Introduction to the Legal System - First Partial

1° BIEM AND BIEF

Written by:
Alessandro Ferraris

LAW AND THE STATE

DEFINITION OF LAW: both IUS (diritto) AND LEX (legge).

- **Ethymology**: The word "law" comes from the latin term "directum", meaning straight or just. Various languages, such as Italian and French have adopted this word.
- **Concepts:** "Ius" in Latin translates into Law, leading to words like Justice, Jurisdiction, and Jurist. There's a debate whether law is "what has been commanded" (IUS QUIA IUSSUM) or "what is just" (IUS QUIA IUSTUM).

There 2 different views of law, such as:

- **Legal Naturalism**: Ancient view where **law is regarded as a natural order where everything has a rational place and purpose**, possibly divinely influenced.
- **Legal positivism**: Modern view where laws are seen as **established by a legal authority**. This view dominates contemporary legal discourse and was notably developed by **HANS KELSEN** (Hans Kelsen was an Austrian legal philosopher who lived from 1881 to 1973. He is best known for developing a very influential version of legal positivism, an approach that separates law from morality and politics. **Kelsen believed that law should be understood purely as a system of norms, without mixing it with ideas about what is ethically right or wrong.** His most famous contribution, the Pure Theory of Law, argued that **law is a hierarchy of rules**, where each rule gains its validity from a higher rule, ultimately leading back to a fundamental basic norm, or Grundnorm. According to Kelsen, **what makes a rule legally valid is not whether it is just or good, but whether it fits within this structured system.** In this way, he refined legal positivism by insisting that legal analysis must be “pure,” meaning focused only on the internal logic of law itself, free from external influences like politics, morality, or sociology. His work deeply shaped modern legal thought and constitutional theory.)
- **The formation of national states**, which **began in the early 18th century,** had a huge impact on how political power was exercised and how private law developed. Before this period, power was often fragmented among local lords, religious authorities, and different regions. But as national states started to form, sovereign entities like absolute monarchs or, later, democratic parliaments became much stronger and more centralized. **They needed clear, uniform rules to govern increasingly unified territories, and this pushed them to make more direct political decisions that would apply across an entire nation.**
- **Private law, which deals with relationships between individuals like contracts, property, and family matters, was especially shaped by this trend.** National rulers and lawmakers created unified codes and systems of private law to replace the many local customs and traditions that had existed before, aiming for legal certainty, predictability, and greater control over economic and social life within the state. In short, the rise of strong national governments led to the systematic and centralized development of private law as we know it today.
- The **"Westphalian Paradigm"** refers to a system of political organization that came into general agreement after the Peace of Westphalia in 1648. This event marked the end of the Thrity years' war in Europe. The **key ideas** analyzed in this paradigm are the following:
    - **State Sovereignty**: The Westphalian paradigm established the principle that **each state has supreme authority over its own territory and internal affairs.** No external power, whether another state, a religious authority, or an international organization, can lawfully interfere in the domestic matters of a sovereign state. This principle became the **cornerstone of the modern international system.**
    - **Domestic Law**: *Within this sovereign territory*, the **government has the exclusive right to legislate, administer, and judge**. The **creation** and **enforcement** of domestic laws are **fully under the control of the state itself**, meaning that internal governance, including civil, criminal, and administrative matters, is handled independently of any external influence.

- **International Law**: Although states are sovereign and independent, they can voluntarily enter into agreements with other states through treaties or alliances. These agreements are legally binding but rest on the voluntary consent of the states involved. International law, therefore, respects state sovereignty while creating a framework for cooperation, diplomacy, and peaceful coexistence.

2) COMPARATIVE LAW:

- **Comparative law** is a discipline that **studies the differences and similarities between laws of different nations.** It helps to understand how laws function in different national concepts and helps in the construction of both national and international laws.
- **Comparative Law is NOT Foreign Law:** Foreign law refers to the legal system of a country other than one's own country, used in legal cases involving foreign elements (**comparative law is about analysis across systems**, while foreign law is about understanding a particular system outside your own)

Comparative law and foreign law are related but different concepts in legal studies.

- **Comparative law** is the academic discipline that studies and compares the laws of different countries or legal systems. Its **goal** is to understand how legal rules, principles, and institutions differ across cultures, why those differences exist, and what they reveal about law in general. **Comparative law looks at multiple systems side by side, analyzes them, and often tries to find general patterns or lessons that can be applied elsewhere.**
- **Foreign law**, on the other hand, simply refers to the **law of a country other than your own.** When you study foreign law, you are focusing on the rules, procedures, and institutions of a specific country, without necessarily comparing it to others.
  - **For example**, if an Italian lawyer studies only the French civil code, they are studying foreign law. But if they compare the French civil code with the Italian civil code to understand similarities and differences, they are doing comparative law.

- **The AIMS of COMPARATIVE LAW are:**
- **AID TO LEGISLATURE:** it serves as a tool to help lawmakers understand different legal systems which can be useful in crafting new national or international laws.
- **ACADEMIC DISCIPLINE:** comparative law is studied in universities to deepen understanding of global law systems
- **UNIFORM LAW DEVELOPMENT:** studying comparative law can push efforts to standardize law across countries, making legal interactions easier and smoother.
- **HISTORY OF COMPARATIVE LAW:** the historical **birth of comparative law** is the International Congress of Comparative Law which was held in **1900**.
- **THE FATHER OF COMPARATIVE LAW (ERNST RABEL):** Ernst Rabel was a German legal scholar born in 1874 who is often called the father of modern comparative law. He revolutionized the way legal scholars approach the study of different legal systems by insisting that **comparison must be systematic, scientific, and based on a deep understanding of each legal culture**. Rabel believed that **studying foreign legal systems was not enough on its own**; what mattered was carefully comparing how different societies solved similar legal problems, in order to find broader patterns and even propose unified legal solutions where possible. His most famous work, The Conflict of Laws: A Comparative Study, showed how different countries handled issues like contracts and obligations across borders, and it influenced both European and American legal thinking.
- **There are multiple methods used by Comparative Law to be as much effective as possible, such as:**
- **The Historical Comparatist Approach:** this method focuses on the historical and cultural roots of legal systems. It seeks to understand how legal traditions developed over time and how they

influence current laws.

- **The Functionalist Approach:** this method looks at laws in terms of their functions and how they solve specific problems, without looking at the historical background.
- **The Theory of Dissociation of Legal Formats:** it helps understand the complexities within different legal systems, by acknowledging that 1) Legislation, 2) Judicial decisions and 3) Scholar's opinions might diverge within the same legal system. This theory allows comparative law scholars to analyze and compare these discrepancies across different jurisdictions.
- **Micro-Comparison:** this method of comparing legal systems relies on operational solutions to address real-world problems and practical cases.
- **Macro-Comparison:** in contrast with micro, macro looks at broader legal frameworks. It compares national laws by considering their constitutional and institutional characteristics, as well as the overall legal culture in each system.

3) INTERNATIONAL PRIVATE LAW:

- **LEGAL FAMILIES:** groups of legal systems in different nations that share common features and historical roots (ex-neo-latin countries share the same roots and have similar civil codes)
- **Renè David's Classification:** Renè classified legal systems around the world into families based on shared concepts and characteristics. René David was a French jurist and a major figure in the field of comparative law during the 20th century. He is best known for his work in classifying the world's legal systems into major families based on their fundamental characteristics. His most influential idea was the division of Western legal traditions into two main families: **the civil law family and the common law family**. According to David, **civil law systems**, which **originated mainly from Roman law** and developed strongly in continental Europe, are **based on comprehensive written codes and a systematic approach to lawmaking.** *Common law systems*, on the other hand, which *developed in England and spread to countries like the United States, rely heavily on judicial decisions, case law, and the principle of precedent rather than on comprehensive legal codes.* René David's classification helped legal scholars and practitioners understand that despite differences among individual countries, legal systems in the West could be grouped into broader families based on shared history, sources of law, and methods of reasoning. His work made it easier to study, compare, and even harmonize different legal traditions, and it remains a foundation of comparative legal studies today. He identified 2 main families within Western Legal Tradition:
- **COMMON LAW:** In Common Law, the **main concept is precedent**, meaning that decisions made by higher courts in past cases guide the outcomes of future cases. Judges play a central role in shaping the law through their interpretations and rulings, and written statutes are important but often interpreted in light of previous court decisions. **Law develops gradually, case by case**, with an emphasis on practical solutions and judicial authority.
- **CIVIL LAW:** In Civil Law, the **main concept is the written code**, a **comprehensive set of laws** (The concept of comprehensive laws refers to laws that are written down in a complete, organized, and systematic way, usually collected into a legal code. These laws are meant to cover all the main topics and situations that could arise in a specific area of law, such as contracts, property, or criminal behavior. In systems based on comprehensive laws, like Civil Law systems, lawmakers try to create a full set of clear rules in advance, so judges and citizens know exactly what the law says without needing to invent or guess at new rules for each individual case) that judges must apply directly to cases. Judges have less creative freedom than in Common Law; they are mainly expected to interpret and apply the codes and statutes according to general principles. Legal reasoning focuses more on abstract, logical structures defined by legislation rather than on previous judicial decisions.
- **LEGAL TRADITIONS:** It is NOT like legal families, legal traditions focus on the cultural practices that influence legal reasoning in different nations. In short, **a legal family classifies legal systems by how they work, while a legal tradition explains why they work that way, tracing the**

cultural and historical background behind them.

- The **concept of legal traditions refers to the broader historical, cultural, and philosophical foundations that shape how a legal system understands law, justice, and the role of legal institutions. A legal tradition is not just a collection of rules; it includes deep ideas about what law is for, how it should be made, and how it should be applied.** Legal traditions develop slowly over centuries and are influenced by religion, political structures, social habits, and economic practices. They are about the spirit and mindset behind the law.
- **Legal families**, on the other hand, are more **technical groupings of legal systems based mainly on their structure, sources of law, and method of legal reasoning**. While a legal family organizes systems by concrete similarities—such as whether they rely mainly on codes or judicial precedents—a legal tradition explains why those systems developed the way they did, looking at the deeper roots behind the legal techniques.

- **Mixed legal systems:** Some countries such as Scotland, South Africa or Quebec have **legal systems which combine elements from multiple legal traditions and legal families,** having a blend of Civil Law, Common Law and other indigenous legal practices.
- **International Private Law (or CONFLICT OF LAWS):** it is also **known as conflict of laws**, it addresses **situations in which legal issues involve more than one country and it determines which legal system and which laws are applicable.** International private law, also called conflict of laws, **deals with legal disputes that have a connection to more than one country**. It answers questions like which country's laws should apply, which court should hear the case, and whether a foreign court's decision should be recognized and enforced.
- **MAIN CONCERNS OF INTERNATIONAL PRIVATE LAW:** It mainly **concerns private relationships, such as contracts, marriages, or inheritance, when the people involved come from different countries or the situation crosses national borders**. International private law does not create uniform rules for everyone but instead gives methods for deciding which national law is the right one to use in each case.
- **EXAMPLE:** There is a contract between a french and german party in Italy, in this case, international private law is used to determine which laws we should apply.
- **EU regulations:** For EU state members many aspects of international private law are unified under EU regulations, which help standardize the rules across member states.

4) UNIFORM LAW:

- **DEFINITION:** Uniform law **aims at making laws and regulations consistent across different countries, to simplify and harmonize legal interactions from different places**. Uniform law refers to a **set of legal rules that different countries or jurisdictions agree to adopt in the same or very similar form, with the goal of creating consistency across borders**. It is designed to eliminate differences between national laws in specific areas, making international transactions or relationships easier and more predictable. Unlike international law, which governs relations between states, **uniform law works within domestic legal systems by harmonizing internal rules based on shared international agreements, model laws, or conventions.**
- A **good example of uniform law** is the United Nations Convention on Contracts for the International Sale of Goods (**CISG**), which provides a common set of rules for business transactions between companies in different countries.
- **HOW? WITH LEGAL TRANSPLANTS AND CONVENTIONS:** Legal transplants involve transferring a law from one country to another with minimal modifications. *Conventions are formal agreements or treaties between countries that agree to adopt the same legal standards.*
- **Legal transplants are the transfer of legal rules, principles, or entire systems from one country to another**. They happen when a country voluntarily adopts foreign legal solutions because they seem better suited to modern needs or because of historical, economic, or political

influence. Legal transplants can be partial, where **only certain rules are adopted**, or full, where **whole areas of law are imported**. Their **purpose** in relation to uniform law is to spread successful legal ideas across different countries, helping to create more similar legal systems without necessarily having a formal international agreement.

- **Legal conventions**, on the other hand, are **formal international agreements or treaties where multiple countries come together and explicitly decide to adopt common legal rules, usually in a specific area like trade, transport, or human rights**. Conventions are negotiated multilaterally and are binding once countries ratify them. Their role in promoting uniform law is more organized and official, as **they create legally standardized frameworks that participating countries must incorporate into their national systems.** The difference between them is mainly in the process: legal transplants are often informal, one-sided, and voluntary by a single country, while legal conventions are formal, collective, and based on negotiated agreements between multiple states. Both aim to reduce differences between national laws, but conventions do so through international cooperation, while transplants rely more on imitation or borrowing.
- **PROBLEM WITH LEGAL TRANSPLANTS:** There is potential for a "rejection crisis" which occurs when the legal system of a country receiving the foreign law struggles to integrate it because of ingrained legal traditions. Such differences can cause the new law to be misinterpreted, improperly applied or also rejected.
- **RABEL'S PERSPECTIVE:** Rabel thinks that true uniformity in law is achieved only when uniform legislation is interpreted using comparative law, considering all the legal systems involved. Otherwise, local courts might interpret uniform legislation based on domestic criteria leading to interpretation problems.
- **HISTORY OF INTERNATIONAL CONVENTIONS AND MODEL RULES:** Both international **conventions for B to B sales** (B to B sales, short for business-to-business sales, are transactions where one business sells products or services directly to another business, rather than to individual consumers. In B to B sales, the buyer usually needs the goods or services either to run their operations, produce their own goods, or resell them. These sales often involve larger amounts of money, longer negotiations, formal contracts, and more technical or customized products compared to sales made to ordinary customers) **like the CISG** (UN convention on international sale of goods) **and model rules like the UCC** (Uniform Commercial Code) serve **crucial roles in global commerce and legal interactions internationally in sales from a company to another. (B to B)**

UNIT 2: CIVIL LAW AND COMMON LAW JURISDICTION

1) ROMAN LAW

- **CORPUS IURIS CIVILIS:** collection of Roman Law. It was **compiled under the direction of the Byzantine emperor Justinian I in 6th century,** it systemized centuries of Roman Jurisprudence into a comprehensive legal code which had a strong influence on the development of legal systems.

The CORPUS IURIS CIVILIS HAS 4 MAIN COMPONENTS: CIu-D-I-NC

- **CODEX IUSTINIANUS**
- **DIGESTA**
- **INSTITUTIONES**
- **NOVELLAE CONSTITUTIONES**

2) IUS CIVILE

- **REINASSANCE OF ROMAN LAW:** the tradition of studying roman law had a revival in between the 11th and the 12th century, these studies deeply influenced the development of legal traditions of western countries.
- **ROLE OF IRNERIUS:** Irnerius was a scholar who **re-discovered the CORPUS IURIS CIVILIS** and started comment and teach it in Bologna. This favoured the foundation of the first University of the Western world, the ALMA MATER STUDIORUM UNIVERSITY OF BOLOGNA.
- **WHO WAS IRNERIUS?** Irnerius was an Italian legal scholar from Bologna, active around the late 11th and early 12th centuries, who is famously **credited with the revival of Roman law** in medieval Europe. **He is known for rediscovering and systematically teaching the Corpus Iuris Civilis, the great body of Roman law compiled under the Byzantine emperor Justinian in the 6th century.** At a time when much of Europe had lost touch with the sophisticated Roman legal tradition, Irnerius began to study these ancient texts carefully, explain them to students, and annotate them with short explanatory notes known as **glosses**. His work laid the foundations for the University of Bologna's law school, which became the most important legal center in medieval Europe and gave birth to the tradition of legal scholarship known as the "School of Glossators." Thanks to Irnerius, Roman law re-entered European legal thinking, deeply influencing the development of civil law systems across the continent.

3) CIVIL LAW

- **CIVIL LAW'S CHARACTERISTICS:** The Civil law system is characterized by a division of state powers in **1) LEGISLATION; 2) EXECUTIVE; 3) JUDICIARY**. It has a **preference in organizing laws into comprehensive code that provides clear and accessible legal guidelines to promote justice and equality.** It gives a clear set of laws and regulations that aim to assess the most common operations that judges will have to interpret, in order to give them a **clear MODUS OPERANDI, without letting them interpret the law as they wish.**
- **SEPARATION OF POWERS:**
  - **1. Legislation – the parliament or legislative body creates general laws;**
  - **2. Executive – the government implements and enforces those laws;**
  - **3. Judiciary – independent courts apply the laws to individual cases and resolve disputes.**
- **EXAMPLE IN ITALY: CODICE CIVILE**
- **EXAMPLE IN FRANCE: CODE CIVìL**
- **PHILOSOPHERS IMPORTANT TO REMEMBER so far, will keep updating in next units: HANS KELSEN(theory of radical different approach to legal positivism, laws should be applied bc designed by institutions that fully understand their reasoning), ERNST RABEL(father of comparative law, and theoretical on importance of comparative law in uniform and international private law approach), RENE DAVID(father of legal families, dividing the two western blocks of law into civil and common law), MONTESQUIEU(theory of division of**

powers)

- **ROLE OF MONTESQUIEU:** He was a French philosopher famous for articulating the theory regarding the division of powers, for example he described the JUDGES as only the "mouth that pronounces the words of law".
- **WHO WAS MONTESQUIEU?** Montesquieu was a French philosopher and political thinker who lived from 1689 to 1755. He is most famous for developing the theory of the separation of powers, an idea that **argued government authority should be divided into three distinct branches: legislative, executive, and judicial.** Each branch would have **its own powers and would check and balance the others, preventing any one group from becoming too powerful.** Montesquieu explained this theory in his major work The Spirit of the Laws, published in 1748, which had a huge influence on modern constitutional design, especially on the founding principles of the United States and many later democratic systems. Through his careful analysis of different types of governments, Montesquieu promoted the idea that freedom could only be preserved if political power was not concentrated in a single authority.

