. The structure of private/civil law presented below applies more or less to the law of every continental civil law country. Even if common law jurisdictions look at these attempts of categorization somewhat differently, the same fields, categories and sub-categories can be identified in those legal systems as well.

1.1 General part

Usually, just as in most other branches and fields of law, civil law has a general part and a specific part. The general part contains rules which are common for every specific category. These rules are shared by all possible private law relations. You are likely to find a part called *General part* or *Common provisions* in most civil codes or in most literary works discussing jurisprudence, usually at the beginning of the code or jurisprudential work. For example the principle of *good faith* or the prohibition of *abusive use of rights* equally applies in the law of persons as in contract law, in property law or in inheritance law. These are commonly shared values for the entire body of civil law, even though it may be possible that for specific situations specific details on these commonly shared values are found in the specific chapters of one or more categories.

For instance, protection of good faith is usually looked at as a general rule in private/civil law. In all civil law relations, the parties (legal subjects) are required to act in good faith when dealing with each other. In some legal systems this is further supplemented with other principles, such as the duty to cooperate, in others it is not – but the requirement that the parties must exercise their rights in good faith is a common rule for all civil law relationships.

Example II.1.1

Imagine that during negotiations for a contract one of the contracting parties already knows that it will *not* conclude the contract with the other party, yet it behaves as if the other party still had the chance to be contracted. It may have several reasons to do so: for example it wants to keep the other party busy in the negotiations so that the other party will be likely to concentrate on the current negotiations and in the meantime it is likely to miss out a chance for another contract with a third person in which the wrongfully negotiating party is interested as a competitor. This situation is clearly against the general principle of good faith, which is a common rule for civil law. Yet the law on contracts may contain further specific rules on the situation, giving it a name – the situation is often called wrongful negotiations – and supplying further rules about how to handle it.

Example II.1.2

Situations similar to the above example can be found in other categories of civil law, too. Imagine, for example, that a young lover is enthusiastically trying to deepen relations with his chosen one. He is hopeful that he will soon marry his chosen girl and he is providing one lavish gift after the other to the girl. The girl is accepting these gifts and she knows that the purpose of these gifts is that the giver wants to marry her. With her behavior she fully encourages her lover, yet she is pretty firm that she will never marry this man, not even a kiss, nothing. She keeps her desperate lover in the false belief that he can be successful, only to keep the generous and valuable presents for herself. In other words: she is not acting in accordance with the general principle of good faith when she accepts the gifts although she knows that she will never want to marry the poor guy. Family law may nevertheless contain additional specific rules on returning engagement gifts, which are specific only to family law.

In both examples above, the same standard – the standard of good faith – was breached. The standard is common for all private law situations because it is possible to breach good faith in all civil law situations. Other rules are, however, specific only for one or another category of private/civil law. For example, the rules on child maintenance are specific to family law only, and there is nothing that would even remotely resemble child maintenance in intellectual property law or in inheritance law. Or the copyright rule that an author is granted the right to have his name identified with his work without time constraints (Shakespeare remains the writer of Romeo and Juliet forever) triggers nothing similar in non-contractual liability law or family law or company law. Those rules that are specific only to one or another type of legal relation are contained in the *special part* of civil law. Eventually, the amount of special rules compared to provisions of the general part is overwhelming.

Some specific fields within private law have their own general part, which contain provisions applicable throughout the specific provisions of that field of law only. For instance contract law has an extensive general part that contains rules that apply to every

single specific contract that follows. Other areas of private law, such as intellectual property law or inheritance law, do not have their own general part.

The general part of private/civil law is not taught in the LL.B. program in any individual class (even this lecture is not about the general part of private law but rather a general introduction to private law). The general part of specific fields within private law is discussed within the course that relates to that specific part of private law. For example, the course *Comparative Contract Law* will address general contract law issues.

1.2 Special part

The special part contains a set of categories that are regulated differently from each other. From the overall category of law through the separation of public and private/civil law the chain of categorization from the overall to the very specific is basically endless, down to the different fields by subject matter within civil law, down to the regulation of specific instruments and then exceptions from these instruments At the end of the line are the individual norms distinguished from one another. Needless to say, the purpose of setting up any kind of system within the jungle of thousands of individual norms is to help orientation within the body of provisions. The system below is based upon traditional classification attempts of private law that distinguishes subject-matter categories of private law mostly *in one level depth* (property law, inheritance law, family law, labor law); sometimes going down the classification chain *in two levels* (intellectual property law and law of obligations) and goes down to a *third level of categorization* only in connection with one area (personal law). This contemporary system of categorization can be looked at as the skeleton of private/civil law. For our purposes, we identify seven basic categories within private/civil law which have, by today, gained independent recognition (the law of persons; property law; intellectual property law; the law of obligations; inheritance law; family law; labor law). As you will find, some of these categories will be divided into further sub-categories. Note that the classification attempts that have been made throughout history, either in the codes themselves or in jurisprudence, seldom agree with each other in every single aspect. Thereby, you may easily find other solutions for categorization. For instance, in the cradle of civil law classification, the old Roman law system described by *Gaius*, only three basic categories are recognized (*personae* = law of persons; *res* = law of things (mostly: property);

actions = common to both, such as inheritance or the law of obligations). Early civil codes like the French or Austrian followed this system of classification. Other codes enhanced this narrowly tailored system: e.g. the basic structure of the German and Swiss civil codes identifies four subject matters in its main titles: law of obligations; law of real things (mostly: property); family law; inheritance. Other codes extend to other areas of law, such as private international law (conflict of laws), that we see to be out of the scope of private/civil law, yet there is some clear connection to it. The reasons why there are many different models of classification are many. Sometimes a specific social phenomenon was as yet absent at the time of codification. For example Gaius, in his time, could not think about the classification of industrial property law (a sub-category of intellectual property), because the technical conditions of mass industrial production were not yet in existence. Another reason is that the subject matter of an area of law was split between existing categories. For example the Napoleonic Civil Code did not identify family law as such, but rather treated questions of marital status (marriage, divorce) in its part on persons and treated property-related issues such as matrimonial property under property law. While an overall comparison of characterization (classification) models of private law would go far beyond the objectives of this introductory lecture, we have attempted to set up an up-to-date, coherent system that would cover and separately identify all major legal fields that have been regulated as private law in most contemporary Western legal systems.

