BDMA - Law & Intellectual Property

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This is a summary of the course *Law & Intellectual Property* taught at the Université Paris Saclay - CentraleSupélec by Professor Karim Tadrist in the academic year 23/24. Most of the content of this document is adapted from the course notes by Tadrist, [1], so I won't be citing it all the time. Other references will be provided when used.

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1 Introduction

Definition 1.1. Rule of Law
General rule imposed on human beings living in society and punished by public authority.

The *rule of Law* is a fundamental principle that governs how a society operates. It means that all individuals, institutions and entities, public or private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights principles.

Characteristics of the *rule of Law*:

- **Generality**: It targets everyone, or some specific kind of people, and it is applied equally.
- **Mandatory**: rules established by law must be followed, and there are consequences of not doing so. This happens regardless of the kind of rule:
  - Imperative rules: non-negotiable demands of the law. These define what must or must not be done. For example, criminal laws that prohibit theft.
  - Complementary rules: norms that can be modified or set aside by the parties involved, usually in the context of private law. For instance, parties entering into a contract can agree on terms that deviate from standard legal provisions as long as they do not violate imperative rules or public policy.

  Both types of rules are mandatory as they establish a framework of legal obligations, but they differ in how strictly they bind the parties and their flexibility.
- **Validity**: refers to the legitimacy or authority of the legal rule. For a law to be considered valid:
  - It must be created by a legitimate authority or legislator.
  - It must follow the proper procedure for legislation, which often includes debate, public consultation, and adherence to constitutional principles.
  - It must be promulgated or published, making it known to the public before it can be enforced.

  This characteristic ensures that laws are not arbitrary but are created through a recognized legal process that confers legitimacy and legal force.
- **Sanctionability**: once the rule is chosen, it will be applied with the risk of a sanction. Sanctions are the consequences or penalties for violating a law, and they serve as a deterrent against illegal behavior. This principle is crucial for the rule of law because it ensures that laws are not just theoretical but have practical effect.

While **legal rules** are formal, codified norms enforced by the state to regulate behavior and maintain order, **moral rules** are informal, subjective norms based on ethical principles and values that guide individual behavior. **Natural law**, meanwhile, is a philosophical theory suggesting the existence of universal, inherent moral principles that should underpin human-made laws and ethical behavior. Each of these norms plays a distinct role in shaping human conduct, societal norms, and legal systems.

1.1 Classification of Legal Rules

- **Public Law**: governs the relationship between individuals and the state, as well as the relationships between different branches of the state. It is subcaterogized as:
  - **Constitutional Law**: the foundation of the legal system of a country. It outlines the structure of the government, the distribution of powers among different branches (executive, legislative, judicial), and the fundamental rights and freedoms of citizens. It is the highest law, against which all other laws are evaluated.

  - **Administrative Law**: covers the rules and procedures that govern administrative agencies of the government. It deals with the actions and decisions of government departments and agencies, including rulemaking, enforcement of laws, issuing permits, and resolving disputes involving public administration.
  - **International Public Law**: governs the conduct of states and international organizations. It encompasses treaties, conventions, and customs that regulate interactions between sovereign nations, including issues related to war, diplomacy, human rights, and territorial boundaries.

- **Private Law**: deals with the relationships between private individuals or entities. It governs legal disputes that involve private parties and their rights and obligations. It is subcategorized as:
  - **International Private Law**: deals with cases where foreign elements are involved, determining which jurisdiction's law applies to a legal dispute and how judgements from one jurisdiction are recognized and enforced in another. For example, when two parties from different countries sign a contract, the matter of deciding which national law shall apply to the contract is a matter of international private law.
  - **Civil Law**: the core of private law. It covers non-criminal disputes between individuals and entities, including laws on contracts, property, family relations, and inheritance. It establishes the rights and duties of private parties in their interactions.
  - **Commercial Law**: it is a subset of civil law, that deals with issues related to commerce and trade between businesses and individuals, including contracts, transactions and business organization.
  - **Labor Law**: this area governs the relationship between employers and employees, including employment contracts, labor rights, working conditions and collective bargaining.