4) COMMON LAW

- **COMMON LAW CHARACTERISTICS:**
- **JUDGES MADE LAW:** Common law is **based on rulings made by judges**, which become **PRECEDENT**, meaning that, decisions made by judges regarding a specific topic will have to be followed by other judges in court when analyzing similar cases
- **ORGANIC DEVELOPMENT:** Unlike civil law systems, based on COMPREHENSIVE CODES, **common law develops organically and gradually through decisions made in the PRECEDENT past in similar individual cases by JUDGES.**
- **EQUITY:** The **EQUITY body is a separate body of law which focuses on addressing shortcomings of the rigidity of the common law system**. It **allows judges to rule decisions based more on fairness rather than following merely precedents which, in some cases, would result in unjust decisions made by judges in court**. In Common Law, the equity body developed as a separate set of rules and remedies to correct the rigidity and unfairness of the strict common law system. Historically, when people could not find justice through the ordinary common law courts, they could appeal directly to the King, who would delegate these cases to the Lord Chancellor. Over time, a separate court system called the Court of Chancery was established to handle these matters. **The main function of the equity body was to offer flexible solutions based on fairness and conscience rather than strict legal rules**. **Equity provided remedies that the common law could not, such as injunctions (orders to do or not do something), specific performance (forcing a party to fulfill a contract), and trusts (holding property for another's benefit).** While common law courts mainly awarded monetary damages, equity courts could create more tailored solutions to ensure a just outcome. Today, although law and equity have largely merged into one court system in most Common Law countries, the principles and remedies of equity still play a vital role in filling gaps and ensuring fairness where ordinary legal remedies are not enough.
- **HISTORICAL DEVELOPMENT OF COMMON LAW SYSTEM:** The historical **development of common law began after the Norman Conquest of England in 1066**, establishing a legal **system that evolved through judicial decisions** rather than statutes. Instead of relying mainly on written laws, this system grew through the decisions made by royal judges, who traveled across the country and created consistent rules by resolving disputes. The common law tradition was deeply influenced by major political events like the English Civil War and the Glorious Revolution, both of which reinforced the idea that judges must be independent from political power and that their decisions must be based on law rather than royal will. Over time, judges built a large body of case law, where earlier decisions served as binding precedents for future cases, a method known as stare decisis.
- **In the 19th century, the system was further modernized by the Judicature Acts of 1873 to 1875, which merged the previously separate courts of common law and equity, creating a**

single, more efficient court structure while preserving the distinct principles of both traditions within the unified system.

UNIT 3: LAW AND JUSTICE

1) NATURAL LAW AND HUMAN REASON:

There are 2 different views of law:

- **LEGAL NATURALISM (IUS QUIA IUSTUM):** This view posits that law is based on the natural order and moral truths. It holds that laws are INHERENT, RATIONAL, and should align with what is NATURALLY JUST and RIGHT. **Laws are VALID IF THEY REFLECT NATURAL JUSTICE**. Legal naturalism, also known as ius quia iustum, is the idea that **law is not just a matter of human decision or political authority**, but is **rooted in a natural order based on reason and moral truths**. According to this view, **true laws are not simply created; they are discovered**, because they already exist within the structure of what is naturally just and right. A law is considered valid only if it reflects these deeper principles of natural justice. **If a rule made by humans contradicts what is inherently fair or moral, it may be considered no law at all under this perspective.** Legal naturalism sees **law and morality as inseparably connected**, and believes that reason can guide humans to recognize the just principles that should govern society.
- **LEGAL POSITIVISM (IUS QUIA IUSSUM):** This perspective emerged in the 19th century and argues that **law is defined by what is enacted by legitimate authorities**, regardless of moral considerations. According to positivism, **laws are valid if they are established by the proper procedures and recognized by the state**, conceptualized notably by **Hans Kelsen**. Legal positivism, also known as ius quia iussum, is the idea that **law is defined purely by its creation through legitimate authority, without any necessary connection to morality or natural justice**. Emerging strongly in the 19th century, this perspective holds that a law is valid not because it is good or fair, but simply because it has been properly made according to the recognized rules and procedures of a legal system. **What matters is the source of the law, not its moral content**. **Hans Kelsen**, one of the most important figures in this tradition, famously **argued that** *law should be understood as a system of norms built on a basic foundational rule, and that its validity depends entirely on its place within this structured hierarchy, not on whether it aligns with ethical or moral ideals.*
- **WHAT IS NATURAL LAW? Natural law is the idea that there are universal principles of right and wrong that exist independently of human laws and governments.** These principles are thought to come from nature, reason, or a higher moral order, and they apply to all people at all times. **According to natural law theory, human-made laws are only truly valid if they reflect these deeper, universal standards of justice.** If a human law contradicts natural law, it is considered unjust and might not deserve to be obeyed. Thinkers from ancient philosophers like Aristotle to later ones like Tommaso D'Aquino believed that natural law could be discovered through human reason and should guide the creation and interpretation of legal systems.
- **LEGAL NATURALISM AND HUMAN REASON:** In the doctrine of natural law, **any law that deviates** from what is perceived as rational and aligned with the natural order is **considered unjust and thus not a true law**. This idea leads to the concept that "**unfair law is no-law**". However, we distinguish two approaches that judges, following the doctrine of natural law, might take:
- **STRONG DEFINITION OF NATURAL LAW:** In this view, **judges recognize when laws are unjust because they conflict with natural law**. They have the discretion to choose whether to apply such laws. This gives judges a more active role in ensuring that the laws they enforce are just according to natural law principles.
- **WEAK DEFINITION OF NATURAL LAW:** Here, judges also recognize when laws are unfair and conflict with natural law but feel obligated to apply them regardless of their own judgments about their fairness. This perspective limits the role of judges to merely enforcing laws, leaving the responsibility to amend or discard unjust laws to legislators.

In the weak natural law view, there is a recognition that laws can still be considered legally

valid even if they are unjust or morally wrong. However, this approach insists that if a law is too unjust, it loses some of its moral authority and may not deserve full respect or obedience, even though it remains technically a law. In other words, **weak natural law separates legal validity from moral goodness to a degree: a bad law is still a law, but it might not command moral obligation.**

In the strong natural law view, on the other hand, **a law must reflect fundamental principles of justice and morality to even be considered a true law.** If a rule seriously contradicts natural justice, strong natural law theorists argue that it is not law at all in a meaningful sense. **As famously put by Saint Augustine and later Tommaso D'Aquino, "an unjust law is no law at all."** In this approach, law and morality are inseparable: **legal validity depends directly on moral correctness.** The **main difference** between them is how strictly they link law and morality. Weak natural law allows for a gap between legal validity and moral goodness, while **strong natural law sees that gap as impossible**: if something is morally wrong enough, it cannot be law at all.

2) LEGAL POSITIVISM:

- **KELSEN'S "PURE THEORY OF LAW":** states that **law** is **comprised of norms or rules that are completely autonomous from morality, religion, or any other external influence**. The theory is termed "pure" because it seeks to define law solely based on its own standards and structures, without mixing it with other disciplines or ethical judgments.
- **LEGAL POSITIVISM:** This theory asserts that law is a system of norms defined by their creation process rather than their content. **The validity of a law** (whether it should be followed and recognized as law) **depends on its origins and the process through which it was established, not on its fairness or moral value.**
- **NORM VALIDATION:** Legal positivism requires a **specific method to recognize which norms are legally binding**. This method focuses on the "**pedigree**" of the norm, meaning **its source or the formal process by which it was enacted by relevant political institutions**. Norm validation in legal positivism refers to the **process of determining whether a rule or norm is legally binding based not on its content, but on its origin and the way it was created**. In this view, **a law is valid if it comes from the proper authority and follows the correct formal procedures established by the legal system.** This idea is often called the "pedigree" of the norm, meaning that **what matters is where the law comes from and how it was made, not whether it is just or fair.** As long as a rule is produced by the recognized institutions—like a parliament, court, or regulatory body—and follows the correct steps, it is considered legally valid, regardless of its moral qualities.
- **HIERARCHY OF NORMS/NORMATIVISM:** Each norm gains its validity from another higher norm. **This hierarchical system ensures that there is a clear rule or higher norm that governs the creation and application of each subsequent lower norm**, thereby providing a systematic and orderly legal framework. The concept of hierarchy of norms, also known as normativism, describes the **idea that every legal rule derives its authority from a higher rule within the legal system**. In this structure, no rule stands alone; each one must be created according to the conditions set by a superior norm, creating a chain of legitimacy that leads all the way up to a fundamental, basic rule at the top of the system. **This hierarchy ensures that the legal order is coherent, organized, and consistent, because every norm must follow a clear, structured process of authorization**. It also means that **lower-level rules, like administrative regulations, must conform to higher-level rules, like statutes or constitutional principles**. This approach was famously **developed by Hans Kelsen**, who argued that the **legal system is like a pyramid**, with each level supporting and controlling the levels beneath it, ensuring a systematic and orderly application of law.
- **JUDICIAL ROLE IN POSITIVISM: Judges under legal positivism are bound to apply the law as it is, regardless of personal judgments about its fairness.** The emphasis is on legal validity rather than justice, making the law's application compulsory as long as it fits the established

criteria for a valid law within the system.

3) THE REINASSANCE OF NATURAL LAW:

- **MARTHIN LUTHER KING JR. THOUGHTS:** he thought that humans have not only a legal but also a moral duty to obey just laws and, conversely they have a moral duty to disobey unjust laws. He was **inspired by St. Augustine, who stated that "an unjust law is no law at all"**.
- **GUSTAV RADBRUCH'S FORMULA:** he was a renowned legal philosopher which believed that law must be just, and if it fails to do so, it loses its authority and it should be disobeyed by humans.

The Renaissance of natural law refers to the **revival of the idea that law and morality are deeply connected, especially after the experiences of injustice and authoritarianism in the twentieth century.** Two important figures representing this revival are Martin Luther King Jr. and Gustav Radbruch.

Martin Luther King Jr. believed that **people have both a legal and a moral duty to obey laws that are just, but they also have a moral obligation to resist and disobey laws that are unjust**. His view was deeply inspired by St. Augustine's famous saying that "an unjust law is no law at all." **For King, the legitimacy of a law depends** not simply on its formal enactment, **but** on whether it **aligns with higher principles of justice**, such as **respect for human dignity and equality.**

Similarly, Gustav Radbruch, a leading legal philosopher, argued after World War II that **positive law loses its authority when it becomes intolerably unjust**. In what became known as Radbruch's Formula, he stated that if a law is so unjust that it violates the very essence of justice, then it must be treated as invalid and disregarded. For Radbruch, there are moral limits to legal obedience: when the gap between law and justice becomes too great, the law ceases to deserve respect.

Both thinkers reflect the renewed belief that law cannot be separated from morality and that true legal authority depends on fidelity to fundamental principles of justice.

PHILOSOPHERS TO KNOW AND REMEMBER: HANS KELSEN (FATHER OF LEGAL POSITIVISM, HIERARCHY OF NORMS AND LEGAL VALIDITY), ERNST RABEL (FATHER OF COMPARATIVE LAW), RENE DAVIS(LEGAL FAMILIES), MONTESQUIEU(DIVISION OF POWERS, MARTIN LUTHER KING JR & GUSTAV RADBRUCH (AN UNJUST LAW IS NO LAW AT ALL)

UNIT 4: RULES, PRINCIPLES AND LEGAL SYSTEMS

0) WHAT IS A NORM? A norm in private law is a legal rule that regulates relationships between private individuals, such as people, companies, or organizations. Unlike **public law norms**, which govern the relationship between individuals and the state, *private law norms focus on areas like contracts, property, family relations, and obligations*. These norms create, define, modify, or end rights and duties between private parties, helping to ensure that interactions are predictable, fair, and orderly. A private law norm typically follows a structure: when a certain situation occurs (the "if" clause), it triggers a legal consequence (the "then" clause), which might create a right, impose a duty, change an existing relationship, or even cancel it altogether.

1) STRUCTURE OF NORMS

- **LAWS ARE NOT ABSOLUTE IMPERATIVES: Laws are not absolute imperatives**; unlike religious or moral norms, **they do not solely rely on personal belief**. For instance, the commandment "Thou shalt not kill" illustrates a moral directive typical in religion but not suitable for law. According to Kelsen's theory,, legal norms are defined not only by the commands they issue but also by the sanctions for non-compliance. This *highlights law's coercive nature, enforcing social order through specific penalties, contrasting with the voluntary adherence seen in moral imperatives.* Laws are not absolute imperatives in the way that religious or moral commands are. **Unlike moral or religious norms, which people are expected to follow based on personal conviction or belief, legal norms are backed by the authority of the state and enforced through specific consequences.**
  - **For example**, the religious commandment "Thou shalt not kill" is a moral obligation that relies on an individual's internal sense of duty,, *whereas* **in law, the prohibition against killing is enforced through a system of penalties like imprisonment or even more severe punishments**.
- According to Hans Kelsen's theory, **what defines a legal norm is not simply that it tells people what to do or not do, but that it links behavior to a coercive sanction if the rule is broken**. In this way, *law ensures social order not by appealing to personal conscience, but by attaching legal consequences to certain actions, making obedience less a matter of choice and more a matter of enforced necessity.*
- **STRUCUTRE OF A NORM:**
- **IF CLAUSE:** The "if" clause describes the specific situation or condition (specifies the state of affairs) that must happen in order for the legal rule to take effect. **It sets out the circumstances that activate the rest of the rule**. In other words, the **"if" clause outlines when and under what conditions the law applies**, serving as the trigger for the consequences that are **stated in the "then" part of the norm.** Without the situation described in the "if" clause, the legal rule remains inactive.
- **THEN CLAUSE:** it is the consequence specified by the norm. **it explains the details regarding what actions the law will enforce when the conditions of the If clause are met**.
- **NOT ALWAYS A NEGATIVE CONSEQUENCE:** The "then" clause in a legal norm is often thought to impose a negative consequence, like a punishment or a penalty, but this is not always the case, especially in private law. In fact, **when the condition described in the "if" clause is met, the "then" clause can lead to different types of legal effects, not just sanctions.** Specifically, it can
  - **1) create a new legal situation, such as establishing a contract when two parties agree,**
  - **2) modify an existing legal relationship, like changing the terms of a contract, or**
  - **3) nullify a legal relationship, such as canceling a contract when one party fails to meet their obligations**.
- So rather than always producing a punishment, the "then" clause in private law often organizes and adjusts rights and obligations between individuals, depending on the circumstances set out in the "if" clause.

- **SCOPE OF NORMS: A NORM IS MARKED BY 2 DIFFERENT CHARACTERISTICS:**
  - **GENERALITY:** it means that a norm applies universally to all individuals who find themselves meeting the conditions of the If Clause. Everyone is treated equally.
  - **ABSTRACTNESS:** Abstractness means that the **situation described in the "if" clause must be stated in general terms, not tied to a specific case or individual**. The idea is that the condition should be broad enough to apply to any event or action that fits its description, no matter who is involved or when it happens. **This generality ensures that the law can apply consistently to many different situations without needing to be rewritten for each new case.** When an event matches the general condition set out in the "if" clause, it automatically triggers the "then" clause and the legal consequences that come with it.
    - **EXAMPLE:** Whoever kills an animal will be..... (in this case "Whoever" is the general characteristic since it is not specifying a single human but humans as a class and "An animal" is the abstract part since it is not specifying a specific animal.
- **MANDATORY AND DEFAULT RULES:**
- **MANDATORY RULES:** these **laws may NOT be set aside by an agreement between parties**. Most of public law is composed of mandatory rules to maintain the supremacy of public interest over individual interest.
- **DEFAULT RULES:** these **rules may be set aside through an agreement between parties**. Most of private law is composed of default rules, essential for example in the case of supplement agreements entered by the parties.

2) NORMATIVISM

- **HIERARCHICAL ORDER OF NORMS AND VALIDITY:** legal norms are organized in a hierarchy, where **each norm derives its validity and authority from a higher norm above it in the legal system** (pyramidal hierarchy, where all the rules are linked to the GRUNDNORM). **The most foundational norm is the GRUNDNORM or BASIC NORM.**
- **SOFT POSITIVISM:** This theory, associated with the **philosopher H.L.A. Hart**, suggests that **while legal norms primarily derive their authority from their place in the hierarchical structure (pedigree), they also incorporate principles of justice or moral values recognized by society**. This contrasts with strict legal positivism (hans kelsen), which holds that the validity of a law depends solely on its origins and not on its content.