The **law of persons (personal law)** focuses on the *general legal recognition* of persons. In most contemporary legal systems persons are divided into two: *natural persons* are human beings, private individuals. *Legal persons* are artificial creations by natural persons (and other legal persons) for the purpose of pursuing some specific activity, such as different company forms (e.g. stock corporation, limited liability company, partnership, etc.) for pursuing profitable business relationship, or political parties for pursuing political activity, or associations or other like forms to pursue civil activity. Legal persons are sometimes also considered to include, and sometimes not to include, artificial creations without recognized legal personality, e.g. a spontaneous group of same-hobby followers, or branches or organizational units of recognized legal persons, e.g. a department or institution of some legal person.

By today, *company law* (in the U.S.: the law of corporations) has pretty much grown to be an independent area of law, with its own legislative acts and/or codes and rules. The same applies, to some extent, to non-profit legal persons. Private/civil laws differ from country to country as to how much non-profit legal persons are covered by private/civil law and how much they fall under the scope of a civil code or whether they have created their own legal instruments. Generally, those non-profit organizations that may primarily be in the service of public and political purposes, such as political parties, are considered to be governed by constitutional law and public administrative law. Those forms which fall closer to traditional private/civil law purposes, such as foundations, are usually covered by private/civil law. Some forms, such as associations, are equally open to be utilized for both public and private purposes, and their categorization differs from country to country, or they are partly covered by private/civil and partly by public law. The course *Comparative personal, family and inheritance law* will focus upon natural persons. Company law will be the subject matter of another course: *Comparative Company Law*; the law of non-profit organizations is not covered in-depth in this program.

Questions relating to the personal law of natural persons relate to the general legal capacity of natural persons (whether one can have rights and obligations *in general* in civil law just by existing as a human being) and to the capacity to act (whether one can exercise one's own rights in one's own name and on one's own behalf, or whether restrictions apply, e.g. due to age, insanity or other like factors). The time-factor of general legal capacity (commencement and end) and its major characteristics are also covered by this area of law.

Personal law also covers those rights of a private/civil law nature that stem from simply existing as a human being (without additional qualifying factors): these are called personality rights or (in common law jurisdictions) privacy rights. The scope of the course *Comparative Personal, Family and Inheritance Law* will, however, not extend to personality/privacy rights issues in the LL.B. program.

Property law is the traditional area of law that regulates issues in connection with ownership of things. It includes such issues as the categorization of "things" as objects in law (e.g. movable or immovable, tangible or intangible, etc.), the property rights of full ownership and restricted forms (e.g. possession, enjoyment); the commencement and end of

property rights, etc. All these questions will be touched upon in the course *Comparative Property Law*.

Property law issues in connection with nationalization and expropriation and other forms of forced changes in property due to compelling state interests (such as confiscation) are usually considered to be either on the borderline between private/civil law and public law, or are considered to fall entirely within public law (constitutional law, public administrative law, financial law, criminal law and criminal procedure, etc.). Property law issues in connection with protection of foreign investment in the hosting country against nationalization or expropriation; and against risks such as civil wars or riots are, however, usually considered to be covered by *international economic/trade law*.

Property rights can often be disposed of in the form of a contract: e.g. a contract of sale deals with ownership rights and usually physical possession of some goods. These means of providing for changes in property rights are, however, regulated by contract law and not property law. Other private/civil law changes in property may be covered in other fields of private/civil law: e.g. the effects of marriage and divorce on property are covered by family law; change in ownership due to the death of the owner is covered by inheritance law. Some forms of change of property remain within property law, such as *adverse possession*.

Intellectual property law deals with the rights and obligations relating to intellectual creations of the human mind (like literary works, poems, novels, or works in the industrial domain like inventions) in connection with their utilization or practical realization. It has two sub-categories: *copyright law* and *industrial property law*. Copyright law (sometimes also called *authors' rights*) protects works in the *literary, artistic and scientific domain*: poems, novels, dramatic works, songs, paintings, sculptures, PhD dissertations, handbooks, etc. It contains a set of rules about whether or not a creation of the human mind is protectable under copyright, about how to establish authorship, and about the rights of different actors in respect of the work. These actors are the author, other users who add to the product such as performers, publishers, producers, etc., and finally users who use the end-product, e.g. retailers of copies of the work or the general public. *Industrial property* answers similar questions in connection with creations that are mostly for industrial/commercial use. Some of these forms are widely known such as patentable *inventions* or *trademarks*. Others are rather specific, such as the *topography of microelectronic semi-conductors* (microchips). Some general

differences between copyright law and industrial property law are that copyright protects the form in which some intellectual content was expressed against unlicensed copying (hence the origin of the word: copyright was originally nothing more than literally the right to copy) and disposal of copies; whilst industrial property law protects against unlicensed reproduction/realizing of the contents of the protected procedure or product. Another important example is that copyright protection does not need registration (it is available from the time the work was created) while industrial property rights need registration.