- **Mixed**:
  - **Procedural Law**: encompasses the rules that govern how courts and other legal institutions handle civil, criminal, and administrative proceedings. It includes the procedures for filing cases, conducting trials, and appealing decisions.
  - **Criminal Law**: governs crimes and punishments. It defines what constitutes criminal behavior and specifies the sanctions (punishments) for such behavior. While it primarily deals with offenses against the state or society at large, it has elements of both public law (the state prosecutes offenders) and private law (in aspects like victim compensation).

1.2 Sources of the Rule of Law

1. Before the French Revolution, local laws in what is now France were divided between the **Germanic customary laws** in the north and the **Roman laws** in the south. There laws were based on local customs and traditions, with Roman law influencing the legal systems due to the Roman Empire's historical presence.

2. **Ordinances and Edicts of the King** began to replace local customary laws. Ordinances were more general laws, while edicts could address specific issues or grant rights and privileges. This centralization of legal authority under the monarchy was a step towards a unified legal system.

3. In the *ancien régime* of France, there were **Parlements**, which were sovereign courts that registered the king's edicts and could protest against them, although they could not ultimately prevent their enforcement.

4. In addition, there was the **Canon Law**, the law governing the Church and its members, which was a significant source of law in Europe before the French revolution, especially in matters of marriage, legitimacy and inheritance.

5. Now, there are other sources of the contemporary law, divided into international and national sources:

   (a) **International Sources**: **treaties** are international agreements that countries are bound to follow. The article 55 of the French Constitution acknowledges the superiority of treaties over national laws, provided they are ratified according to the constitution. In addition, there is the **European**

Union Law, which is based on the Treaty of Rome (1957), that established the European Economic Community, now part of the European Union. EU law includes regulations and directives issued by EU institutions like the European Commision and the European Council, which have direct or indirect effect on member states' laws and take precedence over national legislation.

(b) **National Sources**: the **Law** referes to statutes passed by the Parliament, while **regulations** are issued by the executive branch (the government) and deal with matters not expressly reserved for law. In addition, there are **decrees** and **orders**, which are forms of regulation dealing with specific issues or individual matters, not considered as the law in the broader sense. For example, a decree might appoint public officials to certain administrative positions, or an order might impose temporary restrictions on water use in response to a severe drought in a department.

6. Finally, we find the **Constitution**, which is the supreme legal document, defining the fundamental principles and the organization of the state. It outlines the domain of laws passed by Parliament (matters of personal status, fundamental principles) and the Executive branch's authority to issue regulations on matters not covered by law, except as specified in articles 38 and 16 of the French Constitution. Article 38 allows the government to legislate by ordinance in areas delegated by Parliament, while Article 16 grants the President exceptional powers under certain crisis conditions.

1.3 Drafting of a Law

1. **Initiative**: the process of creating a new law begins with the initiative, which can be taken by the Prime Minister or member of the Parliament. This involves the drafting and proposal of a new law.
2. **Examination and voting**: the proposed law is examined, debated, and voted on by each assembly of Parliament (the National Assembly and the Senate).
3. **Promulgation**: after a law is passed by Parliament, it is promulgated by the President of the Republic through a decree. Promulgation is the formal declaration that the law is enforceable.
4. **Publication**: the law is then published in the official gazette, and it becomes enforceable the day after its publication.

In addition, it must be ensured that the law complies with higher sources of law:

- **Constitutionality**: the Constitutional Council examines the constitutionality of the new law before its promulgation. This can be requested as a preliminary ruling on constitutionality.
- **Review of legality**: there's also a mechanism for reviewing the legality of regulations, which can be challenged a posteriori (after the fact) by someone claiming a legitimate interest, either by *"voie d'action"* (direct action) or *"voie d'exception"* (as a defense in court proceedings).