3) SOURCES OF LAW (SECONDARY RULES): Sources of law are the fundamental rules that determine how legal norms are created, changed, or abolished within a legal system. **ce-dy-ef**

- **DEFINITION AND CHARACTERISTICS:** They are called "secondary rules" because, instead of directly regulating behavior like primary rules do, **they regulate how primary rules come into existence and how they can be modified**. Sources of law are essential for maintaining three key qualities in a legal system: they provide **certainty**, by making clear where the law comes from and how it is made; they allow **dynamism**, meaning that the law can evolve and adapt to new circumstances; and they guarantee **efficiency**, by setting structured procedures for creating and updating legal norms. **Each legal system defines its own sources of law—such as constitution ,statutes, regulations, or court decisions—and these sources are valid only within that system.** What counts as a legal source in one country may not be recognized at all in another.
- **CAPABILITIES:** Sources of law have **three important functions within a legal system**.
  - **First**, they have the **power to create new legal rules**, establishing new rights, duties, or procedures.
  - **Second**, they **can amend or repeal existing rules**, meaning they can change the content of a rule or completely eliminate it when it no longer fits the needs of society.
  - **Third**, sources of law also **serve to validate whether a specific rule can be recognized as a legal rule**, by confirming that it has been created according to the correct procedures and by the proper authority. In short, sources of law are what allow the legal system to grow, adapt, and maintain its internal consistency.
- **TWO TYPES OF SOURCES OF LAW:**

- **SOURCES OF PRODUCTION:** they are mechanism through which laws are created or altered and they are divided into:
- **ACTS:** These are formal decisions made by sovereign authorities, such as parliaments, to enact new laws, amend existing ones or repeal outdated laws.
- **FACTS:** These refer to customs and traditions that evolve and become legally binding due to their long standing and consistent practice (**opinio iuris as necessitates**).
- **SOME EXAPLES: The constitution, Statues and Enactments, Regional Laws, Regulations, Uses.**
- **SOURCES OF COGNITION:** They are methods to inform about laws such as official publications, such as Gazzetta Ufficiale della Repubblica Italiana.

4) EU LAW

- **PRIMARY SOURCES OF EU LAW: Primary sources of EU law are the core legal documents that create the European Union itself and define how it functions**. These include major treaties like the **Treaty of Paris, the Treaty of Rome, the Maastricht Treaty, and the Treaty of Lisbon**. **They lay down the fundamental principles, values, and rules that guide the EU's activities, and they establish the powers and duties of its main institutions**, such as the European Parliament, the European Commission, and the European Court of Justice. These primary sources serve as the legal foundation for everything the EU does, providing the basic framework from which all other EU laws and regulations are derived.
- **FOUNDING TREATIES:**
- **TREATY OF PARIS (1951):** It established the **European Coal and Steel Community**, aiming to integrate economic interests and reduce the likelihood of conflict between member nations
- **TREATY OF ROME (1957):** It created the **European Atomic Energy Community (EURATOM)** and the **European Economic Community (EEC)**, the latter of which is aimed at creating a common market, canceling taxes (i.e. creating a COMMON MARKET WITH FREE MOVEMENT OF GOODS, SERVICES, LABOR AND CAPITAL across EU state members).
- **MAASTRICHT THREATY:;** The Maastricht Treaty, officially known as the **Treaty on European Union**, was **signed on 7 February 1992 and entered into force on 1 November 1993.** It marks a foundational moment in the history of European integration, as it **formally established the European Union (EU) and laid the groundwork for the Economic and Monetary Union (EMU)**, including the eventual introduction of the euro. The Treaty was **signed by the then twelve member states of the European Communities and created a three-pillar structure.**
  - The **first pillar** focused on the European Communities, covering economic, social, and environmental policies, broadening the EEC stated in the threaty of Rome (1957).
  - The **second pillar** dealt with Common Foreign and Security Policy (CFSP), while
  - the **third pillar** concerned **cooperation in justice and home affairs**.
- The Maastricht Treaty also **introduced the concept of European citizenship, giving EU nationals the right to move and reside freely across the Union.** Moreover, it reinforced the powers of the European Parliament and formalized the principle of subsidiarity, ensuring that decisions are taken as closely as possible to the citizen. Overall, the Treaty significantly deepened political and economic integration among member states and is considered a key milestone in the evolution of the EU.
- **LISBON TREATY (2007):** The Lisbon Treaty, signed in **2007**, is the **most recent and important reform of the European Union's constitutional structure**. It **aimed to make the EU more efficient, transparent, and democratic, especially as the Union had expanded to include many more member states.** The treaty simplified the EU's complex system of governance by reorganizing its institutions and decision-making processes. One of its key achievements was **strengthening the role of the European Parliament**, giving it **greater legislative and budgetary powers to better represent EU citizens**. The Lisbon Treaty also introduced new mechanisms for citizens to influence EU policies and made the Union's external actions more coherent by creating the position of High Representative for Foreign Affairs.

- **LEGAL DECISIONS BY THE EU'S JUDICIARY:** Legal decisions by the EU's judiciary, particularly those made by the European Court of Justice, have played a crucial role in shaping and expanding the meaning of the EU treaties. These landmark rulings are considered primary sources of EU law because they interpret and sometimes even develop the fundamental principles contained in the treaties.
    - A **famous example** is the **Van Gend en Loos case from 1963**, where the **Court established** the **principle of direct effect**. This means that certain provisions of EU law are not just obligations between member states, but can also create rights for individual citizens, which they can directly enforce before their national courts without needing their government to act first. **Through decisions like this, the EU judiciary has made EU law a powerful and directly accessible source of rights across member states.**
- **CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION:** The Charter of Fundamental Rights of the European Union is a **key document that brings together in one place all the essential rights enjoyed by people living in the EU.** It covers a wide range of protections, including personal freedoms, civil and political rights, as well as economic and social rights. The Charter draws its principles from the shared constitutional traditions of the EU member states and from their international commitments, such as human rights treaties. It serves as a modern, unified reference point for protecting individual dignity, equality, freedom, solidarity, citizenship, and justice within the European Union, reinforcing the idea that the EU is not just an economic project, but also a community based on common values and fundamental rights.
- **TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU):** Alongside the **Treaty on European Union (TEU)**, it sets out the explicit functions, policies, and operations of the EU.
- **SECONDARY SOURCES OF EU LAW:** Secondary sources of EU law are **legal acts that come from the powers given to the EU's institutions by the treaties, specifically Article 288 of the Treaty on the Functioning of the European Union (TFEU).** These acts include **regulations, directives, and decisions**, each serving different purposes in how EU law is applied across member states.
- **Regulations** have **general application are immediately binding in all member states without needing to be transformed into national law.**
- **Directives set goals** that **all member states must achieve**, but leave them some **flexibility on how to implement them within their own legal systems.** Directives are a type of legal act used by the European Union to set certain objectives that all member states must achieve, but they leave it up to each country to decide how to implement them within their own legal systems. **Unlike regulations, which apply directly and immediately, directives require member states to pass their own national laws to give effect to the goals set out by the directive.** This allows countries some flexibility in how they adapt EU objectives to fit their specific legal and political traditions, as long as the final result matches what the directive demands.
- **Decisions** are **binding legal acts** on those to whom they are specifically addressed, whether it is a country, a company, or an individual.
- In addition to these binding acts, there are also **non-binding acts**, such as recommendations and opinions, which guide but do not impose legal obligations.
- **Together, these secondary sources allow the EU to adapt and legislate in a wide range of areas, supporting and expanding on the principles set out in the primary treaties**.
- **FACCINI-DORI CASE (1994):** The Faccini Dori case, decided in 1994 by the **European Court of Justice (ECJ)**, is a significant ruling about how EU directives work in legal relationships between private individuals, known as horizontal relationships. **The Court confirmed that although directives are binding on member states, meaning governments must implement them, they do not automatically create rights that individuals can directly enforce against other individuals if the directive has not yet been properly incorporated into national law**. In other words, a directive on its own cannot be used by one private person to bring a legal claim against another private person unless the member state has fulfilled its duty to turn the directive into

national law. The case emphasized that **directives primarily create obligations for states, not for individuals, although member states can be held responsible if they fail to properly implement them.**

- **THE RELATIONSHIP BETWEEN NATIONAL AND EU SOURCES OF LAW:** The relationship between national law and EU law was initially tense, marked by conflicts between the European Court of Justice (ECJ) and the constitutional courts of member states. Over time, however, a *clear principle was established*: **EU law has supremacy over national law**, meaning that whenever there is a conflict between the two, EU law must prevail, no matter whether the national law in question was created before or after the relevant EU law. This principle was first firmly set out in:
- **Costa v. Enel case in 1964**, where the ECJ ruled that European legislative acts take precedence over national laws, ensuring the uniform and consistent application of EU law across all member states. This idea was later strengthened by:
- **Simmenthal case in 1978**, where the Court made it clear that all national courts have the duty to immediately set aside any conflicting national law without waiting for their own constitutional courts to declare it unconstitutional. **Together, these rulings built the foundation for the priority of EU law in the European legal order.**
- **EXAMPLE:** when a national court encounters an issue requiring EU law interpretation during a case, it must suspend proceedings and refer the question to the ECJ for resolution, ensuring that EU law is upheld consistently across all Member States.
- **RELATIONSHIP BETWEEN EU LAW AND NATIONAL SOVEREIGNITY:** The relationship between EU law and national sovereignty was clearly addressed in the 1993 Maastricht ruling by the German Constitutional Court. In this decision, **the Court acknowledged that the European Union does exercise sovereign powers within the areas given to it by the member states, but it firmly stressed that the EU is not a federal state like the United States**. Instead, the **EU's authority exists because the member states have voluntarily transferred certain powers to it through treaties.** The ruling also made it clear that **national constitutional courts, like Germany's, retain the right to review whether actions taken by the EU respect the fundamental principles of their own national constitutions.** This means that while EU law generally has supremacy, the ultimate guardianship of constitutional identity and basic rights still remains with the member states themselves.
- **CASES IN WHICH STATES FAIL WITHIN ITS COMPETENCIES:** When a subject falls within the European Union's areas of competence, the **EU exercises two main types of authority over it**.
- The **first is legislative power**, which allows the EU to create binding laws that affect both the member states and their citizens. This legislative process *involves several key institutions*: the **European Parliament**, made up of representatives directly elected by EU citizens; the **Council of the European Union**, which represents the governments of the member states; and the **European Commission**, which proposes and helps shape legislation.
- The **second is judicial power**, which guarantees that EU law is interpreted and applied consistently across all member states. This **role is primarily fulfilled by the Court of Justice of the European Union (CJEU)**, which ensures that EU rules are followed correctly, resolves conflicts between EU institutions and member states, and upholds the legal order of the Union as a whole.
- **THE EUROPEAN COURT OF JUSTICE (ECJ):** it consists of 2 main courts:
- **COURT OF JUSTICE:** The Court of Justice, often simply called the ECJ, **mainly deals with requests from national courts asking for clarification on how to interpret EU law**. This ensures that EU law is applied uniformly across all member states. The Court of Justice also handles certain important cases, such as actions to annul EU laws and appeals from decisions made by the General Court.
- **GENERAL COURT:** The General Court, by contrast, **focuses primarily on cases brought by individuals, businesses, and sometimes even member states, especially when they are challenging EU acts that affect them directly.** It deals with areas such as competition law, state

aid, trade disputes, agriculture, and trademarks. **The General Court helps to lighten the workload of the Court of Justice and ensures that private parties and companies have a direct way to defend their rights under EU law.**

- **EXAMPLE:** If a private individual or company suffers damage due to an EU institution's action or inaction, they have two possible ways to seek legal recourse.
- § **First**, they can act indirectly through national courts, which may refer the case to the Court of Justice for a ruling.
- § **Alternatively**, they can act directly before the General Court if the EU institution's decision has affected them individually and directly.
- **EU LAW AND COMPARATIVE LAW:** The relationship between EU law and comparative law is clearly shown in the way European legal principles interact with and are influenced by the national traditions of member states.
- **THE WERNER MANGOLD VS RUDIGER HELM CASE (2005):** In this decision, the Court of Justice of the European Union (CJEU) looked at legal principles found in the Finnish and Portuguese constitutions, particularly the prohibition against discrimination based on age. **Drawing on these national traditions, the Court recognized a general principle of EU law that prohibits age discrimination.** Importantly, the **Court gave this principle direct horizontal effect, meaning that individuals could rely on it directly in disputes against other individuals, not just against the state.** This case is a powerful illustration of how legal ideas rooted in the constitutional traditions of member states can influence and enrich EU law, even when such principles are not explicitly written into the main treaties, and how they can become binding parts of European private law.
- **DOWNWARD IMPACT ON NATIONAL PRIVATE LAW:** The downward impact of EU law on national private law can be seen in how European legal principles gradually influence and reshape the way national courts interpret and apply their own laws. A strong example is the growing importance of the principle of good faith across the legal systems of member states. In Italy, for instance, the Corte di Cassazione, the country's Supreme Court, used to apply the principle of good faith cautiously and infrequently. However, after EU law, particularly **the Unfair Terms Directive, placed strong emphasis on protecting fairness in contracts, Italian judges began to give much greater importance to good faith in their rulings.** This shows how European legal standards can drive change from above, pushing national courts to adapt their practices and interpretations over time.
- **CHARBONNIERE DE BELGIQUE VS HIGH AUTHORITY CASE (1954-1956):** In this case, Advocate General Maurice Lagrange pointed out that while EU law can draw from international law, its main sources are typically found within the national legal traditions of the member states. His insight highlights how the relationship between national law and EU law is not one-directional: **while EU law influences national legal systems, it is also deeply shaped by the shared legal experiences of the member states themselves.**

5) FILLING GAPS

- **FILLING LEGAL GAPS:** Filling legal gaps is necessary because, even though legal positivism holds that **an ideal legal system should be both complete and consistent**, in practice no legal system fully meets these standards. Completeness means that there should be no gaps in the system: for every possible situation that could arise, there should already be a rule available to resolve it.
- **Consistency means that the system should not contain contradictions:** the legal rules should fit together logically, and every legal case should lead to only one correct legal outcome without conflict between different rules.
- **However, in reality, legal systems often face gaps, where no existing rule clearly applies**, and **inconsistencies**, where two or more rules may seem to point to different results. **To deal with these problems, legal systems rely on secondary rules,** which **provide methods for judges and lawmakers to fill in missing rules and resolve contradictions.** These secondary rules help

maintain order and adaptability in the legal system, ensuring that even when primary rules are imperfect, the system can still function effectively and deliver coherent outcomes.

- **ENGLARO CASE STUDY:**
- **DESCRIPTION OF THE CASE:** The Englaro case involved Eluana Englaro, a young woman who fell into a permanent vegetative state after a car accident. Although she was kept alive through artificial feeding and hydration, her family, particularly her father, argued that Eluana had previously made it clear that she would not want to be kept alive in such a condition. He sought legal permission to end her life support in order to honor her wishes.
- **CONTITUTIONAL CONTEXT:** The case raised serious constitutional questions under Italian law, touching on the principles of personal liberty, the right to health, and the duty of solidarity. The Italian Constitution protects individual freedom and the right to make decisions about one's own body, while also recognizing health as both a personal right and a collective societal interest.
- **LEGAL DECISION:** The Corte di Cassazione, Italy's Supreme Court, ruled that a legal guardian could authorize the withdrawal of life-sustaining treatments like artificial feeding, but only under strict conditions. It required proof that the patient was in an irreversible vegetative state and that discontinuing treatment aligned with the patient's previously expressed wishes, beliefs, or values.
- **CONSEQUENCE:** As a result of this decision, Eluana's artificial feeding was stopped, and she passed away naturally, in accordance with her and her family's wishes. The Englaro case was **highly significant because it helped fill a major legal gap in Italy, where there had been no clear laws on withdrawing life support when patients could no longer express their will.** It set a major precedent for handling future cases involving end-of-life decisions and patient autonomy.
- **FILLING GAPS: TWO OPPOSITE VIEWS:**
- **HART:** gaps may be filled at judges' discretion by creating a new law when they encounter a case that is not specifically addressed by existing laws or precedents. **According to H.L.A. Hart, when judges face a case that is not directly covered by existing laws or precedents, they have the discretion to fill the gap by creating new law through their decisions**. For Hart, the legal system is not always complete, and judges must sometimes step beyond interpretation and actually make new law to resolve new or unexpected cases.
- **RONALD DWORKIN:** he argued that no gaps in law really exist because all decisions can be guided by the underlying moral principles of "implicit" law. In contrast, Ronald Dworkin rejected the idea that true gaps exist. **He argued that even when written rules seem incomplete, judges should not simply create new law.** Instead, **they must find the correct legal answer by interpreting the deeper moral principles that already underpin the legal system**. In Dworkin's view, the law contains implicit standards that guide judges to the right decision without needing to invent anything new.
- **ANALOGY:** it is **primarily used in civil law systems** and it is a legal method where judges apply existing statues to situations that are not explicitly addressed in the law, based on the similarity to cases that are covered.
- **LIMITATIONS OF ANALOGY:** particularly in criminal law, where the principle **"nullum crimen, nulla poena sine lege" (no crime and no punishment without law**) prevails, preventing the use of analogy to create new offenses or penalties. Analogical application is also restricted in cases where norms are considered exceptional and not similar to any other cases, thereby limiting its use to more routine situations.
- **ITALIAN MODEL:** in italian law, judges can apply 2 types of analogy to address cases where the law is silent, such as:
    - **ANALOGIA LEGIS:** allows judges to **extend specific laws to similar cases not explicitly covered by the existing statutes** if these cases are closely related to the matters legislated.
    - **ANALOGIA IURIS:** is used as a **backup when no specific law applies, allowing judges to decide based on general principles of the state**.
- **SWISS MODEL (HART VIEW):** In the Swiss legal model, **if no specific law applies to a case, judges use customary law as the first reference**. **If customary law is also insufficient**, they

then **apply what they believe the law would dictate,** based on legislative intent and established legal traditions. This approach **allows Swiss judges to use their discretion to fill legal gaps, ensuring decisions respect historical practices and the underlying principles of the law.**