Example II.2.1

Imagine that an engineer developed some specific spare part for an automobile engine of specific types of cars. The invention that he developed was registered as a patent. The engineer later published the most important features of his invention in a professional magazine for the car industry. If another magazine republishes the article in one of its own volumes without authorization of the author or original publisher, that will be an *infringement of copyright*, because unauthorized copying of a work in the scientific domain took place. However, the patent itself (the industrial property right) remains unaffected. However, if another car manufacturer simply takes the magazine article, and from that the engineers of that manufacturer develop and then without authorization use the same solutions in their cars as found in the article, that will infringe *industrial property rights* over the *patented invention*, because the procedure (or the product itself) contained in the patent was reproduced without licensing.

Earlier it was believed that intellectual property law is a *sub-category of property law* (hence the name: intellectual *property* law), since the author/inventor, etc. have property-like rights over their creations. Others thought that it was a *sub-category of personal law*, since some rights of owner resembled personality rights, such as the right to be recognized as author of the work. Historically speaking, the cradle of intellectual property law (i.e. XVII-th century England) was *public law*, since after the invention of printing, also of several industrial inventions, duplicating intellectual creations (printing machines) and some related important industrial activities were a royal monopoly, so that licensing questions arose as royal concessions granted to private enterprises. By today intellectual property law has pretty much been recognized as an *independent field of law* within private/civil law.

Example II.2.2

Imagine that a famous contemporary writer publishes his most recent romantic thriller, a copy of which you, as a great fan of thrillers, purchase in the local bookstore. Rights over your copy of the book fall under traditional property law. That is, if you accidentally leave your book on a public bus, you can have a claim to that copy against the public transportation company (or whoever finds it) under property law. However, just by purchasing a copy of the book, nobody would think that you

> also purchased the right to make further copies at home on a photocopier and sell them on the market; or approach a film studio that you have an offer for them to have this book put on screen; or replace the original author's name for your own name as writer, claiming that by purchasing a copy you in fact bought the right to be identified as author. All these questions would come under intellectual property law – copyright law – and not property law (or personal law for that matter).

Intellectual property law will be covered in detail by the course *Intellectual Property Law*.

The law of obligations covers fact patterns where legal obligations are created only between persons relative to that specific fact pattern (usually two); whereas in other fields of private law, subject to some exceptions, legal relations are between one entitled person and the whole world. For example, in property law the property rights of the owner need to be respected by everyone else. These latter types of legal relations are often called *absolute* because the right owner's position is absolute: it has to be respected by everyone else. In contrast, the law of obligations contains rules that are *relative*: usually between two (or more) specified people. The two main grounds for a law of obligations relationship are *contractual* and *non-contractual liability* (in common law: tort). A contract binds just those who are party to it, and apart from some specific exceptions, they are of nobody else's concern. Non-contractual liability relationship arises when someone causes harm to someone else and liability (financial liability) has to be established. For example, when a car hits a pedestrian causing them harm, questions arise like whether or not the car driver is liable for the accident, and to what extent the driver should pay damages to the pedestrian. This fact pattern is also relative only to those involved: the driver and the pedestrian. Legal obligations have been created by the accident only between these two, and unlike in absolute legal relations, others are neither entitled nor obligated in this situation.

Loss or damage is often caused by a *wrongdoing*, such as, in most cases, hitting someone with a car. The traditional notion of wrongdoing is understood as:

a) a wrongdoing by someone for which the person is *liable*;

b) which *caused loss, damage, harm or injury* to someone else;

c) in which the loss, damage, harm or injury is the *result* of the wrongdoing; and

c) for which the wrongdoer has to *compensate* the injured party financially.

The traditional term of wrongdoing is often called *delict*, after the term's Latin origin. However, more than just contract and delict, financial liability in a legal relationship relative only to certain persons may arise from other fact patterns, too.

Example II.2.3

Imagine that Liga receives an amount of money in her bank account by mistake from someone she does not even know. By some technical mistake, or the mistake of either the sender or the employee of the bank, one figure within the 24 digits of the original recipient's bank account number was mistyped, and the mistyped bank account number displayed Liga's account. Even upon moral considerations, anyone would feel that Liga should return the amount transferred by mistake. She should not be allowed to keep the money thus received. Yet in this relative relationship which exists between Liga and the sender of the money, there was *no contract*: Liga and the sender did not even know each other. There was *no wrongdoing* on Liga's side either: she did not do anything to get the money, it just, all of a sudden, appeared in her account. Thus, this case is neither contract nor delict.

The above example is often called *quasi-delict*, a situation in which no wrongdoing took place, yet other than that, the fact pattern behaves like a delict: Liga is obligated to give the money back. Quasi-delict is in fact a *sub-category* of the law of non-contractual obligations.

Thus, one way to describe the basic structure of the law of obligations is this:

Contract law	**The law of non-contractual obligations**	
	Delict	Quasi delict

The size difference between Delict and Quasi-delict refers to the fact that in practice the law of delicts has gained by far more importance than quasi-delict.

Some categories of non-contractual behavior that cause harm to someone may take both forms: delict and/or quasi delict. Such is the case of the broad category of *product liability*: the liability of manufacturers, producers etc. over injury caused by their product to third persons (persons other than those the manufacturer, producer, etc. is in a contractual relationship with).

The line between contractual and non-contractual obligations is also not uniformly the same in most jurisdictions: some categories are difficult to classify. For example the case of *wrongful negotiations* in the situation in *Example I.2.1* is sometimes characterized (categorized) as part of contract law, because negotiations took place in the course of contract formation, even if ultimately no contract was made. In other countries, wrongful negotiations are part of the law of quasi delict, since the fact that in these cases no contract exists excludes it from the scope of contract law.