1.3.1 Revoke of Laws and Regulations

Laws and regulations do not automatically fall into disuse: they must be explicitly or implicitly revoked. The principle is that law remain in force until revoked.

1.3.2 Case Law or Judicial Precedence

Judges in France are expected to enforce the law. However, judicial decisions can create law under certain conditions, such as when the law is unclear or when new, unforeseen situations arise. Article 4 of the Civil Code mandates that judges must make a decision even in the absence of clear, precise laws, under penalty of being charged with denial of justice.

However, according to Article 1355 of the Civil Code, a judgment only has authority in relation to the specific case it resolves and does not create regulatory judgments applicable to all.

Therefore... **do judges create the rule of law?**

While judges do not create laws in the legislative sense, their interpretations and decisions in unclear or new situations can influence the development of the law. They do not create rules that have general applicability like laws passed by Parliament, but can set precedents within the bounds of existing laws

1.3.3 Other Sources of Law

Customs are established practices that are considered legally binding, even though they are not formal laws. Customs can be used to interpret and complete the law, provided they are not *contra legem* (against the law).

Legal doctrine refers to scholarly legal writings that can influence legal interpretations and the development of the law. Legal doctrine is not binding like laws or regulations but can be persuasive in legal reasoning and decision-making.

1.4 The Applicability of the Rule of Law

1.4.1 The Applicability of Law in Space

French Law applies throughout the entire country to everyone living in the national territory, with the exception of local legal systems surviving in Alsace Lorraine and in some territories outside continental France.

1.4.2 The Applicability of Law in Time

The principle is the **non-retroactivity of Laws**. Article 2 of the Civil Code states that a new law applies only to the future and does not have a retroactive effect. This means that actions taken and situations that arose before the new law's enactment are governed by the law as it was at that time. The rationale behind this principle is to protect legal certainty and individual's trust in the law, ensuring that people can plan their actions according to the law without fear of future changes affecting them retroactively.

However, the new law may apply to ongoing legal situations without retroactive effect. For instance, a new law may apply to continuing contracts or relationships, affecting the rights and obligations of the parties from the date of the law's enactment forward, without altering the legal situation that existed before.

There are some **exceptions**:

- Retroactive laws by nature: certain types of laws are designed to have retroactive effects. These include:
  - More clement criminal laws: if a new criminal law is more favorable to the defendant, it can be applied retroactively to past actions. This exception is rooted in the principle of lenity (courts should interpret the law in the way most favorable to the defendant), which aims to ensure fairness in the administration of justice.
  - Interpretative laws: these laws clarify the intended meaning of previous legislation without changing the legal rule itself. Since they aim to explain what the law always meant, they can be applied to situations that occured before their enactment.
- Decision of the legislative power: the legislators may explicitly decide that a particular law should have retroactive effect. This is usually done in specific cases where the lawmakers deem it necessary for the law to address past situations, subject to constitutional and human rights considerations that may limit the ability to legislate retroactively.

1.5 Subjective Rights

Subjective rights are legal rights that belong to individuals or legal entities, granting them the authority to perform certain actions or to demand certain behaviors from others, based on the legal system's recognition of those rights. They are *subjective* because they are granted to individuals, the *subjects* of the law. They are considered subjective in contrast to *objective law*, which refers to the body of laws, norms, and statutes that govern society as a whole.