- **CUSTOMARY LAW:** In the Swiss model, **customary law refers to legal rules that arise from consistent and long-standing practices followed by a community, combined with the belief that these practices are legally obligatory.** In Switzerland, customary law has a recognized place in the legal system, especially when there are gaps in written legislation. If no applicable statutory rule exists, Swiss courts can rely on established customs to resolve disputes, provided that the practice is widely accepted, stable over time, and regarded as binding by those who follow it. However, **in the Swiss model, customary law is considered secondary to written law.** Judges must first look to statutes and codified laws, and only if no clear written rule exists can they turn to custom.
- **ARTICLE 1 SWISS CIVIL CODE:** The Swiss Civil Code even explicitly acknowledges this in Article 1, stating that judges should decide according to custom if the law does not provide a solution. **Thus, in Switzerland, customary law fills gaps in the legal framework, but always within a structured hierarchy where legislation remains the primary source of law.**
- **FRENCH MODEL (DWORKIN VIEW):** Judges **in France are required to decide cases based on existing laws, even if these laws are unclear or incomplete**. They are prohibited from refusing to judge by claiming that the law is silent or ambiguous, ensuring they actively fulfill their judicial duties. This approach restricts the use of analogy, particularly in criminal law, to adhere closely to the written law and its explicit provisions.
- **SETTLING ANTINOMIES:** An antinomy in law refers to a contradiction between two rules or laws where both cannot apply simultaneously. These inconsistencies arise when different provisions of the law clash, making it unclear which should be followed.
- **The hierarchical criterion** says that **if a conflict exists between two rules of different ranks**, the **rule from the higher legal source must prevail.** This ensures that more authoritative laws, like constitutional rules, take priority over lower-level laws like ordinary statutes.
- **The content-based criterion** is **used when the conflicting rules are on the same hierarchical level**. In this case, the **law that is more specific and directly addresses the situation takes precedence over the more general rule**, because specific laws are better suited to handle particular issues.
- **The time-based criterion** applies when **two laws of equal rank contradict each other**. In this case, the **newer law prevails over the older one, based on the idea that the more recent expression of the legislature's will better reflects current needs and intentions.**
- **SUMMARY:** These criteria together help maintain coherence and order within the legal system when contradictions arise.

6) CRITERIA OF INTERPRETATION:

- **CRITERIA:** they are established methods used to determine the scope of application of a law to **make sure judges are applying it consistently**. They are primarily used in civil law systems, where judges need to interpret laws written in the comprehensive civil codes.
- **Grammatical/Literal Interpretation**: it focuses on the exact wording of the law.
- **Systematic Interpretation**: looks at the law in the context of the whole legal system in which it is.
- **Historical Interpretation**: considers the original intent of the lawmakers based on historical documents and preparatory works
- **Teleological Interpretation**: examines the purpose or policy behind the law to determine its broader or narrower application.
- **Example**: there is a law that forbids the presence of dogs in a butchery, and we have to use different criteria of interpretation to examine whether also guide dogs are included in the If clause and therefore cannot enter by the then clause.
- **Literal Interpretation**: the law explicitly forbids all dogs, with no exceptions for guide dogs. Thus, a strict reading of the text means guide dogs are also not allowed in a butchery.

- **Legislative Intent**: The law's purpose, based on legislative discussions, is to maintain hygiene in food stores. Since guide dogs are still dogs and the law is designed to prevent hygiene risks associated with dogs, this interpretation would also exclude guide dogs.
- **Teleological Interpretation**: This approach considers the law's objective to ensure hygiene. Recognizing that guide dogs are well- trained and fewer in number, they might not significantly impact hygiene. Therefore, it could be argued that guide dogs could be an exception to the rule, as their controlled presence still supports the law's goal of maintaining hygiene.

7) DOCTRINE OF STARE DECISIS (PRECEDENT):

- **STARE DECISIS:** This doctrine, used primarily in Common Law legal systems, which means "to stand by decisions," is a **legal principle that mandates courts to follow the rulings of higher courts in previous similar cases.** It ensures **consistency** and **predictability** in the law by binding lower courts to adhere to established precedents unless they are overruled.
- **A Precedent Set by a Higher Court**: **A precedent set by a higher court is binding on lower courts within the same jurisdiction**, ensuring legal uniformity by requiring these courts to follow established rulings on similar legal questions.
- **Overruling**: **When a higher court determines a previous ruling is unsound, it can overrule that precedent, removing its binding effect.** This allows the law to evolve and stay relevant by adapting to new interpretations or changed circumstances.
- **Distinguishing**: Courts use distinguishing to handle cases that are similar but not identical to a precedent. If there are significant differences in facts or legal issues, a court may decide the precedent does not apply, providing flexibility while maintaining respect for established rulings.

UNIT 5: PRIVATE LAW AND PUBLIC LAW

1) PRIVATE LAW VS PUBLIC LAW:

- **HISTORY:** the distinction between the two types of law originates from Roman law, and is now present in most of Continental Europe. **The distinction between private law and public law has its roots in Roman law and has been carried forward into the modern legal systems of most Continental European countries.**
  - In Roman times, **public law dealt with issues concerning the organization of the state and the interests of the community**, while **private law governed the relationships between individual citizens**. This basic separation has remained influential over centuries.
  - **Today**, public law continues to regulate matters involving the state, government institutions, and public administration, whereas private law focuses on legal relationships between private individuals or organizations, such as contracts, property, family, and obligations. This historical division helps organize legal systems by clearly separating rules meant to protect the public interest from those that regulate private interactions.
- **PUBLIC LAW:** defined as the **sector of law involving administrative roles, indicating where government or state functions are directly involved.** Public law is the branch of law that **governs the relationships between individuals and the state**, as well as the **structure and operation of government institutions**.
  - It includes **areas like constitutional law, administrative law, and criminal law**, and is mainly **concerned with protecting the public interest**, regulating the exercise of public authority, and ensuring that state power is used lawfully. It **also aims to protect the state's authoritative power from being subjected to private law norms**. This means public law seeks to separate the functions and powers of the state from those of private individuals, especially concerning civil liability.
- **SPECIAL NATURE OF PUBLIC LAW:** Unlike private law, which is applicable to all legal subjects (individuals and organizations), **public law is described as "special".**
- **APPLICABILITY OF PUBLIC LAW:** It is **applicable solely to the state or governmental entities as they exercise their sovereign powers**. This special status helps to manage the state's unique responsibilities and authorities without conflating them with those of private entities. **Public law is divided into different branches**, such as:
  - **Administrative Law**: this is **about how government agencies work**. It includes the rules these agencies must follow when making decisions, like issuing licenses or enforcing regulations, ensuring they act fairly.
  - **Criminal Law**: this **deals with crimes and their penalties**. It defines what actions are crimes and explains what punishments they carry, aiming to protect society and maintain public order.
  - **Constitutional Law**: this is the **core of a country's legal system**, outlining the basic rules that govern a nation. It **defines the rights of individuals and the powers of government officials, ensuring that citizens' freedoms are protected.**
    - Constitutional law is the **branch of public law that deals with the fundamental principles and rules that organize a state's political and legal system.** It defines the *structure, powers, and limits of government institutions, sets out the basic rights and freedoms of individuals, and establishes how authority is distributed between different branches of government and between the state and its citizens*. Constitutional law **provides the legal foundation for a country's political life, ensuring that power is exercised according to clear and binding rules, and protecting fundamental rights against abuses of authority.**
  - **Procedural Law**: this **sets the steps for conducting legal actions**, including trials. It **ensures that everyone uses the same process in court, whether in a criminal or civil**

case, promoting fairness and consistency.
    - **Tax Law**: this concerns how government collects taxes from individuals and businesses. It sets the **rules for tax collection**, ensuring that the process is clear and that the taxes levied are as per the law.
- **PRIVATE LAW:** described as the area of law where the state or administrative bodies do not play a direct role. **This domain typically covers laws that govern individual and private entity interactions.** Private law, on the other hand, **regulates the relationships between private individuals, companies, or organizations.** It **deals with** matters such as **contracts, property, family relations, and obligations**.
    - Its **main purpose is to organize and protect private interests, ensuring fairness and predictability in personal and commercial dealings.**
    - I**t also focuses on the relationships between individuals or entities**, regulating the interactions and disputes among them without direct involvement of the state in its role as a regulator or enforcer and it is divided into 2 branches: **CIVIL LAW AND COMMERCIAL LAW**:
- **CIVIL LAW**: Civil law is broad and **applies to everyday life, covering the legal matters that affect the general population**. Civil law is the **branch of private law that regulates the relationships between individuals and legal entities in matters such as contracts, property, family, and obligations.** It covers the general legal rules that apply to daily personal and business interactions, aiming to protect private interests, resolve disputes, and ensure fairness and predictability in society. **Within civil law**:
    - **Contract law** governs the formation and enforcement of agreements and obligations between parties.
    - **Tort law** deals with situations where one person's wrongful act causes harm to another, creating obligations to compensate for damages.
    - **Property law** regulates ownership, use, and transfer of property rights.
    - **Family law** focuses on personal matters such as marriage, divorce, child custody, and other family relationships.
    - **Inheritance law** addresses how assets are passed on after a person's death, ensuring that succession is handled according to legal rules.
- **Through these various areas**, civil law structures the basic legal framework for private life and social relations.
- **COMMERCIAL LAW:** this branch of private law specifically **targets enterprises and commercial activities**. **Commercial law, while part of private law as well, specifically governs business and commercial activities.** It deals with rules related to trade, business contracts, commercial transactions, companies, and financial markets.
    - **FOCUS:** Commercial law focuses on the **needs and practices of merchants, entrepreneurs, and businesses, providing a legal framework for economic activities and ensuring that business dealings are conducted in an orderly and reliable manner.**
    - It is divided into:
- **COMPANIES LAW:** includes laws that govern how companies are formed, operated, and dissolved.
- **FAIR COMPETITION AND ANTITRUST PROHIBITION:** Ensures business practices promote healthy competition (FAIR COMPETITION) and prohibit monopolies and other forms of unfair competitive advantage (ANTITRUST PROHIBITIONS).
- **INDUSTRIAL AND INTELLECTUAL PROPERTY LAW:** covers patents, copyrights, trademarks, and industrial design rights, which are crucial for protecting the creations and inventions of businesses.
- **ITALIAN CODICE CIVILE: this Italian code includes both branches of private law in the same code: civil law and commercial law.**
- **EXCEPTION (IURE PRIVATORUM):** it is also **possible that the state can act as a private party and is treated like any other private party in legal terms.** (**acting Iure privatorum**). An

important exception to the usual division between public law and private law is that **the state itself can sometimes act not as a sovereign authority, but as an ordinary private party.** When the state behaves this way, it is said to be acting iure privatorum, meaning it operates under the same legal rules that apply to private individuals or businesses. **In these cases, the state does not exercise public power or enforce public interests but instead engages in activities like signing contracts, buying or selling property, or managing assets, just like any private entity would**. When acting iure privatorum, the state is subject to private law rules and can be sued or held accountable in the same way as any other private party.

UNIT 6: LEGAL FACTS AND LEGAL ACTS, RIGHTS AND DUTIES

1) LEGAL RELEVANCE OF NATURAL EVENTS:

- **IDENTIFYING LEGAL EVENTS:** it's **challenging to establish clear criteria for what is inherently legal versus what is not when talking about natural events**. When it comes to natural events, understanding their legal relevance can be complex. **It is not always easy to define which natural events have inherent legal meaning and which do not.** Some events, like death, have immediate and obvious legal consequences, such as the transfer of inheritance rights, while others might not trigger any legal reaction unless they are connected to a legal relationship.
- **ASSESSING LEGAL INSIGNIFICANCE:** it's **problematic to determine when events or actions cease to hold legal relevance.** However, it is essential to recognize that **any event capable of triggering legal effects remains significant**. Similarly, deciding when an event loses its legal importance can also be difficult.
    - However, the **key point** is that **any event—natural or otherwise—that has the ability to produce legal effects, such as creating, modifying, or ending rights and obligations, must be considered legally relevant.** If an event can influence legal relationships, it cannot be dismissed as insignificant within the legal system.

2) LEGAL ACTS AND FACTS:

- **LEGAL ACTS: A legal act is any action, like signing a contract, that creates, changes, or ends legal rights and duties. understanding of their legal effects.**
- **Examples: Contracts, Wills, Marriage.**
- **PARTY'S AUTONOMY ON LEGAL ACTS:** is a **core principle** allowing individuals or groups to declare their intentions, verbally or through behavior, to alter rights and duties. The central idea is that **individuals have the freedom to make decisions about their personal or property rights unless there is a specific legal restriction preventing them**. Party autonomy in legal acts is a fundamental principle that gives individuals or groups the freedom to express their will—either through words or actions—to create, change, or end legal rights and obligations. The key idea is that **people are generally free to manage their personal and property affairs according to their own choices, as long as there is no specific law that restricts them.**
- **The Draft Common Frame of Reference (DCFR)** provides a clear **overview** of this principle. **It recognizes that while parties have broad freedom to arrange their agreements and legal relationships, this autonomy is not unlimited.** Parties can modify or opt out of many default legal rules, but they cannot override mandatory legal provisions that protect essential rights or uphold important public interests. In this way, the **DCFR strikes a balance between respecting individual freedom and maintaining the legal structure needed to protect fairness, public policy, and societal values.**
- **AUTHONOMY IN PATRIMONY VS PERSONALITY:**
- **PATRIMONY AUTHONOMY**: Party autonomy in matters of patrimony refers to the broad freedom individuals have to manage, use, and transfer their property and financial assets as they see fit. **People can buy, sell, donate, or otherwise dispose of their wealth with relatively few restrictions, as long as they respect the legal rules that govern property transactions.**
- **PERSONALITY AUTHONOMY:** On the other hand, **autonomy in matters of personality is much more limited**. This concerns **rights tied to a person's identity, dignity, and physical or moral integrity, such as rights to one's name, image, privacy, or body.** Here, the law imposes stricter limits to **protect fundamental human values and ethical principles.** Unlike property rights, these personal rights cannot be freely traded, waived, or harmed by agreements, because they are seen as essential to human dignity and are often protected by mandatory legal provisions.
- **STRUCTURE OF LEGAL ACTS:**
- **Unilateral:** unilateral legal acts **require a declaration from just one party**, like in wills, where an individual decides on asset distribution without others' consent, or when someone unilaterally

withdraws from a contract.

- **Bilateral:** bilateral legal acts **necessitate mutual agreement between two parties**, as seen in sales contracts where buyer and seller consent to the transaction terms. This is the most common type of legal act in daily transactions.
- **Multilateral:** multilateral legal acts **involve three or more parties**, common in forming companies or international agreements, where all participants must agree to establish legal terms jointly.
- **CONTENT OF LEGAL ACTS:**
- **PATRIMONIAL:** Patrimonial legal acts **involve interests that have economic value and can be financially evaluated**.
  - **An example** is a contract under **Article 1321 of the Italian Civil Code**, which typically deals with transactions like buying or selling goods, where the terms directly relate to economic aspects. **Article 1321 focuses precisely on contracts as instruments for governing patrimonial relationships.** This means:
    - **Contracts are not used to regulate moral, political, or spiritual matters, but rather matters that affect property, money, or obligations measurable in economic terms.**
    - **They are tools for the private autonomy of individuals, allowing them to shape their legal-economic relationships within the boundaries of the law.**
  - Thus, Article 1321 affirms that **contracts are the main vehicle for the exercise of private autonomy in economic affairs, and it ties the enforceability of contracts directly to their patrimonial nature.** Non-patrimonial agreements (e.g., purely moral commitments) fall outside this legal definition and generally do not create enforceable obligations in civil law.
- **NON-PATRIMONIAL:** focus on **interests that are not primarily financial in nature**.
  - For example, **marriage** is considered a non-patrimonial act because its main intent is not economic, even though it may have financial implications. In such acts, the economic aspect is present but does not define the overall nature of the legal act.
- **INTER-VIVOS ACTS: legal actions taken during a person's lifetime**, like buying property or entering contracts**, which immediately affect their rights and those involved**. These acts manage and address concerns directly while the parties are still alive.
- **MORTIS-CAUSA ACTS:** involve **plans made for asset distribution after an individual's death, such as wills or estate plans**. These **actions** only **become effective upon death**, ensuring the person's wishes for their property and assets are executed afterward.
- **LEGAL/MATERIAL FACTS: Legal or material facts are events that occur independently of human intention but still produce important legal effects**. These events **happen naturally**, without being deliberately caused to create legal consequences, **yet they automatically trigger changes in legal relationships**.
  - **For example**, when a person dies, their death immediately activates the inheritance process, transferring their property to their heirs according to the law, no matter the circumstances of the death.
- **DIFFERENCE BETWEEN LEGAL ACTS AND FACTS:** This is different from legal acts, where individuals intentionally take actions—such as signing a contract—to create, modify, or end legal rights and obligations. **In short, legal or material facts produce legal outcomes without the need for deliberate human will.**

3) LEGAL RELATIONS:

- **Legal relations** are the **basic connections created by law that link individuals or entities by assigning them specific rights and duties toward each other.** These relationships usually involve two sides: a "**can do**" aspect, where one party has the right to demand a particular action or behavior, and a "**shall do**" aspect, where another party is legally obligated to fulfill that demand.
  - **A clear example** is a **credit relationship**. A creditor holds a legal right—meaning they **can** request payment or performance from another party. On the other side, the debtor has the corresponding duty—they **shall** perform the agreed action, such as paying a sum of money or delivering a service. In this way, legal relations always involve a structured link between a right

held by one party and a duty owed by another.