The term "non-contractual obligations" is only one choice to name this area of law. Yet it seems that this is the choice that the European legislator prefers over other names (see the so-called Rome II Regulation: Regulation (Ec) No 864/2007 of the European Parliament

and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)). Common law traditionally calls the law of delict *tort law*, offering a somewhat different structure of this body of law than civil law legal systems. Others prefer to call the law of non-contractual obligations *liability law* or the *law of damages*. Note however, that these names may sometimes be misleading: as to liability law, financial liability exists under other branches of law, too, such as in financial law; and as to the law of damages, damages claims also arise in contract law and sometimes in other areas of law, e.g. labor law.

Since the course on *Comparative Contract Law* is offered as the first mandatory private/civil law course, more on this subject is discussed in that course. However, non-contractual liability (tort law) is not covered in the LL.B. (B.A.) program.

Inheritance law or **the law of succession** primarily deals with the question of passing of property and other related rights due to the death of the original owner. The two main areas of inheritance law are *intestate succession*, in which case the (US) decedent (UK: deceased) did not make provisions about the passing their property in the event of their death, and the *law of wills*. Intestate succession law primarily draws up a legal order of inheritance between the surviving relatives after the deceased/decedent, and contains some additional correctional provisions.

The law of wills deals with questions such as testamentary capacity (the capacity to provide for the event of death), formal and substantive conditions of wills, the status of changing circumstances after making a will (e.g. when there is either a change in the property disposed of in the will, or in the persons in connection with the estate of the decedent/deceased); revocation of wills; interpretation of wills, etc. It also contains correctional measures to restrict the autonomy of the testator in protecting the interests of others, e.g. to prevent the exclusion of some important relatives (e.g. a surviving spouse or children) from inheritance, or unreasonable conditions in the will.

Death itself may lead to changes in property other than just what is considered to be inheritance. For example, death may give rise to payment of a sum by an insurance company under a life insurance contract. These cases (so-called non-probate transfers) are only partly covered by inheritance law.

Succession cases are often closely connected with other fields of private law: the result of inheritance is a change in ownership, which connects it to property law. Some

instruments recognized and dealt with by in inheritance law come from contract law, e.g. a contract about inheriting in exchange for personal maintenance, or a gift given by the decedent/deceased while alive to someone (an *inter vivos gift*) are given specific importance in inheritance law. Nevertheless, issues arising out of death quite notably distinguish this area of private law from other fields.

Inheritance law will be covered by the elective *Comparative Personal, Family and Inheritance Law* in detail.

Family law deals with questions relating to the private law dimension of family and like relationships. In particular, specific issues of marriage – marriage conditions, rights and obligations within marriage, marital (matrimonial) property rights, maintenance, termination of marriage (divorce) – are considered. A specific chapter of family law deals with the rights of children within the family. Also, family law covers issues relating to private relationships that seek similar recognition as families do: cohabitation, life partnership, and the legal recognition of same-sex relationships.

Earlier in history, the main body of family law used to fall partly under personal law (personal status, marriage) partly under property law (marital/matrimonial property). However, since the XIXth century, when German legal thinkers started to group norms relating to family and marriage together, the independent character of family law has started to be recognized. Today family law is a changing body of law that has, although it has kept its overwhelmingly private law character, incorporated public law provisions as well, such as those relating to the legal treatment of domestic violence, the enforcement of children's rights, state supervision of guardianship within the family, etc.

Family law will be covered by the elective *Comparative Personal*, *Family and Inheritance Law* in detail.

Labor law is a relatively new area of law compared to traditional private/civil law fields. The categorization of labor/employment relations within private/civil law is not as widely recognized as those of the previous legal fields. Some aspects of an employment relationship are undeniably *private* in character, since the relationship between a private employer and employee usually rests on an *employment contract*, which has grown out of the private law notion of contract law. Nevertheless, the role of the state in employment relations is much more than just being the legislator for labor relations, while sometimes the state can act as employer (see, e.g. civil servants). Illustrations of public law regulations in

labor law are many. For example, through its unemployment agencies the state itself is active in employment relations. Again, through its system of state subsidies or tax exemptions, the state encourages specific labor relations over others, or employment in one sector over others. Moreover, through its system of labor supervision it monitors employers to make sure that employee rights are protected (for safety, social security and other like reasons). Additionally, through its fiscal system the state burdens both employers and employees from payments made within the employment relationship. Besides, the state provides for specific social security services such as pensions, the contents of which are linked to employment relations in a variety of ways. Finally, the state interacts in protecting labor rights such as the right to strike, provision for holidays and resting time for employers, etc. More than any other area of private law, labor law is the one which is the most complex in its nature and incorporates both private law and public law features.

Labor law does not form part of the LL.B. program.

I. General part: issues commonly covering every segment of private/civil law.
II. Special part: issues by categories, depending on the subject matter of the legal relation. The list of issues in these categories is by way of example only.

Personal law (law of persons)			**Property law**	**Intellectual property ("IP") law**		**Law of obligations**		**Inheritance law/Succession**	**Family law**	**Labor law**
Natural persons (human beings) Issues: legal capacity of natural persons; personality (privacy) rights and remedies	***Legal persons and other artificial persons without legal personality***		Issues: classification of things (e.g. real or personal property). Rights and obligations of owners and other proprietors (e.g. possessors). Forms of acquisition of property. Commencement and end of property rights. Public law aspects: nationalization, expropriation and other forms of deprivation of ownership and property rights because of compelling state interests.	*Copyright law* Issues: protection of authors in respect of original literary, artistic and scientific works. Rights of authors in respect of their works *vis-à-vis* users (performers, publishers, producers, simple end-users, etc.) and rights of users *vis-à-vis* each other and the author.	*Industrial property law* Issues: rights of creators of a variety of intellectual works for commercial and industrial use. E.g.: patents, trademarks, appellations of origin, topography of microelectronic semi-conductors, etc. Rights and obligations of creators and of all interested parties regarding different forms of utilization of the protected work.	*Contracts* Issues: formation, performance and termination of contracts, rights and obligations of the contracting parties. Liability and remedies for defects in performance of the contract. Specific regulation of a variety of specific contracts.	*Non-contractual obligations (tort law)* Issues: liability for illegally causing harm or damage to someone. Determining the level of care, causality, the amount of damages to pay and other possible remedies, excuses for causing damage, etc.	Issues: the passing of property and other rights upon death, either under a will or under intestacy law. A brief discussion of non-probate passing of property and of estate administration.	Issues: rights, obligations and legal implications in connection with the family: marriage, divorce, marital property, maintenance, child support. Legal recognition of other forms of relationship: life partnership, cohabitation, etc.	Issues: rights and obligations of employee and employer; e.g. working conditions, pay, holidays, commencement and termination of employment, etc. Strong public law aspects for state employees working under command (e.g. civil servants, members of armed forces, etc.) Also: public law issues affecting society at large, e.g. regulation of strikes.
	Business entities (companies, corporations of various kinds). Issues: establishing, managing, functioning and dissolving business entities. This area of law has, by today, individualized itself from the law of persons and is called Company Law or the Law of Corporations/Corporate Law.	*Non-profit organizations* (e.g. civil and other non-profit associations; foundations; political parties, etc.) Issues: establishing, managing, functioning and dissolving non-profit organizations.								

Not all of these categories of law serve a business function. Eventually, personal law of natural persons and of non-profit organizations, non-contractual liability law, inheritance law and family law do not serve business. It is, for example, not possible to get married or inherit on a professional profit-making basis, even if huge sums of money may be involved in any matrimonial relationship or estate. The rules of family law or inheritance cannot be applied in a profit-making business fashion, even if from time to time extreme cases emerge in which young people – of both sexes – may turn out to be marrying elderly parties with the intention of surviving them and getting rich from their estate. The rules of these fields of law do not serve business objectives but, rather, important *social purposes*.

The main legal instrument of conducting business is, however, *contract*. Contract law can also perform non-business purposes. *Company law* creates the preconditions for conducting business; thereby it is *entirely at the service of business*. *Intellectual property law* also strongly serves business purposes, albeit some aspects of activities governed by IP law, such as artistic creation, are not necessarily linked with business purposes. Traditional property law serves *much broader social interests* than just conducting business, although it is possible to utilize the regulation of company law *entirely* for business purposes, e.g. real estate agencies.

Besides the above categorization, both practice and jurisprudence have developed other categories of the law. The terms *commercial law* or *trade law* or *business law* deserve special attention. Although some smaller differences exist between these categories, they nevertheless come from the same idea. They group together those areas of law that are *relevant for conducting a professional profit-seeking activity*. A commercial lawyer or business lawyer would most often handle *all aspects of law* that his / her client presents in a business capacity, be it of a public or private law nature. Aside from business related fields of civil law outlined in the previous paragraph, business law covers public law aspects of conducting business, such as *competition law* (state supervision of business competition in order to safeguard that competition remains fair and free of distortions), *financial law* (esp. tax law), *public administrative law* to the extent business activity is administered by the state, etc.

Note that models for systemizing private/civil law based upon *other criteria* than subject matter also exist; see, for example, the above discussion – after the table – on how some parts of the law are at the service of business whilst others serve little if any business

function. Yet another aspect of categorization is one which focuses on the legal source: whereas everything that is in a separate civil code is considered to be traditional private/civil law (e.g. personal law of natural persons; traditional property law; law of obligations; inheritance) while other parts of law codified in separate law sources (codes) form separate fields of law (e.g. company law where there is a separate companies code; family law where there is a separate family law code; labor law with labor codes, etc.). Other models of categorization are based upon the nature of the legal relationship from the point of view of being *absolute* or *relative* (discussed above). Nevertheless, the model presented above is probably the most useful in giving orientation in what is the special part of private/civil law today.

1.3 Sources of private law

Three different systems call for independent recognition in connection with the sources of private law. By today, the line between these three systems can not be sharply drawn.

In *civil law countries* the *major sources* of private law are *civil codes*. In these countries the underlying idea is that it is possible, through legislation, to enact a single-piece code that covers all (or as many as possible) fields of private law. Living examples of the civil law model are the 1804 French Civil Code (earlier called the *Code of Napoleon*), the Austrian Civil Code of 1812 (*Allgemeines bürgerliches Gesetzbuch*: AGBG), the German Civil Code (*Bürgerliches Gesetzbuch*: BGB) of 1900 or the Swiss Civil Code of 1904 (*Zivilgesetzbuch* - ZGB). (For historical perspectives from the Code of Hammurabi through the Roman Corpus Juris Civilis or a list of religious codes regulating private law relations such as the Canons of the Apostles, the Qur'an and Sunnah or the Indian Law of Manu, also for early industrial age codifications, you are kindly referred to your studies in Legal History.) The civil law concept has been most prominent in continental European countries (other countries following the Napoleonic model included Italy, the Benelux countries, Spain, Portugal, Greece, etc.). The only area traditionally unaffected by the civil law movement in Europe was Scandinavia. However, especially through influence in colonial times, in a number of Latin-American, African and Asian countries the civil codes of the colonizing nations were enacted or adopted. In other non-European countries, the civil law codification movement was followed voluntarily. By today civil codes apply in such countries outside of Europe as Turkey, Japan,

Taiwan, South Korea, the Philippines, Thailand, Indonesia and a variety of Latin-American and Sounth-American countries. Civil law traditions sometimes appear as islands in common law oceans: e.g. in the U.S.A., Lousiana follows the civil law method; as does Scotland within the United Kingdom. In Canada civil law is most prominent in Quebec.