4) **CATEGORIES OF RIGHTS:**

- **RELATIVE RIGHTS (RIGHTS IN PERSONAM):** Relative rights are **legal rights that a person holds specifically against one or more particular individuals or entities**, rather than against the world at large. These rights *create personal obligations, meaning they are enforceable only against designated parties and not against everyone*. **This type of right is also known as a right in personam.**
    - A **classic example** is the **credit-obligation relationship**. When a **creditor** holds a credit, they have the **right to demand a specific economic performance, like payment, from a particular debtor.** At the same time, the **debtor has the legal duty to carry out that performance in favor of the creditor.** This relationship clearly shows how relative rights work: the creditor's claim is aimed directly and exclusively at the debtor and cannot be enforced against anyone else.
- **ABSOLUTE RIGHTS (RIGHTS IN REM):** Absolute rights are **legal rights that apply universally and can be enforced against anyone who interferes with the right-holder's protected interests.** Unlike relative rights, which are directed at specific individuals, **absolute rights are rights in rem, meaning they are recognized and protected against the world at large**. Among absolute rights, there are two main categories:
    - **Absolute patrimonial rights** involve **interests that can be measured in money and transferred**.
        - Examples include **ownership of property, copyright protections under intellectual property, and industrial property rights like patents and trademarks.** These rights have clear economic value and can be bought, sold, or otherwise exchanged.
    - **Property**: ownership
    - **Intellectual Property**: copyright
    - **Industrial Property**: patents and trademarks
    - On the other hand, **absolute non-patrimonial rights protect** aspects of a person's individuality and dignity, such as **rights to dignity, privacy, image, and name.** These rights are personal in nature and cannot be exchanged for money or commercially transferred.
    - **Rights of Personality**: dignity, privacy, image, name.
- In addition, **rights can be either disposable or non-disposable**.
    - **Disposable rights** are those that the **holder can transfer to someone else**, such as selling a house or assigning a copyright (**absolute patrimonial rights**, for ex).
    - **Non-disposable rights**, usually **related to personality**, are so closely tied to the individual that they cannot be transferred or given up, preserving the essential dignity and identity of the person.
- **CASE STUDY OF DWARF-TOSSING:**
- **Situation:** ***Dwarf-tossing involves individuals with dwarfism being thrown for sport***, which led to a legal dispute when a French town's mayor banned the activity. Participants challenged the ban, arguing it infringed on their right to earn income.
- **Legal Resolution:** The **French Supreme Administrative Court upheld the ban, ruling that dwarf-tossing could be prohibited to protect human dignity and public order.** The United Nations Human Rights Committee also supported the ban, emphasizing that it maintained public order and upheld human dignity without being discriminatory.

5) **STATUTES OF LIMITATIONS:**

- **DEFINITION AND PURPOSE:** Statutes of limitations are **legal rules that define the maximum period of time allowed to bring a lawsuit after a certain event occurs, such as a breach of contract or a personal injury.**
- Their **main purpose** is to promote fairness and legal certainty by ensuring that claims are made while evidence is still fresh and reliable. They also **protect individuals from the constant threat of being sued over old matters, encouraging people to resolve disputes within a reasonable**

timeframe. By limiting how long legal action can be taken, statutes of limitations help stabilize legal relationships and give debtors and defendants confidence that, after a certain point, they are no longer at risk of being held liable for past actions.

- **EXCEPTIONS TO STATUTES OF LIMITATIONS: rights related to ownership and non-disposable rights, such as certain family rights or personal statuses, do not expire after a prescribed period.** These exceptions acknowledge the enduring nature of such rights that should not be compromised by time limits.
- **TOLLING:** is the **legal suspension of the statute of limitations, pausing the countdown on the time limit within which legal action can be taken.** Common reasons for tolling include the claimant being a minor, mental incapacity, or the defendant being out of the jurisdiction. **The statute remains paused until the specific condition is resolved.**
- **INTERRUPTION:** Interruption happens when the **running of the statute of limitations is completely stopped and reset, causing the time period to start over from zero.** This usually occurs when the rights holder actively asserts their claim, for example by filing a lawsuit or making a formal demand for enforcement. Such actions acknowledge the existence of a dispute and show a clear intent to seek a remedy. Unlike tolling, which merely pauses the time without resetting it, interruption wipes out the time that has already passed and grants a full, fresh period for initiating legal action, giving the claimant more time to pursue their rights.

UNIT 7: LEGAL SUBJECTS

1) LEGAL SUBJECTS:

- **2 TYPES OF LEGAL SUBJECTS: Legal subjects are the entities recognized by the law as capable of having rights and obligations. There are two main types of legal subjects.**
- **NATURAL PERSONS:** Natural persons are **individual human beings**, who **hold legal rights and responsibilities simply by being alive, from birth until death**. They enjoy **rights that are tied to human dignity**, such as the right to privacy, freedom of expression, and protection of their physical integrity. These rights are considered fundamental and are safeguarded by legal systems to preserve personal autonomy and human worth.
- **LEGAL PERSONS:** Legal persons, on the other hand, are **entities created through legal processes, such as corporations, foundations, or associations**. They are **treated by the law as if they were individuals in many ways: they can own property, sign contracts, sue, and be sued.** However, since they are not living beings, **they do not possess rights that are inherently human,** like the right to life, freedom of religion, or protection of physical integrity. Their rights and obligations exist only within the limits set by the law that created them.
- **ANIMALS:** Animals are **treated differently from both natural persons and legal persons in the legal system**. They **do not qualify as persons because they cannot independently hold rights and duties in their own name.**
    - **NO MORE CLASSIFIED AS "THINGS":** At the same time, modern law no longer simply classifies them as “things” or property in the traditional sense. Instead, **animals are recognized as sentient beings, meaning they are capable of feeling pain and emotion, and laws increasingly provide them with specific protections to safeguard their welfare.** Although animals cannot directly participate in legal relationships like humans or corporations, the law imposes ethical obligations on people to treat them properly, reflecting society’s growing awareness of their special status.
- **ROBOTS/AI:** Technological entities like robots, autonomous vehicles, and AI systems present new legal challenges due to their advanced capabilities and autonomy. **Traditionally, these technologies are classified as property controlled by human operators**. However, as they become more autonomous, there's increasing debate on whether they should be granted some form of legal personhood or rights. This ongoing discussion reflects the evolving nature of law in addressing the complexities introduced by modern technology.

2) LEGAL PERSONALITY AND CAPACITY TO ACT:

- **LEGAL PERSONALITY:** it refers to the **ability of an entity (natural or legal persons) to be vested with rights and duties**; this applies to both human beings and legal entities like corporations. This concept is fundamental in law as it defines who can be a participant in legal transactions and who can be held responsible for actions or debts.
- **CAPACITY/POWER TO ACT:** is about the **ability of those entities to engage actively in legal processes, such as entering contracts, owning property, or suing and being sued**. This involves the power to establish or modify legal relationships (contracts, court cases, ect) based on the entity's decisions and actions.

3) NATURAL PERSONS:

- **NATURAL PERSONS:** A **natural person is any human being who is recognized by law as having rights and obligations**. From the moment of birth—and in some legal systems even from conception—an individual is granted rights such as the ability to own property, make contracts, and seek protection or remedies through the legal system. **Natural persons are also entitled to basic human rights, including the rights to life, liberty, and personal security, which are fundamental to their dignity and freedom.**
- **DEATH OF A NATURAL PERSON:** When a natural person dies, **most of their rights and**

obligations, especially those related to property and financial matters, are passed on through legal procedures like probate. However, **personal rights** that are intimately connected to the individual's existence, such as the right to privacy or the right to a name, **generally come to an end and are not transferred to heirs or other parties.**

- **EMBRYOS AND FETUSES AS LEGAL SUBJECTS: embryos and fetuses are not considered natural persons as they are not yet born**. This classification primarily influences their legal rights under various laws.
- **CONSTITUTIONAL CONTEXT:** In the constitutional context, the U.S. Supreme Court in **Roe v. Wade (1973)** held that the word "person" as used in the Fourteenth Amendment does not include unborn children, thereby supporting the legal basis for a woman's right to seek an abortion.
- **RIGHT OF ABORTION:**
- **ROE VS WADE CASE (1973):** The **right of abortion was originally established in Roe v. Wade**, where the US Court linked the right to abortion to the broader constitutional right to personal privacy, drawn from several amendments. *The decision framed abortion as a matter of personal choice, protected under constitutional privacy rights.* However, later legal developments changed this framework.
- **LEGAL DEVELOPMENT-DOBBS VS JACKSON WOMEN'S HEALTH ORGANIZATION:** In the case of Dobbs v. Jackson Women's Health Organization, *the Supreme Court overruled Roe v. Wade, holding that the Constitution does not guarantee a right to abortion.* As a result, **the power to regulate abortion was returned to individual state governments**, allowing each state to set its own laws on the matter.
- **RIGHTS OF EMBRYOS AND FETUSES:** *though not recognized as natural persons*, **embryos and fetuses are granted specific legal protections**, such as rights related to health and potential heirship, reflecting their future potential if born alive.
- **NATURAL PERSONS AND SLAVERY:**
- **ARISTOTELIAN VIEW:** Aristotle viewed slavery as a natural and justified institution within society. In his work Politics, he argued that **some people are "natural slaves" because they lack the rational capacity to govern themselves and are better off being directed by others who possess full reason.** According to Aristotle, **a natural slave is someone who, while physically capable of labor, lacks the intellectual ability to make rational decisions for their own good**. Thus, **for him**, **slavery was** not simply a social or economic arrangement but **a reflection of a natural hierarchy among persons**. In his view, enslaving those who were naturally inferior was beneficial both for the master and the slave, as it allowed each to fulfill their natural role.
- **LEGAL STATUS OF SLAVES:** In historical legal practice, this idea was reflected in the way slaves were treated under the law.
    - **NORTH CAROLINE LENOIR VS SYLVESTER CASE (1830):** For example, in the 1830 North Carolina case Lenoir v. Sylvester, the **court confirmed that slaves were not recognized as natural persons with legal personhood. Slaves had no independent legal rights: they could not own property, enter into contracts, or even accept gifts.** Anything they acquired legally belonged to their master, underlining their status not as persons with rights but as property under the law.
- **LEGAL CAPACITY TO ACT OF MINORS:** minors generally **gain full legal capacity to act independently at 18**, although this can vary between 15 and 21 depending on the jurisdiction. Before reaching majority, **minors lack the legal capacity to perform acts such as entering into contracts or making valid wills without restrictions**.
- **EMANCIPATION:** minors gain **partial legal capacity through EMANCIPATION**, which **allows them to engage in certain legal actions like marriage or managing their own finances**. Minors can gain partial legal capacity through the process of emancipation. Emancipation is a legal mechanism that grants minors the ability to perform certain acts on their own, even before they reach full majority. Through emancipation, minors can take on specific legal responsibilities, such as entering into marriage, managing their own finances, or living independently without the

supervision of their parents or guardians. While emancipation does not necessarily give minors complete legal autonomy, it recognizes their ability to make important decisions in certain areas of life based on their maturity and circumstances.

- **LEGAL REPRESENTATION FOR MINORS:**
- **FUNDAMENTALS:** The **fundamentals of legal representation for minors are based on the principle that minors generally lack the full legal capacity to make significant legal decisions on their own.** To protect their interests, the **law provides mechanisms for adults—usually parents or guardians—to act on their behalf**.
    - **LEGAL REPRESENTATIVES FOR MINORS:** Legal representatives are **empowered to perform important legal acts for minors, such as entering into contracts, managing property, or making decisions about healthcare and education.**
    - Their role is to **safeguard the minor's rights** and **ensure that any action taken is in the minor's best interest**. In civil law systems, this representation is usually automatic and comprehensive, while in common law systems, it tends to be assigned individually through court appointments when specific needs arise. **The overall goal of legal representation is to balance the minor's protection with their gradual development of independence as they approach the age of majority.**
- **CIVIL LAW APPROACH:** In civil law systems, **minors and incapacitated adults are generally required to act through legal representatives, such as parents or guardians, when dealing with significant legal transactions.** These representatives have the authority to act in the best interest of the minor, especially in important or extraordinary decisions that minors cannot legally make on their own, like selling property or entering into major contracts.
- **COMMON LAW APPROACH:** In common law systems, the **approach is different**. There is **usually no automatic legal representative assigned to minors or incapacitated adults for all legal matters**. Instead, **if needed, a court can appoint a deputy or guardian on a case-by-case basis to handle specific legal actions.** This appointment is tailored to the situation, giving the deputy the powers necessary to assist with particular decisions without creating a permanent or broad legal representation as seen in civil law systems.
- **LIMITED CAPACITY TO ACT:** Limited capacity to act refers to the idea that minors, usually starting from the age of seven, can enter into contracts, but with important protections in place.
    - Typically, **contracts made by minors are considered voidable**, meaning the **minor can later choose to cancel them, unless the contract involves items necessary for daily life, such as food, clothing, or basic services.** Some legal systems allow minors to have a limited form of contractual capacity starting from a particular age, provided certain conditions are met.
- **WHY AGE 7? The choice of age 7 as the starting point for limited legal capacity is largely based on historical custom (consuetudine) and longstanding legal tradition rather than on modern scientific or psychological standards.** Historically, it was **believed that by around the age of seven, a child had reached a basic level of reasoning and understanding**, enough to be responsible for very simple legal acts, especially those connected to daily life, like buying food or small personal items.
- **ROMAN AND MEDIEVAL CANON LAW INFLUENCES:** This belief was influenced by both Roman law and medieval canon law, which treated age 7 as a milestone for beginning to distinguish right from wrong and being capable of basic decision-making. Thus, **the age 7 rule became a customary reference point in many legal systems, not because of a precise scientific study, but because tradition and practice accepted it as the moment when minimal legal responsibility could sensibly begin.** Modern law has mostly kept this age for reasons of continuity and practicality, even though the way minors' capacity is regulated has become much more detailed and protective.
- **In Italy**, the **approach is particularly strict**: **minors** are generally **restricted from entering into legal acts independently** unless specific conditions outlined in the civil code are satisfied or they

have been emancipated.

- **In France**, minors can act within the boundaries set by law and social customs, as long as their actions are reasonable and typically **carried out under the supervision of parents or guardians.**
- **In Germany**, the **law allows minors' contracts to be considered valid if they involve minor, everyday transactions** or if the money used comes from funds that were given to them specifically for that purpose, such as an allowance.

- **Each system seeks to balance the minor's ability to engage with society while protecting them from exploitation or entering into obligations they may not fully understand.**

- **INCAPACITIES OF ADULTS DE IURE: Incapacities of adults de iure refer to situations where the law restricts an adult's legal ability to act, either to protect them or as a form of punishment.**
- **PROTECTIVE INCAPACITIES:** Protective incapacities are **put in place to help adults who suffer from impairments or disabilities that limit their ability to manage their own affairs**. In these cases, a support administrator or guardian is appointed to assist or make decisions on their behalf, depending on the seriousness of their condition.
    - **The purpose** is to protect the individual while respecting their autonomy as much as possible.
- **PUNITIVE INCAPACITIES:** Punitive incapacities **occur as a result of criminal convictions**. Here, the **law imposes certain restrictions on the individual, such as banning them from holding public office or certain professional roles.** However, even adults under punitive incapacity usually retain the ability to make important personal decisions, like marrying or writing a will.
- **CAPACITY TO ACT OF AN INCAPACITATED ADULT:** When it comes to capacity to act, **contracts made by an incapacitated adult are generally treated as invalid, similar to contracts made by minors**. However, legal systems often allow **exceptions** for **simple, everyday transactions—such as buying food or basic necessities—that are considered essential for daily living.** This ensures that incapacitated adults can still function in society for their basic needs without risking exploitation or abuse.
- **INCAPACITIES DE FACTO: temporary condition where an adult's ability to engage in legal agreements is impaired due to factors like drunkenness, drug abuse, or mental disturbances.** Incapacities de facto refer to temporary situations where an adult's ability to make valid legal agreements is impaired because of conditions like intoxication, drug use, or mental disturbances. Unlike formal, permanent incapacities recognized by law, **these are short-term and not officially declared in advance**. However, if someone enters into a legal transaction while under such an impairment, the transaction can be declared invalid or challenged afterward, but only if two strict conditions are met:
    - **SEVERE IMPAIRMENT TEST:** the impairment was so severe that it completely negated the individual's ability to understand or control their actions.
    - **BAD-FAITH AWARENESS TEST:** the other party involved in the contract was aware of the individual's severe impairment and exploited the situation to their advantage.
- **CONSUMERS:** Consumers are defined as natural persons who enter into transactions for purposes outside their professional or commercial activities. This means **they engage in actions primarily for personal, family, or household reasons**. The definition is consistent across European Union legislation to ensure that consumer protection laws are applied uniformly across member states.
- **WHY CONSUMER LAW?** Consumer law exists **because markets naturally create certain imbalances between businesses and individual buyers.** *Consumers usually have weaker bargaining power compared to businesses and often lack access to the same level of information, putting them at a disadvantage*. These imbalances may include **unequal bargaining power and information asymmetries**, where businesses have more knowledge than the consumer.
- **PURPOSE OF CONSUMER PROTECTION LAWS:** Consumer protection laws are **designed to**

correct these inequalities by giving individuals stronger rights when dealing with businesses.