However, even these countries differ somewhat as to whether some specific (usually newer) fields are regulated within the civil code or separately. For example labor law or intellectual property law are often contained in separate pieces of legislation; and family law may sometimes be regulated at least partly outside the scope of civil codes. The reasons are that sometimes these fields of private law emerged much later after the original codification of civil law and are often contained in international conventions, such as the basic corpus of intellectual property law. With other areas, such as labor law or family law, the public law features often called for legislation outside of the scope of civil law.

Although the main sources of (civil) law are civil codes that systematically address as many legal issues in connection with the regulated subjects as could possibly be foreseen by the legislator, and although there is no system of precedent, even in civil law countries judges play some role in developing the law itself. Firstly, as an exception from the lack of precedents in civil law countries, some higher courts do have the power to decide on important interpretational questions that courts are obliged to follow in future cases. The magnitude of these compulsory decisions is, however, usually insignificant compared to judge-made law in common law jurisdictions. Court decisions that are mandatory for ("binding on") courts in future cases are said to have *binding authority*. The second option for judges to develop the legal system in civil law jurisdictions and thereby to be identified as sources of law is through establishing a *non-binding uniform judicial practice* in interpreting and / or applying certain provisions of codified law. Although in civil law countries as a general rule court decisions do not have binding authority for future cases, courts nevertheless tend to pay attention to past judgments in connection with interpreting / applying the same provisions. Thereby, a lawyer may successfully rely upon and cite to the past courtroom practice of the same provision in a given case, because judges tend to prefer harmony in their judicial decisions, even though past decisions are not formally binding for future cases. This phenomenon is wrapped up in the term that court decisions have *persuasive authority*, because even though they do not bind the courts, they do persuade the

judge to interpret or apply the law in a similar fashion as in previous cases. Even very tight and extremely precise codes need judicial interpretation, usually because there may be cases that the legislator did not think of when passing the code, or because the more a certain subject is overregulated, the higher the chances are that the law will contain some contradictions or ambiguities that need interpretation and clarification by the judge.

Finally, sometimes *jurisprudence* itself, legal literature, scholarly writings and academic opinion are considered to constitute a very specific source of law when either interpretation or gap-filling in connection with codified law is needed. For example in Germany it may easily happen that the theoretical academic opinion of a well-known scholar or passages from a widely recognized commentary will be decisive in a given case before a court, even though jurisprudence formally does not have legislative powers. Jurisprudence also helps to systemize and understand codified law – this is especially true in connection with civil law.

Quite the opposite of the civil law system are *common law jurisdictions*. Sources of law – and of private law, too – were primarily precedents, whereas court decisions had binding authority for future cases. (For the historical reasons for common law to have developed in the way it did, you are kindly referred back to your studies in Legal History.) Since common law originated from England, former British Empire countries usually follow the common law tradition: Ireland, the United States (excl. Louisiana), Australia, New Zealand, South Africa, Canada (except French-speaking Quebec), India, Pakistan, Malaysia, Singapore, Sri Lanka, Ghana, Cameroon and Hong Kong.

By today, in all common law countries the rate of statutory law compared to judge-made law has significantly increased. In fact, statutory law slightly takes the place of judge-made law. Nevertheless, lawmaking through legislation in common law countries is quite different from law-making in civil law countries. In private law this means that while in civil law countries a general and systematic civil code is aimed at covering private law as widely as possible, in common law countries separate acts or codes exist in connection with the different fragments of private law. What is wrapped up in a civil law country in a single civil code is often contained in a number of acts in common law countries, all covering specific segments of their designated subject matter. As an example, while the major body of family law in Germany and France is to be found in their respective civil codes, in England relevant

acts include the Matrimonial Causes Act, the Divorce Reform Act, the Matrimonial and Family Proceedings Act, the Married Women's Property Act, the Children Act, the Guardianship of Minors Act, and some specific aspects of family law would be covered by such less obvious pieces of legislation as the Rent Act, the Housing Act or the Administration of Estates Act. All these questions would, in a civil law country, be resolved under the same civil code.

Another typical feature of common law legislation is that it is less sensitive to jurisprudential categories. For example private law matters of inheritance law are usually governed in the same civil code in civil law countries where all other *private* law matters are governed. However, such issues as court procedure or other public law aspects are usually outside of the scope of civil codes. As a counter-example, the federal-level non-compulsory code of inheritance in the United States is called the Uniform Probate Code. This code is not part of any overall civil code, because there is none. On the other hand however, it provides a complex coverage of inheritance, dealing not only with private law aspects of inheritance but also with such public aspects as procedure (probate and administration of estates) or apportionment of estate taxes.

The role of jurisprudence is quite different in common law countries than in civil law countries. Originally, the work of jurisprudence was done by judges: the sophistication of legal arguments in case law often resembles the style of continental legal writers. As a result, you are likely to find less traditional jurisprudence in common law countries than in civil law, and even what exists is less considered with the same value in courtrooms than their civil law counterparts.

The third group of legal systems is considered to form a *hybrid* or *complex* group, something in between civil law and common law. Often the legal system of Communist countries (the so-called Socialist legal systems) and even their Post-Communist versions display elements of both basic systems. Traditionally the codification movement was strong in a number of Post-Communist countries (especially in Central and Central-East Europe) before Communist rule was introduced, and civil codes existed. However, Communist rule through its centralized lawmaking technique often relied on authoritative decrees rather than complex codes. Also, the importance of private law relations was clearly inferior to state and collective relations, which rendered civil codes practically inferior compared to other

sources of law. Finally, hardcore social and communist values often quashed the market-oriented values of civil codes. As a result, even if civil codes existed in a number of Communist/Socialist countries, the most important rules were often contained in decrees and other sources of law. After the fall of Communism, the codification movement has slowly started to gain some impetus in most of these countries. The situation by today usually is that while there may be a civil code in most of these countries, entire fields (e.g. family law) or specific questions are regulated separately. The *coverage of civil codes* is clearly narrower than in traditional civil law countries. On the other hand, the *importance of judge-made law* does not exceed that of civil law countries. The *importance of jurisprudence* remains somewhere halfway between its low reputation in common law countries and its distinct recognition in civil law countries. Because universities were the basis of "independent thinking" during the Communist era, no formal importance whatsoever was attached to jurisprudential works. Also, since Communist parties wanted to secure loyal academic staff, loyalty was often a more important selection criterion than professionalism. This was especially the case in civil law after the Communist concepts of private relations were introduced and most university chairs and academy departments re-organized in almost all Communist countries. As a result, both the professional sophistication and the availability of in-depth academic opinion in most of these countries remain below the level of jurisprudence in traditional civil law countries. Jurisprudence in these countries is yet to claim the recognition that has been achieved in traditional civil law jurisdictions.

So far we have discussed domestic sources of private law. However, the international sources of private law also need to be touched upon. As a general rule, it can be said that the more traditional a private law field is, the less likely the success of international unification is. Such traditional areas as personal law, property law, contract law, the law of non-contractual obligations (tort law), inheritance or family law have always remained primarily within the competence of national legislators, because it is difficult to make the necessary compromise between centuries old national solutions on the international scene. Either in *European Law* or in *Comparative Contract Law* you will learn about the European struggles to unify just the *general principles* of contract law. Exceptions to this main rule are *international aspects* of business, in which economic interests were stronger than national resistance to compromise, and there have been some very well working international conventions. E.g. a

convention exists in the field of contracts for the international sale of goods (the United Nations Convention on Contracts for the International Sale of Goods, in short: the *CISG*, or the *Vienna Sales Convention*), albeit it leaves purely domestic sale of goods unaffected.

The only field of significant international legislation in private law was where there had hardly been considerable traditional lawmaking before. This is the area of intellectual property law, which, with a little exaggeration, started off as "international" from the beginning. In the mid XIX century, especially when international uses of intellectual creations called for legislation, work commenced immediately on the international level. The amount of national intellectual property legislation that had existed before was insignificant and often did not offer a solution to the problems that arose by then. The 1883 Paris Convention on industrial property and the 1886 Berne Convention in the field of copyright were the first two major sources within intellectual property, and they were immediately international: in the laws of most countries, there was nothing significant that they would have replaced. The reason is that when technology facilitated mass duplication and reproduction of intellectual creations, the need arose to tackle these issues on the international scene at the same time when it arose within domestic contexts. With the help of technological developments, the uses of most intellectual creations swept through borders: sheet music, graphic designs of industrial works, printed reproductions of images, translations of literary works all spread from one country to the other quite easily, often without compensation for the original author or inventor. Thereby, legislative work could be commenced internationally. The same is true of other issues in relation with recent technology: regulation of a variety of private law relations that required technical development and which was important in international relations could commence on the international level, even outside of IP (e.g. railroad transport, carriage by road and by air, etc.)

1.4 Relationship with other branches and fields of law

In real life the legal problems of a specific fact pattern *seldom present themselves as clearly focused* on any one specific category of law as jurisprudence draws the line between the different branches and fields of law. For example in an inheritance case, besides private law questions of succession, inheritance taxes need to be dealt with; civil procedural law may

govern the procedural aspects of the procedure before the notary public or probate court or any other such entity connected with probate. Public administrative law may govern specific questions requiring the assistance of public administration, such as recording the change of ownership of the real estate of the deceased in the real estate registry. It may become necessary to determine the country whose law applies to the case, if a foreign/international element occurs in the fact pattern, such as assets of the deceased abroad, or beneficiaries or heirs residing in another country. All these aspects fall outside the scope of private/civil law and require knowledge of other branches and fields of law. Yet in the practical setting in which they arise to the client in reality, they are all connected with his/her "inheritance case".

It is therefore useful to shortly explain and sum up how other branches and fields of law are in connection with civil law fact patterns.

International law (public international law) is relevant to the extent that some of the subject matters within our subject are governed by international sources of law: international conventions or treaties, international customs (customary international law), international usages, etc. Dealing primarily with relations between states (also international organizations), international law provides the form and structures in which traditional civil law questions may become relevant. The content of an international legal instrument may well be traditionally private. As an example, states may agree (as they eventually did) that an international convention should be concluded for transactions involving contracts for the international sale of goods: that is, when for example a Mexican seller sells products to a Latvian buyer (see: The United Nations Convention on Contracts for the International Sale of Goods). International law provides the form of an internationally harmonized set of rules; it contains rules on how an international convention can be adopted; its incorporation into and its place within national law and within the hierarchy of legal norms, etc. The contents of the convention, however, overwhelmingly belong to contract law. Also, there may be conventions relevant for family law (we will discuss these in family law). Other conventions may prohibit certain acts, breach of which may lead to a non-contractual liability (tort) claim. Yet another body of international law relates to protection of foreign investments, which, *inter alia*, tackles the issue of nationalization of foreign investments within the hosting country – and soon we are discussing property law issues. Other conventions define basic human rights, and prescribe that the signatory states must provide for equality or

universality of general legal capacity of natural persons – and we soon arrive at personal law within private / civil law. Other international conventions relate to protection of creators and authors of literary, artistic and scientific works, and we are soon discussing copyright law, etc.

Those international sources of law that are in connection with international business activity (overwhelmingly contract law; also intellectual property and property law – foreign investment) are dealt with by lawyers under the terms *international business / commercial / trade law* (albeit the coverage of international business / commercial / trade law is greater than just these sources of international law). These issues will, however, be dealt with at length in other courses.