- **A SPECIAL CASE, MIXED TRANSACTIONS:** A special and more complicated situation arises with **mixed transactions, where a person acts partly for personal reasons and partly for professional ones in the same deal**. These cases are controversial because they blur the clear boundary needed for applying consumer protection rules, making it harder for courts to decide whether the person should be treated as a consumer or not.

4) LEGAL ENTITIES:

- **LEGAL ENTITIES:** In civil law systems, legal entities are divided into two main categories based on whether they serve public or private interests.
- **UNDER PUBLIC LAW: Public law entities** include institutions like the **State or governmental bodies**, which act on behalf of the public and are governed by public law principles.
- **UNDER PRIVATE LAW:** Private law entities, on the other hand, are **organizations created by individuals for private purposes**, such as companies limited by shares, and are regulated by private law. **Within private law, legal entities can be further divided into two types.**
    - **CORPORATIONS (OR LEGAL PERSONS):** Corporations (or legal persons) are **fully autonomous organizations with a legal identity that is separate from their owners**. They can own property, sign contracts, sue, and be sued independently of the individuals who founded or manage them. **Corporations are structured with internal governance systems**, like boards of directors or executives, **who act on behalf of the entity**.
    - **UNINCORPORED LEGAL ENTITIES:** Unincorporated legal entities, by contrast, **do not have a separate legal identity from their members**. In these cases, **the business and its owners are legally considered the same, meaning that members are personally and directly liable for the debts and obligations of the entity.** There is no protective legal "wall" between personal and business responsibilities, **making unincorporated structures riskier** for those involved.
- **RULES ON AGENCY: Legal entities**, although they exist only as FICTIONAL legal constructs and not as physical beings (i.e., **they exist legally but not physically**), are **able to act and interact in the legal world through natural persons**.
    - **AGENTS PURPOSE:** These individuals, often referred to as agents, are **authorized to represent and act on behalf of the legal entity.** It is through the actions of these agents that the legal entity can enter into contracts, make decisions, and perform other legal acts.
- **AUTHORITY AND BINDING:** When an agent acts within the scope of their given authority, their actions legally bind the entity they represent. This means that the entity itself is responsible for the commitments made by the agent, just as if it had acted personally.
- **DEFECTIVE CONSENT:** However, **issues can arise in the case of defective consent**. **If** an **agent**, even while acting within their authority, **agrees to a contract under conditions that affect the validity of the agreement—such as acting under a mistake, being misled by fraud, or experiencing coercion** (Experiencing **coercion means being forced or pressured into doing something against your free will, typically through threats, intimidation, or other forms of undue pressure)**. In legal terms, if a person (such as an agent acting for a legal entity) agrees to a contract or takes legal action because they were coerced—meaning they were threatened with harm or severe consequences unless they agreed—**their consent is not considered truly free or voluntary**. As a result, **the contract or legal act can be challenged or even declared invalid because the decision was made under pressure, not by genuine choice**)—**the mental state and intentions of the agent are critically examined**. The law looks at whether the agent genuinely consented on behalf of the entity. If a defect is found, it can impact the legal standing of the contract and the responsibilities of the entity itself.
- **NON-PROFIT ENTITIES: Non-profit entities are organizations created to support social, charitable, scientific, or educational causes rather than to generate profits for private benefit.** Because they serve the public interest, they often enjoy partial or complete exemptions from taxation, allowing them to devote more of their resources directly to their missions.

- **PURPOSE AND TAXATION:** One key feature of **non-profits is that they are not allowed to distribute any profits they earn to their founders, leaders, or members.** Any income they generate must be reinvested into advancing the organization's objectives rather than serving private interests.
- **TWO TYPES OF NON-PROFIT ENTITIES:**
- **FOUNDATION:** A foundation is a **type of non-profit often structured as a "corporation sole," meaning it is tied to a single person or office that holds and exercises legal rights on behalf of the organization.**
    - **An example is "The Crown"** in legal systems influenced by English law, where authority is vested in the sovereign office rather than a group of individuals.
  - **A corporation sole is a legal entity consisting of a single person who holds a particular office or position that carries on continuously, even as different individuals occupy that role over time.** The **legal rights, obligations, and property of the corporation are attached to the office itself, not to the individual personally**. When one officeholder leaves (through resignation, death, or replacement), the legal identity and rights of the corporation continue seamlessly with the next officeholder. A classic example is The Crown in British law, where the monarchy as an institution persists regardless of who is the reigning monarch. In the context of non-profits, foundations often follow this model, with authority centralized in one person or a single governing position tasked with managing the foundation's mission.
- **ASSOCIATIONS:** On the other hand, **associations are known as "corporations aggregate," meaning they are formed by a collective of individuals or members who work together to achieve shared non-profit goals.** Associations resemble partnerships but operate within the non-profit sector, focusing on collaboration to advance common causes rather than pursuing personal profit.
  - **CORPORATION AGGREGATES:** A corporation aggregate, by contrast, is **a legal entity formed by a group of people who come together to pursue a common purpose**. It is made up of multiple members, and the entity exists separately from the individuals who make it up. The **legal identity belongs to the association as a whole, not to any one individual**. This structure is typical for associations, where a collective body of members collaborates to achieve charitable, educational, or other non-profit goals. Leadership roles (like boards or committees) represent the association, but the organization's existence is based on the ongoing participation of its membership.
- **DIFFERENCES BETWEEN CORPORATION SOLE AND CORPORATION AGGREGATE:** The main difference between the two is that a corporation sole is centered around a single office that continues over time, while a **corporation aggregate is built around a collective group of people working together**. In the non-profit world, **foundations typically operate as corporations sole**, focusing management authority into a single position, while **associations function as corporations aggregate**, emphasizing group decision-making and collective action toward shared non-profit objectives.
- **CONSTITUTIONAL DOCUMENTS OF A COMPANY:** Constitutional documents of a company are the **essential legal texts that create the company's identity, define its purpose, and regulate how it operates.** They **provide the legal foundation** for the company's existence and ensure that its activities are organized and predictable, both for the company itself and for third parties interacting with it.
  - **The Memorandum of Association** sets out the **company's fundamental characteristics**. It **defines the company's official name, its corporate purpose—meaning the activities it is authorized to carry out—and its share capital**. By doing this, the Memorandum establishes the company's legal identity and frames the boundaries within which it must operate.
  - **The Articles of Association** focus on the **company's internal organization and governance**. They detail **how the company is managed, how directors are appointed, how shareholders' rights are exercised, and how corporate decisions are made**. The

Articles **ensure that the internal structure operates smoothly and according to agreed-upon procedures (such as external structure and purposes stated in the memorandum of association).**

- **Bylaws**, although often more detailed and flexible, further **develop the company's internal functioning**. They **regulate the practical aspects of corporate governance**, such as defining the powers of directors, setting rules for shareholder meetings, and outlining voting procedures. **Bylaws serve as operational manuals, ensuring that decision-making within the company follows clear and legally binding rules.**
- **DIFFERENCES BETWEEN ARTICLES OF ASSOCIATION AND BYLAWS:** The Articles of Association and Bylaws both govern the internal organization of a company, but they serve different roles and have distinct legal importance. *The Articles of Association are a foundational legal document filed with public authorities (such as a company registry) when a company is created*. They define the company's structure at a formal level, setting out essential rules about governance, shareholder rights, director duties, meeting procedures, and how the company will be managed overall. The Articles have strong legal force and are binding both internally and externally, meaning third parties can rely on them when dealing with the company. *Bylaws, on the other hand, are typically internal rules adopted by the company after its formation.* They are more detailed and operational, regulating day-to-day procedures such as how board meetings are run, how officers are appointed, and how internal committees function. Bylaws are binding internally among the members, directors, and officers, but they usually are not filed with public authorities and do not directly affect third parties. In short, the Articles of Association set the legal framework and identity of the company and are publicly recognized, while Bylaws focus on internal management practices and operational details and are mainly for internal use within the company.
- **In short, constitutional documents are legally useful because they give the company a clear structure, define its powers and limitations, protect the interests of shareholders and third parties, and provide a transparent framework for resolving internal disputes**. Without them, a company would lack the necessary legal certainty to function effectively and be recognized as a separate legal entity.
- **CORPORATED BUSINESSES:**
- **GENERAL PARTERSHIPS (GP):** partners manage the business together and share joint and several liabilities, meaning they are **collectively and individually responsible for all business debts and obligations**. This structure allows for shared decision-making and accountability.
- **LIMITED LIABILITIES (LP):** features **general partners who manage operations and carry unlimited liability, and limited partners who invest financially without engaging in management.** Limited partners' liability is confined to their investment amount, making this structure suitable for PE funds and investment funds.
- **LIMITED LIABILITY PARTERSHIPS (LLP):** A Limited Liability Partnership (LLP) is a **business structure commonly used by professional firms, such as law offices, accounting firms, and consulting agencies.** In an LLP, **all partners are allowed to actively participate in the management and decision-making of the business without being personally liable for the misconduct or negligence of their fellow partners**. Each partner is legally responsible only for their own actions and for the actions of those they directly supervise. This structure protects a partner's personal assets from being seized to cover business debts or the mistakes of other partners, offering a balance between active involvement in the business and strong personal liability protection.
- **DIFFERENCES BETWEEN LP AND LLP:** The main differences between a Limited Liability Partnership (LLP) and a Limited Partnership (LP) lie in how management and liability are structured: in an LLP, all partners have the right to actively participate in managing the business without exposing themselves to personal liability for the partnership's debts or for the actions of other partners. Each partner's liability is limited to their own wrongdoing or the actions they directly

supervise. This means personal assets are largely protected even while partners are involved in running the business. In an LP, however, there are two types of partners: general partners and limited partners. General partners manage the business but have unlimited personal liability for the partnership's debts and obligations. Limited partners, by contrast, have liability limited to the amount of their investment, but they cannot participate in the active management of the business. If they do, they risk losing their limited liability status.

- In short, LLPs allow all partners to manage the business while keeping their liability limited, while LPs divide management and liability between general partners (who manage and are fully liable) and limited partners (who invest but stay passive to protect their limited liability).

UNIT 8: CONTRACTS AND OTHER SOURCES OF OBLIGATIONS

1) CONTRACT DEFINITION: Contracts are legally binding agreements that play a crucial role in everyday life and in business operations.

- **CONTRACTS AS CONSUMER TRANSACTIONS:**For consumers, contracts are essential because they allow them to purchase goods and services needed for daily living and to fulfill personal needs.
- **CONTRACTS HELP BUSINESS OPERATIONS:** In the business world, contracts are fundamental tools that help companies organize their activities, manage relationships, and facilitate the exchange of goods and services, ensuring smooth operations and profitability.
- **FORMATION METHODS OF CONTRACTS:** Contracts can be formed in several ways:
  - **BY WRITTEN DOCUMENTATION:** One method is through written documentation, where the agreement is formally recorded by the parties themselves, or with the help of public notaries or solicitors. This written form provides clear evidence of the parties' intentions and the agreed terms.
  - **ORALLY:** Contracts can also be made orally, meaning the parties agree to the terms by simply speaking to each other without creating a written document.
  - **BY CONDUCT:** Finally, contracts can be formed by conduct, where the behavior and actions of the parties clearly show that they have reached an agreement, even if no words are exchanged or documents signed.
- **In each case, the key element is the mutual understanding and acceptance of the terms, regardless of the form it takes.**

2) CONTRACTS IN CIVIL LAW AND COMMON LAW:

- **IN CIVIL LAW:** In civil law jurisdictions, **contracts are primarily seen as binding agreements based on the mutual consent of the parties involved.** The central idea is that once parties reach an agreement–through clear offer and acceptance–their promises create a legal obligation recognized and protected by the legal system.
  - **The emphasis in civil law is on the will of the parties**: contracts are respected as expressions of their freedom to arrange their affairs as they see fit, within the limits of public order and mandatory legal rules. **In civil law traditions, contracts are often treated more formally than in common law systems**. Although contracts can still be made orally or by conduct, **written contracts are strongly preferred in many cases, especially for important transactions like property sales or financial agreements, because the written form provides clarity and legal security.**
  - Another key feature is that in civil law, **contracts are seen as a meeting of wills rather than as a "bargain" or "exchange of promises" as in common law.** As long as there is a serious and mutual intention to create legal effects, the contract is binding.
  - **Good faith also plays a major role**: not only must parties respect the agreed terms, but they must also act honestly and fairly during both the negotiation and performance of the contract. Finally, **in civil law jurisdictions, the general rules about contracts are often codified—for example, in national civil codes—providing a clear and structured set of principles that govern how contracts are formed, interpreted, performed, and terminated.** This codification helps ensure that contracts are treated consistently and predictably across different cases.
- **ROMAN LAW CONTEXT:** In Roman law, the idea of a contract comes from the term "cum-trahere," which means "to bind." This **reflects the essential nature of a contract**: an agreement that legally ties the parties to their commitments and makes their promises enforceable.
- **GENERAL DEFINITION:** In modern civil law jurisdictions, a **contract is generally defined very broadly as any agreement between two or more parties that is intended to create legal obligations.** There is no strict requirement for an exchange of goods or services of equal value; **the key element is the mutual consent to be legally bound**.

- **INCLUSIVITY OF DONATIONS:** One important feature of **civil law** is its **inclusive approach to what counts as a contract**.
  - **For example, donations**–where one party gives something freely without receiving anything in return–**are still treated as contracts**. This is **different from common law systems, where a contract usually requires an exchange (known as "consideration"**).
- **FUNDAMENTAL IDEA REGARDING CONTRACTS IN CIVIL LAW:** In civil law, the focus is more on the agreement itself and the parties' intention to create legal effects, rather than on the idea of a balanced exchange.

- **IN COMMON LAW:** In common law jurisdictions, **contracts are seen primarily as bargains or exchanges where each party must offer something of value, known as consideration, in order for the agreement to be legally binding**.
  - **The focus** is not just on the agreement itself but **on the presence of mutual promises or benefits flowing between the parties**.
  - **WHAT IS CONSIDERATION?** Without **consideration—meaning some form of exchange** – a contract generally cannot be enforced in common law.
  - **Contracts in common law behave as private ordering tools**: they **allow individuals and businesses to freely organize their relationships and transactions according to their own terms, provided they do not violate public policy or statutory rules**.
  - The courts respect this freedom but will closely examine whether the basic requirements–offer, acceptance, consideration, and an intention to create legal relations–are clearly present. Compared to civil law systems, **common law places greater emphasis on formalities and technicalities, especially when interpreting contracts.**
  - **IMPORTANCE OF WORDING:** Judges often **stick closely to the text of the agreement**, giving **priority to the exact words the parties used rather than trying to uncover broader ideas of fairness or good faith** unless the contract itself or the circumstances specifically demand it.
  - **CONTRACTS AS SELF-CONTAINED DOCUMENTS:** Common law also sees contracts as self-contained documents: **the main goal of contract interpretation is usually to enforce what the parties agreed to, based on the written document, without inventing additional duties unless clearly necessary.** As a result, contracts in common law jurisdictions tend to be longer and more detailed because parties are expected to anticipate and regulate every important aspect of their relationship through precise terms.
  - **In summary**, in common law, **contracts behave like structured bargains built on mutual exchange**, and the legal system enforces them based on their clear terms, with a strong respect for the parties' freedom to define their rights and obligations in detail.
- **KEY INCLUSIONS:**
- **GRATUITOUS PROMISES:** These are **commitments made without receiving anything in return**.
  - **In common law**, such promises are typically not enforceable as contracts unless they are formalized through a deed under seal.
  - **Gratuitous promises are commitments where one party agrees to do something for another without receiving anything in return.** In common law systems, these promises are generally not enforceable as contracts because they lack consideration, which is a required element for a valid contract.
    - **Consideration means that both sides must exchange something of value, and without it, a simple promise is not enough to create binding legal obligations.**
  - However, there is an important **exception**: **if a gratuitous promise is formalized through a deed under seal—a special, formally executed document that signifies serious intent—then it becomes legally enforceable even without consideration**.
  - **WHAT IS A DEED?** A deed serves as a **substitute for consideration** by providing a strong

public signal that the promise was made with solemn intent to be binding.

- **GRATUITOUS BAILMENTS:** Gratuitous bailments **occur when one person, the bailor, hands over possession of an item to another person, the bailee, without receiving any payment, reward, or other form of benefit in return.** Since there is **no exchange of value between the parties**, a **gratuitous bailment does not meet the requirements for a contract under common law**, where consideration—a mutual exchange—is necessary for a contract to be enforceable.
    - Even though it is not a contract, **a gratuitous bailment still creates certain legal duties.** The bailee, for example, is expected to take reasonable care of the item while it is in their possession, even though they are not being paid. If the bailee is negligent and the item is damaged or lost, they can still be held liable under general principles of responsibility, even without a formal contractual relationship.
- **CONSIDERATION:**
- **DEFINITION: something of value that each party agrees to give or do for the other in order to form a binding contract**. It's essentially the **exchange of benefits and detriments between parties**, like paying money in return for goods, or providing services in exchange for compensation.
- **LEGAL FUNCTION: Consideration** serves as a **critical mechanism in common law** to differentiate enforceable promises from those that are not legally binding.