Some parts of traditional international law (such as law on diplomacy, or humanitarian law or international criminal law) are largely irrelevant to our subject matter.

European law itself is relevant to private / civil law relations in at least *two dimensions*. Firstly, European law may itself contain specific private / civil law provisions that directly regulate private law matters. At this stage, however, the body of traditional private / civil law legislation is diminishing compared to traditional public law content. Examples may relate to directives in intellectual property law; or ongoing efforts to harmonize general contract law; or specific aspects of the right of establishment within company law. The other dimension in which European law interacts with private law matters is that it regulates several important aspects of the state-private individual relationship if it is in connection with the free movement of goods, services, persons or capital within the European Union. As an example, the provisions relating to a sale of goods transaction from one Member State to another are provided by contract law; however, European law regulates the public law conditions within which the transaction can be carried out: e.g., are there inspections at the border, should customs, duties or other charges be paid; should specific administrative permissions relating to the products (e.g. from sanitary considerations) be obtained? This directly affects such private law issues in the contract itself as the price, the time, place and method of performance, etc.

Or, while a marriage itself is considered to be entirely a private law issue, in reality the prospects of a marriage between nationals of different countries wishing to settle in the same EU Member State are very much predetermined by regulation of the free movement of

persons. EU level legal instruments cover the conditions and obstacles a state may set up if foreign nationals wish to stay, settle, be employed, retire, receive social care, avail themselves of educational facilities, etc. on its territory.

Questions of European law will be covered in separate courses at length.

Constitutional law is relevant to private / civil law to the extent that the basic principles of some of the most important civil law rights originate in the constitution. Also, constitutional law sets the framework for legislation, including private law legislation.

Public administrative law (the law of public administration) contains public law rules that govern the functioning of public administration, from general issues of public administration down to the very specifics of each kind of office or government service or institution within the body of public administration. Very often a civil law case will have several aspects that lead to public administrative law. For example, ownership of real property requires, in most parts of the world, registration by a public authority in a register maintained by the government. Rules of the land register are contained in public administrative law. Another example is that in some countries the registry of industrial property rights is maintained by the state (in other countries this is done by private organizations). As to family law, the public registry of marriage is also governed by public administrative law; and public authorities that supervise the rights of children or persons under guardianship are also governed by public administrative law.

At any instance when some public authority intervenes in a civil law case, the procedure, rights and obligations of that authority (and of the private clients that appear before the public authority) are regulated by public administrative law. More on this subject, however, is dealt with by the course *Comparative Constitutional and Administrative Law*.

Financial law is relevant mostly for its provisions on taxation – this field of financial law is called *tax law*. Often transactions in civil law involve the exchange of valuables which appears as *income* on the side of one of the parties. The state has the authority to tax this income. For example sale of real estate, or distribution of an inheritance, or receiving copyright fees or industrial property licensing fees all involve questions of taxation. The same exchange of valuables may appear as *expenses* on the other side, which may reduce the income of the other party in return. Forms and types of taxes and other duties – e.g. customs if goods arrive from abroad in an international sale of goods contract – are regulated by financial law.

The functioning of the revenue service or taxation authority, the rights and obligations of the revenue service and the client before it, also the procedure itself is governed by public administrative law. International aspects of taxation are governed by *international tax law*.

Private international law (PIL) deals with aspects of any private law fact pattern that contains some *internationality / foreign element*. Questions of PIL arise from the fact that not all cases are entirely domestic. It may be possible that a foreign national wants to conclude a contract and his / her legal capacity, which is a necessary precondition of concluding the contract, is in question. Should it be decided by the laws of his / her nationality or by the laws of the country in which the contract is to be concluded; or by some other law, i.e. by the one in which she / he has habitual residence? Another example may relate not to a question of capacity but a question of contract conclusion or performance. Imagine that a Latvian businessman concludes a contract with a Swedish business entity about some joint investment in Russia. The contract is signed in Estonia during a business fair. What law would decide such questions whether or not the contract needs to be signed by witnesses or an attorney or not; or the level of care during performance; or the time and method of performance; etc. Would it be the law of Latvia, Sweden, Russia or Estonia? Also: if a legal controversy arises, should the plaintiff turn to a court in Latvia, Sweden, Russia, Estonia or in some other country? Or think of another example: a Latvian immigrant to the United States dies and leaves his European holiday home located on the French Riviera to his Latvian relatives. In which country should questions of inheritance be decided, and the inheritance law of which country should apply?

Questions of PIL can be divided into two. One part of these questions relates to *procedural aspects*: courts and other kinds of forum (arbitral tribunal, notary public, etc.) *of which country* can proceed in the given case? This is called the issue of *international jurisdiction* (or shortly: jurisdiction): which country has jurisdiction over the case? Procedural questions also relate to recognition and enforcement of foreign judgments: if the court of another country had the right to proceed, can the judgment be recognized and enforced abroad?

These procedural questions (jurisdiction, recognition and enforcement) are also called *International Civil Procedural Law*, and since within the European Union these questions have

been resolved by a number of legal instruments, within the EU this body of law is called *European Civil Procedural Law* (European Civil Procedure).

The second group of PIL questions relates to issues of determining the country whose law applies to the case. Briefly this is the question of *applicable law*. Since in these cases the different laws of the different countries contain different (conflicting) solutions, this area of law is often called *conflict of laws*.

A separate course on private international law in the LL.B. program offers in-depth insight to the subject.

Some other categories of law usually represent a mixture of different branches and areas of law, some of which come from private / civil law, others from other areas of law. For example *Agricultural law* relates to questions of agriculture and rural development, and covers such public law issues as agricultural subsidies or registration questions within agriculture (such as land or agricultural products), but also covers private law issues such as specific contracts frequently used within agriculture, or property law.