- **CONTRACTS IN EUROPEAN LEGAL SYSTEMS:** In European legal systems, contracts are defined with slight variations but share a common foundation focused on the mutual intention to create legal obligations.
- **DCFR:** Under the Draft Common Frame of Reference (DCFR), **a contract is seen as an agreement made with the purpose of creating a legally binding relationship**. The DCFR **highlights the intention** behind the agreement as the key element that triggers legal consequences, and it treats contracts as either bilateral or multilateral juridical acts depending on how many parties are involved.
- **ITALIAN CIVIL CODE:**The Italian Civil Code, in **Article 1321**, defines a contract as an agreement between two or more parties aimed at creating, regulating, or ending their economic relations. **Italian law places special emphasis on the causa—the lawful purpose behind the agreement—which reflects the broader civil law tradition that requires contracts not just to express mutual consent, but also to serve a legitimate social or economic function.**
- **FRENCH CIVIL CODE:** The French Civil Code, in **Article 1101 (revised in 2016)**, defines a contract more simply as a mutual agreement intended to create, modify, or extinguish obligations. **Unlike the Italian system, the French definition no longer focuses on the concept of causa**. Instead, it **closely aligns with the DCFR's approach**, concentrating purely on the mutual consent and the legal consequences that arise from it, without requiring an inquiry into the underlying purpose.

3) BINDING FORCE OF CONTRACTS:

- **BINDING FORCE OF CONTRACTS IN FRENCH LAW:**
    - **PRINCIPLE:** In French law, the **binding force of contracts is firmly established by Article 1103 of the French Civil Code**, which states that contracts legally formed have the same binding power as legislation between the parties. This principle means that once two or more parties enter into a valid contract, they are legally required to respect and fulfill their obligations under it, just as if the contract were an actual law created specifically for them.
    - **IMPLICATION:** The implication of this rule is significant: **once a contract meets all the legal requirements—such as consent, capacity, a lawful object, and cause (where relevant)—it cannot be disregarded or unilaterally modified by either party.** The parties must perform their agreed duties faithfully, and failure to do so can lead to legal enforcement or damages. This highlights the serious and enduring commitment that contracting imposes, reinforcing the idea that freely made agreements must be honored with the same strength and respect as

formal laws.

4) CONTRACTS AND OBLIGATIONS:

- **CONTRACTS AS OBLIGATIONS:** Contracts serve as a foundational source of obligations in legal and business dealings. They formalize the duties and rights of the parties involved, ensuring structured and enforceable interactions.
- **EXAMPLE, CONTRACT OF SALE:** A contract of sale specifically entails the agreement to transfer ownership of goods or rights in exchange for payment. It outlines specific obligations for both the buyer and the seller to fulfill their parts of the deal.
- **SELLER'S RESPONSIBILITIES:** The seller has two main responsibilities (**OBLIGATIONS)**: **first**, **delivery**, meaning they must hand over the item as agreed upon in the contract, respecting any terms about time, place, and condition. **Second**, the seller must provide a **warranty**, ensuring that the item is free from defects or legal claims by third parties that could interfere with the buyer's ability to use or own the item. This protects the buyer from risks like eviction or undisclosed flaws.
- **BUYER'S RESPONISIBILITIES:** The **buyer also has important obligations, chiefly payment**. The buyer must pay the agreed price at the time and place specified in the contract, thereby completing their side of the transaction and ensuring the seller receives the promised compensation.
- **Through these mutual obligations**, the contract of sale illustrates how contracts in general work: by formally assigning duties to each party, contracts create a legal framework that supports fair, organized, and enforceable exchanges.

5) SOURCES OF OBLIGATIONS:

- **PRIMARY SOURCE: CONTRACTS**
- **SECONDARY SOURCE, TORTS:** Torts are a secondary source of obligations that arise when someone causes harm or loss to another person outside of any contractual agreement. Unlike contracts, where obligations are voluntarily created by mutual agreement, **torts impose responsibilities on individuals based on the duty not to harm others**. If someone's actions—whether through negligence, recklessness, or intentional misconduct—injure another person or their property, the injured party can seek compensation, even though there was no prior relationship or agreement between them. **Torts ensure that individuals and businesses are held accountable for wrongful acts that violate basic duties of care and respect toward others.**
- **OTHER MINOR SOURCES:** such as unjust enrichment, undue payment, and statutory duties. These are less common but can impose legal responsibilities in specific circumstances.

UNIT 9: FUNCTIONS, CONTENTS AND CHOICE OF CONTRACT LAW

1) PARTY AUTONOMY:

- **PARTY AUTONOMY:** contract law is based on the idea that **parties are the best judges of their own interests**, known as party autonomy. This principle allows parties to freely enter into contracts and set their terms without outside interference.
- **SUBSIDIARY PRINCIPLE:** the subsidiarity principle supports **minimal court intervention**, emphasizing that **the primary authority over contracts lies with the parties themselves**.
- **JUDICIAL PERSPECTIVE: courts typically do not alter contracts to benefit a dissatisfied party**, as seen in **Travers v Lismore (1900)**. Their role is to enforce contracts as they were originally agreed upon, not to adjust them based on later concerns or fairness.

2) FREEDOM OF CONTRACTS AND LIMITS:

- **CONTRACTUAL FREEDOM IN THE FRENCH CIVIL CODE:** Article 1102 of the French Civil Code, revised in 2016, emphasizes that **individuals have the freedom to enter contracts, choose their contracting parties, and set the terms of their agreements**. However, this freedom is constrained by the boundaries of the law and cannot override public policy rules.
- **LIMITS TO CONTRACTUAL FREEDOM: Contractual freedom has inherent limitations**, especially **when parties contract in ways that violate legal or moral standards**. If a party lacks the capacity to understand their interests or is irrational, the law intervenes with mandatory rules. These rules can render a contract void or allow it to be annulled by one of the parties, ensuring protection against unfair or exploitative agreements.
- **BUSINESS CONTRACTS AND CONSUMER PROTECTION:** the extent of contractual freedom also differs across business contexts:
- **B2B (BUSINESS TO BUSINESS) CONTRACTS:** In B2B contracts (business-to-business), there is **generally a high level of flexibility because both parties are considered to have similar bargaining power and commercial experience.** Businesses are expected to negotiate and protect their own interests without needing special legal protection, which allows them to agree on almost any terms they choose, as long as they do not violate mandatory laws.
- **B2C (BUSINESS TO CONSUMER) CONTRACTS:** In contrast, B2C contracts (business-to-consumer) are **subject to stricter regulations, particularly under EU law, to protect consumers.** This protection is necessary because consumers are often in a weaker bargaining position compared to businesses, **lacking** the **same level of information, negotiation power, or legal expertise**. As a result, many rules—such as transparency requirements, mandatory consumer rights, and limits on unfair terms—are imposed to ensure that consumers are treated fairly and can confidently engage in transactions.

3) EU CONSUMER CONTRACT LAW:

- **UNITED NATIONS CONVENTION ON CONTRACTS (CISG):** The United Nations Convention on Contracts for the International Sale of Goods (CISG), **often called the Vienna Convention**, was **adopted on April 11, 1980**, and entered into **force on January 1, 1988**. It is specifically **designed for B2B (Business-to-Business) sales involving the international sale of goods.**
    - The CISG **aims to standardize key aspects of contract law across different countries, making international trade more predictable and efficient** by reducing legal uncertainties and minimizing the impact of differences between national legal systems.
- **EU CONSUMER CONTRACT LAW:** In parallel, EU consumer contract law has developed over the past three decades with a strong focus on protecting consumers. **EU legislation has introduced a range of directives that regulate B2C (Business-to-Consumer) transactions**. These laws cover important areas like package travel contracts, doorstep sales, and the sale of consumer goods. **They impose duties** such as the obligation for businesses to provide clear information before a contract is signed and grant consumers special rights like the right to withdraw from a contract within a specified period.

- **LEGAL BASIS OF EU CONTRACT LAW:** The **legal basis for the EU's ability to legislate in contract law, particularly for consumer protection, comes mainly from Article 114 of the Treaty on the Functioning of the European Union (TFEU).** This article empowers EU institutions to adopt measures that harmonize national laws when necessary to ensure the smooth operation of the internal market. In the context of contracts, the EU uses this authority to reduce differences between national consumer protection laws, strengthening trust and fairness across the entire European market.

4) CHOICE OF LAW, ISSUE OF JURISDICTION AND PROPER LAW:

- **NATIONAL CONTRACT LAW:** Contract law is set by legislatures and intrepreted by courts within national jurisdictions. This ensure laws reflect local priorities.
- **GLOBAL PERSPECTIVE:** Contract law shows notable similarities across global jurisdictions, aiding in international commerce.
- **CHOICE OF LAW CLAUSE:** The choice of law clause allows parties to specify which jurisdiction's law governs their contract and which court will handle disputes. This is essential for ensuring clarity in legal obligations and dispute resolution in cross-border transactions.
- **CONVENTION ON CHOICE OF COURT AGREEMENTS:** The **Convention on Choice of Court Agreements, signed in 2005 and entering into force in 2015, is an international treaty that standardizes how court agreements are recognized and enforced between countries like the EU member states and the United States.** Its goal is to make international dispute resolution more predictable by ensuring that when parties choose a particular court to settle their disputes, that choice is respected and judgments are enforced across borders.
- **JURISDICTION ISSUES:** On jurisdiction issues within the EU, the **Brussels I Regulation (EU No 1215/2012) plays a key role**. It simplifies and harmonizes the recognition and enforcement of court judgments among EU countries, **giving businesses greater legal certainty when operating across different European states**. This regulation ensures that once a judgment is issued in one EU country, it can be easily recognized and enforced in another without lengthy procedures.
- **ARBITRATION CLAUSE:** An arbitration clause is another **important tool for managing international disputes**. It specifies that **any conflicts arising from a contract will not be handled by regular courts but instead by an arbitrator, who acts like a private judge.** Arbitration typically **takes place at** institutions like the **International Chamber of Commerce (ICC)** in Paris, following agreed rules and procedures. Arbitration is governed both by local arbitration laws and by international treaties, most notably the 1958 New York Convention, which ensures that arbitration awards are recognized and enforced globally. Arbitration is often preferred for international disputes because it is usually faster, more flexible, and more confidential than traditional court proceedings.
- **THE ISSUE OF PROPER LAW:** Proper law refers to the **legal system or body of law that is most closely connected to a particular contract or legal relationship and is therefore the most appropriate to govern it.** In other words, proper law is the set of rules chosen either by the parties themselves (through a choice of law clause) or, if no choice is made, determined by courts based on which jurisdiction has the strongest link to the case.
    - **The purpose** of proper law is to **provide clarity and predictability in international or cross-border transactions, where more than one legal system could potentially apply.** It helps decide which country's laws will govern the rights and obligations of the parties, ensuring that disputes can be resolved based on a consistent and foreseeable legal framework.
    - **The usefulness** of the proper law concept lies in its **ability to avoid legal uncertainty**. By **identifying and applying the most appropriate legal system, it reduces conflicts, speeds up dispute resolution, and protects the legitimate expectations of the parties involved,** making international commerce and cooperation smoother and more reliable.
- **HARD LAW:** When dealing with the issue of proper law, parties to a contract have the freedom to choose which law will govern their agreement, giving them control over the legal framework that

will regulate their rights and obligations. **They can choose a hard law**, meaning the **formal contract law of a specific national legal system**, such as the law of France, Germany, or the State of Delaware in the U.S. Hard law provides a concrete, enforceable set of rules that courts must apply when interpreting and enforcing the contract.

- **SOFT LAW:** Alternatively, parties can refer to soft law, which consists of **non-binding sets of principles or guidelines, like the UNIDROIT Principles or the Principles of European Contract Law.** Soft law does not have the binding force of national legislation but serves as a tool to guide interpretation, fill gaps, or inspire fair solutions where the national law may be incomplete. *Soft law is often particularly useful when combined with an arbitration clause, because arbitrators, unlike judges in national courts, can more flexibly use soft law to resolve disputes based on fairness and international commercial practices rather than strictly applying the rules of one national system.*
- ***In short, choosing between hard law and soft law allows parties to tailor their contract's legal environment, balancing the certainty of national law with the flexibility and fairness that soft law can provide.***

- **DRAFT PROJECTS ON EUROPEAN PRIVATE LAW:**
- **PURPOSE:** developed to harmonize laws across European nations, these principles aim to facilitate smoother interactions across different jurisdictions.
- **IMPACT:** they have shown effectiveness as model laws within individual countries and across the European Union.
- **APPROACH USED:** a **scientific and comparative approach to law**, these drafts **promote a concept of law** that transcends national boundaries, **akin to the successful methods adopted by the CISG.**
- **STATUS AND VISION:** these **draft projects are not mandatory**; they are proposals that countries can adopt to align more closely with each other. They represent a vision for a unified legal framework within Europe, aiming to standardize aspects of private law across member states.
- **PRINCIPLES ON INTERNATIONAL COMMERCIAL CONTRACTS (PICC):** The Principles of International Commercial Contracts (PICC) are a **set of model rules created to regulate international commercial agreements.** Drafted by legal experts from around the world and inspired by the CISG, **the PICC provides a neutral, standardized framework that parties can use when they want a clear and flexible set of rules for international business deals.** Although not binding law by themselves, the PICC are highly respected and often referred to by arbitrators and courts, especially in cross-border disputes where parties seek a balanced and widely accepted legal foundation.
- **PRINCIPLES OF EUROPEAN CONTRACT LAW(PECL):** The Principles of European Contract Law (PECL) were developed by European legal scholars with the **goal of harmonizing contract law within the European Union.** The PECL focuses specifically on contracts operating within the intra-European market, offering a coherent set of rules to increase legal consistency across member states and make cross-border transactions within the EU more predictable and secure.
- **DRAFT COMMMON FRAME OF REFERENCE (DCFR):** The Draft Common Frame of Reference (DCFR) goes even further than the PECL. It expands beyond contract law to include a wide range of private law topics, such as property law and torts. **The DCFR aims to lay the foundation for a possible future European Civil Code.** Building on the ideas of the PECL, it offers a much more comprehensive framework, seeking to harmonize private law across the EU and to guide both national lawmakers and private parties toward greater legal integration.
- **RESTATEMENT (SECOND) OF CONTRACTS:** The Restatement (Second) of Contracts was developed by the **American Law Institute (ALI)** to **simplify, clarify, and standardize contract law across the United States.** First issued in 1932 and later **updated in 1981**, the Restatement compiles the best legal practices and principles into a single, organized document. Even though each U.S. state has its own contract laws, the Restatement serves as an influential guide for courts, helping to create consistency across the different jurisdictions. Importantly, it does not just

summarize the majority opinions of the states; **instead, it presents what is considered the "better view" of the law, aiming to resolve disagreements among states and promote a more coherent approach to contract law.**

- **DIFFERENCES BETWEEN RESTATEMENT OF CONTRACTS AND EUROPEAN DRAFT PROJECTS:** The difference from European draft projects like the PICC and PECL is significant. The Restatement is designed to harmonize law within a single country that has a complex federal system, while European projects aim to harmonize laws across different sovereign countries within a supranational framework like the EU. European initiatives must bridge differences between entirely independent legal systems, whereas the Restatement focuses on smoothing differences within one national system.

5) CHOICE OF CONTRACT LAW:

- **EU REGULATIONS: ROME CONVENTION AND ROME I REGULATION:**
- **ROME CONVENTION (1980):** Introduced to standardize the rules governing the law applicable to contractual obligations across Europe, providing a framework for determining which national law applies to contracts with cross-border implications.
- **ROME I REGULATION (2008):** Successor to the Rome Convention, allowing parties significant freedom to choose the applicable law for their contracts. Some key provisions are:
  - **ARTICLE 3-FREEDOM OF CHOICE:** Parties can select the law applicable to the whole or part of a contract, ensuring flexibility in cross-border transactions.
  - **ARTICLE 6-CONSUMER CONTRACTS:** Restricts choice of law in consumer contracts to protect consumers. The law of the country where the consumer resides will apply if the business directs activities to that country, limiting the freedom previously mentioned under Article 3.
- **U.S. REGULATIONS:**
  - **STATE REGULATION:** In the U.S., contract law is primarily state-regulated, and there's no overarching federal contract law except for specific areas governed by federal statutes.
  - **UNIFORM COMMERCIAL CODE (UCC):** Adopted by all 50 states to some extent, the UCC standardizes transactions involving goods (and to a lesser extent, services) across states, especially in B-to- B transactions. Article 2 of the UCC specifically deals with the sale of goods, providing a consistent legal framework that facilitates commerce across state lines.

UNIT 10: CONTRACT TERMS AND THEIR INTERPRETATION:

1) CONSTRUCTING CONTRACTS:

- **THEORIES OF CONTRACT INTERPRETATION:** when courts interpret contracts:
- **SUBJECTIVE THEORY:** The **Subjective Theory focuses on the internal, private intentions of the parties**. According to this view, the **true meaning of a contract lies in what the parties actually intended, even if their outward words or actions might suggest something different**. If it can be proven that both parties meant something specific, that mutual intention should determine how the contract is understood.
- **Subjective Test**: evaluates the internal intentions of the parties.
- **OBJECTIVE THEORY:** The Objective Theory, on the other hand, **prioritizes the external expressions of the parties—the words they used and the actions they took**. Under this theory, a contract's meaning is **based on how a reasonable third party would interpret those outward expressions, not on what the parties may have secretly intended**. This approach emphasizes legal certainty, ensuring that contracts are judged by what was clearly communicated, not by hidden or private thoughts.
- **Objective Test**: considers how an external observer would interpret the contract based on outward expressions.
- *In most modern legal systems, particularly in common law, the objective theory is dominant because it provides greater predictability and protects the trust that others place in visible agreements.*
- **CASE STUDY: WOOD VS CAPITA INSURANCE:**
- **BACKGROUND:** In Wood v Capita Insurance Services Ltd, the dispute arose after Capita Insurance bought a company called Sureterm Direct, a business that specialized in selling motor insurance. After the purchase, Capita discovered that Sureterm had engaged in misleading sales practices—specifically, they had misrepresented information to customers in ways that could have led to regulatory problems. These issues mainly involved practices that could have triggered complaints to financial authorities like the Financial Services Authority (FSA), even though at the time of the discovery, no formal complaints had yet been filed.
- **INDEMNITY CLAUSE ISSUE:** The legal fight centered on an indemnity clause in the sale agreement, which Capita argued should protect them from the financial consequences of the mis-selling they had uncovered after buying Sureterm. Capita wanted the clause to be interpreted broadly to cover any mis-selling problems they found, even if there had been no external complaints.
- **COURT'S DECISION:** Mr. Wood was a former shareholder of Sureterm who had sold his shares to Capita as part of the deal. As a seller, Wood was directly affected because if the indemnity clause was interpreted broadly in Capita's favor, he (and other sellers) could have been forced to compensate Capita for the losses resulting from Sureterm's misbehavior. **Ultimately, the court decided that the indemnity clause should be interpreted narrowly**: it only covered cases where a formal complaint had been made to a regulatory authority like the FSA. Since no such complaints had been filed at the time, Capita could not claim compensation under that clause. This case emphasized that the actual words of the contract are decisive—courts will not stretch or rewrite what the parties agreed just because one party later discovers problems.
- **GENERAL PRINCIPLES OF INTERPRETATION APPLIED:**
    - **TEXTUALISM:** In this case, textualism was important because the court focused on the specific wording of the contract to make their decision. This method helps keep things clear and predictable by sticking closely to the written words.
    - **CONTEXTUALISM:** This method wasn't as influential in this case but generally involves looking at the broader situation around a contract to make sure the interpretation fits with the overall purpose and business reality.

2) **INTERPRETATION IN COMMON LAW:**

- **UNDERSTANDING CONTRACT INTERPRETATION IN COMMON LAW:** contract interpretation primarily focuses on the objective meaning of the words used in the contract. This approach seeks to determine how a reasonable person, with all the background knowledge available to the parties at the time of the contract, would understand the contract terms.
- **KEY SOURCES AND PRINCIPLES:**
  - **LORD HOFFMAN'S VIEW:** Lord Hoffmann's view on the interpretation of contracts in common law was a major shift away from the traditional, strict literal reading of contracts. His approach was most famously stated in t**he case of Investors Compensation Scheme Ltd v West Bromwich Building Society (1998).**
  - **PRINCIPLE:** According to Lord Hoffmann, the **true meaning of a contract is what the document would reasonably convey to a person with all the background knowledge that would have been available to the parties at the time of the agreement.** In other words, **interpretation should not be based solely on the literal meaning of the words used, but on how a reasonable person, aware of the context and the situation, would understand them.** This approach recognized that the meaning of language can depend heavily on context. **It moved common law away from a purely literal interpretation**—which only looks at the strict words of the contract—and **toward a more contextual interpretation**, where courts consider the factual background ("the matrix of fact") known to the parties when they made the agreement.
  - **IMPACT:** The impact of Lord Hoffmann's view was significant: **it introduced a more flexible, realistic method of understanding contracts, one that seeks to uphold what the parties actually meant to achieve, not just the surface meaning of the words.** However, courts still maintain caution: they will not allow purely subjective intentions or ignore clear wording unless necessary to avoid absurd results.
  - **LORD HODGE'S VIEW:** Lord Hodge's view on the interpretation of contracts, as set out in **Wood v Capita Insurance Services Ltd**, builds on but also slightly refines the approach introduced by Lord Hoffmann.
  - **PRINCIPLE: According to Lord Hodge, the central task in interpreting a contract is to find the objective meaning of the words the parties chose to use.** This means the **court must focus on the language of the contract itself, asking what the words would reasonably mean to an informed third party, rather than trying to guess at any hidden or subjective intentions the parties might have had.** Lord Hodge emphasized that while context and background are important to understanding the agreement, the **starting point—and often the ending point—is the actual wording of the contract.** The way the contract is framed, and the specific words chosen by the parties, carry great weight. Courts should give meaning to the language actually used unless the wording is obviously unclear or produces an absurd result.
  - **IMPACT:** The impact of Lord Hodge's approach is a **reinforcement of a more structured and disciplined way of interpreting contracts: priority is given to the written words, but with enough flexibility to consider background facts when necessary.** It stresses that parties must take care in how they draft their agreements, because the courts will generally stick closely to what has been written, not invent new meanings based on broader guesses about intent.
  - **In simple terms:** Lord Hodge moved interpretation a little closer back toward respecting the literal meaning, but without ignoring the importance of context when genuinely needed.
  - **LORD DIPLOCK'S VIEW:** Lord Diplock's view **on the interpretation of contracts**, as expressed in the **case Antaios Compania Naviera S.A. v Salen Rederierna A.B. (1985)**, highlights the **importance of applying business commonsense** when interpreting agreements.
  - **PRINCIPLE:** Lord Diplock stated that if taking the literal meaning of a contract's words would

lead to a result that clearly makes no sense from a practical business perspective, then the literal interpretation must give way to a more sensible, businesslike reading. In other words, **even if the wording is clear on its surface, it should not be strictly followed if doing so would produce an absurd or commercially unreasonable outcome.**

- **PRINCIPLE:** The principle he established is that **contracts must be understood in a way that reflects how rational businesspeople would have intended their agreement to operate in real-world practice**, not in a way that follows the language blindly to ridiculous or unfair results.
- **IMPACT:** The impact of Lord Diplock's view was significant because **it introduced an explicit practical and commercial lens into contract interpretation**. Courts were encouraged to ensure that their interpretations produce results that make business sense, helping protect the real economic purposes behind agreements rather than getting trapped in technical or overly literal readings that the parties likely never intended.
- **In short**: **Lord Diplock promoted a pragmatic, reality-based approach — if the strict words of the contract would create a foolish outcome, courts should interpret the contract differently to preserve its commercial purpose.**

- **EXTRINSIC EVIDENCE:** In **Oates v Romano**, the court addressed how and when **extrinsic evidence—that is, evidence from outside the written contract, such as negotiations, background facts, or oral discussions**–can be used to interpret the meaning of a contract.
- **PRINCIPLE:** The principle established is that **if the words of the contract are clear and unambiguous, then extrinsic evidence should not be used to change, modify, or reinterpret their meaning.** The courts will stick to the plain meaning of the words as written.
- **However**, **if the contract's language is ambiguous**–meaning it can reasonably be understood in more than one way–**then extrinsic evidence may be brought in to clarify the parties' true intentions by looking at the broader factual context.**
- **IMPACT:** The **impact of this approach is that it balances two important needs**:
- (1) protecting the certainty and reliability of written contracts by not allowing parties to later argue about meanings based on outside information when the contract is clear, and
- (2) providing enough flexibility to ensure that when the contract is unclear, the true understanding of the parties can still be honored by considering the real-world context in which the agreement was made.
- **In short**: Courts prioritize the clear text first, but if the wording leaves room for genuine doubt, context and background evidence can be used to resolve that ambiguity sensibly.

3) **INTERPRETATION IN CIVIL LAW:**

- **UNDERSTANDING CONTRACT INTERPRETATION IN CIVIL LAW:** Civil law systems generally emphasize finding a balance between the subjective and objective methods of interpreting contracts. This approach aims to discern the common intentions of the parties, going beyond the literal meaning of the contract terms.
- **KEY SOURCES AND PRINCIPLES:**
  - **GERMAN CIVIL CODE (BGB):** In the German Civil Code (BGB), the **interpretation of promises or agreements is guided by the principle that the effective intent of the parties is what truly matters**, rather than sticking rigidly to the exact literal wording of the contract.
  - **PRINCIPLE:** The principle is that **when courts interpret a contract, they must seek to uncover what the parties actually intended when they made their agreement, even if the words they used are not perfectly clear or could suggest a slightly different literal meaning.** The goal is to honor the real will of the parties over a purely grammatical or technical reading of the contract's text.
  - **IMPACT:** The impact of this approach is that **it provides greater flexibility in interpretation**. Courts are allowed–and even required–to look beyond just the words themselves and to consider the surrounding circumstances, negotiations, and behavior of the parties to find out

what they really meant. This ensures that the contract is interpreted in a way that reflects its true purpose and avoids unfair or absurd results caused by rigidly sticking to the literal language.

- **In short:** *Under the BGB, interpretation is centered on discovering the parties' true, effective intentions, making the process more flexible and closer to the spirit of the agreement rather than just its surface form.*
- **FRENCH CIVIL CODE:** In the French Civil Code, the **interpretation of contracts is based on the principle that the court should prioritize the mutual intention of the parties,** rather than relying solely on a literal reading of the contract's words.
- **PRINCIPLE:** The principle is that **when interpreting a contract, judges must first try to discover what the parties actually meant when they entered into the agreement.** The goal is to respect the genuine will of the parties rather than simply enforcing the strict wording if it does not match what they intended.
- **SUBSEQUENT GUIDANCE:** The subsequent guidance is that **if the parties' common intention cannot be clearly established**—if it is too ambiguous or uncertain—then the **contract should be interpreted as a reasonable person in the same circumstances would understand it.** This fallback method introduces an objective standard to ensure that interpretation remains fair and predictable when the subjective intentions are unclear.
- **IMPACT:** The impact of this approach is that **French contract interpretation uses a dual method**: the **primary focus** is on finding and honoring the true shared intention of the parties (subjective approach), but **if that fails**, courts use an objective standard based on reasonableness to fill the gap. This balances respect for private autonomy with the need for clarity and fairness in contract enforcement.

- **DIFFERENCES BETWEEN GERMAN AND FRENCH APPROACHES TO CONTRACT INTERPRETATION IN CIVIL LAW:** The German and French approaches to contract interpretation within civil law share a common goal — uncovering the true will of the parties — but they differ slightly in method and emphasis:
- **GERMAN APPROACH: In the German approach (under the BGB), the focus is very much on discovering the effective intent (wirklicher Wille) of the parties.** German courts are willing to go beyond the text early on, using a flexible analysis of the surrounding circumstances, negotiations, and behavior to reconstruct what the parties truly intended. Literal wording is considered, but it is clearly secondary to the real will of the parties.
- **FRENCH APPROACH: In the French approach (under the French Civil Code), the starting point is also the mutual intention of the parties.** However, if the courts cannot find clear evidence of a shared subjective intention, they quickly switch to an objective standard: interpreting the contract based on how a reasonable person in the same situation would understand it. This fallback ensures clarity and legal predictability when subjective intent is too uncertain.
- **UNIDROIT PICC:** Under the UNIDROIT Principles of International Commercial Contracts (PICC), the interpretation of contracts follows a balanced and pragmatic method.
  - **PRINCIPLE:** The principle is that **a contract should first be interpreted according to the common intentions of the parties**—what they mutually meant when forming the agreement. If it is not possible to clearly establish their shared intention, **then the contract should be interpreted according to what reasonable people in the same situation would have understood, bringing in an objective standard** as a fallback.
  - **DETAILS ON PARTY CONTRACT:** The **PICC** also **adds important details about party conduct**: the behavior and statements made by the parties must be assessed in light of what each party knew or should have known about the other's intent. This **reinforces a subjective approach** initially because it **takes into account** not just the **outward words but also the background understanding between the parties**.
  - **IMPACT:** The impact of this system is that **contract interpretation remains flexible and realistic, aiming to respect both the expressed terms of the agreement and the broader**

context created by the parties' conduct and communication. It allows the contract to be read not just through isolated words, but through the practical and commercial realities surrounding it.

- **DIFFERENCES BETWEEN UNIDROIT PICC, GERMAN AND FRENCH APPROACH TO CONTRACT INTERPRETATION IN CIVIL LAW:**
- **German law** prioritizes the real subjective intent, even if the words say otherwise.
- **French law** prefers mutual intention but moves faster to a reasonable interpretation when needed.
- **PICC** combines both approaches: it starts with subjective intention but evaluates the parties' behavior carefully and falls back to a reasonable person standard if necessary.

4) **EXPRESSED/IMPLIED TERMS:**

- **EXPRESSED TERMS:** These are the specific conditions and details explicitly stated within the contract by the parties involved.
- **IMPLIED TERMS:** These terms are not specifically stated but are understood to exist to fill gaps in the contract. They ensure the contract can function effectively and fairly.

5) **IMPLIED TERMS IN CIVIL LAW:**

- **IMPLIED TERMS OVERVIEW:** In civil law systems, **contracts are recognized as sometimes being incomplete because the parties might not address every possible situation or detail**. To deal with these inevitable gaps, the **law provides implied terms**——provisions that are automatically considered part of the contract even though the parties did not expressly include them.
- **These implied terms** can arise in different ways: they can come directly from **statutes** (laws that automatically impose certain obligations), from **court decisions** (judges interpreting what should reasonably be expected in certain types of contracts), or from the **reasonable expectations of the parties**, meaning what sensible parties in the same situation would have assumed without needing to state it.
- **When such gaps appear**, the *law steps in with default rules—often called "rules of thumb"—which automatically supply missing obligations or rights unless the parties have specifically agreed otherwise.* These rules ensure that the contract can still function properly, providing structure and predictability without forcing the parties to renegotiate every detail for every imaginable situation.
- **GENERAL AND SPECIAL PARTS IN CIVIL LAW:**
  - **GENERAL PART:** refers to a broad set of norms that apply to any contract, regardless of its type.
  - **SPECIAL PARTS:** contains norms that are specifically tailored to the most relevant and common types of contracts, like sales or leases.
  - **TERMS IMPLIED BY LAW:** are part of the general norms and serve to fill in gaps in contracts, ensuring basic fairness and functionality.
- **IMPLIED TERMS IN SPECIFIC CONTRACTS:**
  - **SALE**
  - **LEASE**
  - **LOAN**
  - **DEPOSIT**
- **EXAMPLE, ART 1510, PLACE OF DELIVERY:** Specifies that unless the contract states otherwise, the default delivery location for goods sold is either where the goods were located at the time of the sale or the seller's place of business.
- **THE CONTRA-PROFERENTEM RULE:** This legal principle applies when a contract term is ambiguous. In such cases, the unclear term is interpreted against the party who introduced it. This rule is widely used to protect the party who did not draft the term, ensuring fairness, particularly in consumer contracts under EU law.

6) **IMPLIED TERMS IN COMMON LAW:**

- **CLASSIFICATION OF CONTRACTS:** First, classification of contracts into special categories (like

sale, lease, service contracts) is less emphasized in common law. While civil law systems often apply detailed, specific rules based on the type of contract, **common law prefers to use general principles that apply broadly across different kinds of agreements**, without needing to fit each contract into a strict legal category.

- As for the source of implied terms, they are mainly derived from three areas:
- **Natural interpretation** of the contract's explicit terms: Courts read the express words and ask what additional, unstated obligations must logically flow from the contract for it to make sense.
- **Established business practices or customs**: Courts recognize what is typically expected in the relevant industry or business relationship.
- **Statutory requirements**: Certain laws impose mandatory implied terms, especially in consumer protection, employment, or sale of goods, to ensure fairness and proper functioning of contracts.
- **In short**: in common law, implied terms are a way to make contracts workable and sensible, filling in the gaps based on logic, standard business behavior, and legal necessities, rather than being tied tightly to rigid contract categories.
- **TYPES OF IMPLIED TERMS IN COMMON LAW:** In common law, implied terms fall into several important categories that help ensure contracts are fair and function properly.
- **OBVIOUS, REGULAR AND CUSTOMARY TERMS:** One type consists of obvious, regular, and customary terms. These are terms so natural and expected in a given transaction that the parties would not have thought it necessary to state them explicitly. For example, when someone sells goods, it is automatically expected that the goods should be of merchantable quality, even if the contract says nothing about it.
- **TERMS NECESSARY FOR BUSINESS EFFICIENCY:** Another important group is terms necessary for business efficiency. These are terms that the court inserts into the contract because, without them, the agreement would not work as intended. The idea is that the parties must have intended these terms to apply, because without them the contract would not fulfill its commercial purpose. Courts apply what is often called the "business efficacy" test, meaning they ensure that the contract operates effectively and sensibly in the real business context.
- **TERMS IMPLIED BY LAW OR STATUTE:** Finally, there are terms implied by law or statute. These are rules that courts or legislatures impose directly, even if the parties did not agree to them. Their purpose is often to uphold public policy, to ensure fairness between parties, or to protect weaker participants, such as consumers or employees. For example, consumer protection laws might automatically give buyers the right to a refund or impose quality standards on products sold.
- **In short**, implied terms in common law serve to fill in the missing pieces of contracts by adding elements that are obvious, necessary for the agreement to function, or required by law, making sure that agreements are workable, fair, and aligned with reasonable expectations

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