1.5.1 Patrimonial Rights

Patrimonial rights are economic in nature, can be assessed financially, and relate to an individual's assets and liabilities. They can be transferred, seized, and have commercial value. These rights can be subdivided into:

- **Patrimony (property)**: refers to the total sum of an individual's rights and obligations with economic value. It's a legal universality, distinct from the individual assets or liabilities it comprises. The key characteristics are:
  - Inalienability: it cannot be transferred except by death.
  - Singular nature: a person only has one patrimony.
- **Rights in Rem (real rights)**: these are rights directly over things, giving the holder a direct and immediate authority over the property. This includes:
  - **Principal rights in Rem**: concern the ownership and use of property, which itself can be broken down into the right of usus (use), fructus (enjoyment of fruits, i.e., rent), and abusus (disposition, including sale or destruction).
  - **Rights in Rem Accesories**: these are a type of right that serves as security interests. Unlike principal rights in rem, these are secondary rights that secure the performance of an obligation, usually the payment of a debt. They are *accessory* because their existence depends on a principal obligation. Therefore, these are guarantees for creditors, such as pledges (a right over a movable asset, which the creditor can sell if the debtor fails to repay the loan) and mortgages (a right over immovable property).
- **Intellectual Property Rights**: these are rights based on intangible assets, including:
  - Literary and Artistic Property: covers copyright.
  - Industrial property: includes patents, trademarks, designs and models.
  - Right of clientele: relates to the commercial exploitation of a business's customer base. This right refers to the value associated to the customer base of a business. It is specially relevant in commercial entreprises and professional practices where the ongoing relationship with customers or clients contributes significantly to the business's value.

Patrimonial rights can be commercialized (sold, leased, etc.), transmitted during the owner's lifetime or upon death, seized by creditors, and may become extinct.

1.5.2 Extrapatrimonial Rights

Extrapatrimonial rights are non-economic, related to personal and family dignity and integrity, cannot be commercialized, and are inalienable and imprescriptible. They include:

- **Family Rights**: such as parental rights, which govern the relationship between parents and their children.
- **Individual Rights**: including the right to one's name, honor, image rights, and the right to privacy.
- **Moral Rights of the Author**: protect the personal and reputational interests of creators, such as the right to be recognized as the author of a work and to prevent any changes in the work that harms the creator's honor or reputation.

The key features of extrapatrimonial rights are:

- Non-marketable: cannot be sold or bought.
- Cannot be included in one's patrimony.
- Inalienable: cannot be transferred, seized.
- Imprescriptible: not subject to expiration or limitation over time.

1.5.3 Sources of Subjective Rights

Legal Acts are actions taken by individuals or legal entities with the intention of creating, modifying, transferring, or extinguishing legal rights and obligations.

These can be:

- **Bilateral acts**: these involve two or more parties and include agreements or contracts, where each party, undertakes certain obligations towards the others. For example, a sales contract involves a buyer agreeing to pay a price and a seller agreeing to deliver goods.
- **Unilateral acts**: these are actions taken by one party that can create legal obligations or rights, even without the consent of others. For instance, a will is a unilateral act where a person decides the distribution of their estate after their death without needing agreement from the beneficiaries.

Legal acts are further categorized based on their nature and purpose:

- **Acts of disposal**: these involve transferring or renouncing a right or interest in property. Selling a piece of land is an act of disposal because it transfer the ownership from the seller to the buyer.
- **Acts of administration**: these are actions taken to manage and maintain an asset without altering its substance or ownership structure, like leasing a property.
- **Conservative acts**: these are measures taken to preserve the value or condition of an asset, such as repairs or maintenance work on a property.

Definition 1.2. Legal Facts refer to events or situations that create, modify, or extinguish legal rights and obligations, independent of the will or intention of the parties involved. These can be natural events (like birth and death) or human actions that are not intended as legal acts but still have legal consequences.

- **Article 1242-3 et seq.**: these are related to example of creation of a right in response to a fact. For example, when a person makes a payment thinking they are paying a debt, which did not exist (fact), they have the right to reclaim the payment from the recipient. A similar situation arises when someone pays intentionally someone else's debt.

Legal facts differ from legal acts in that they do not stem from the deliberate intention to bring about legal effects. For example, the death of a person is a legal fact that triggers the distribution of the deceased's estate according to their will (a unilateral legal act) or the law of succession if there is no will.

1.6 Proof of Subjective Rights

1.6.1 The Subject of the Proof

Principle *Actori Incumbit Probatio:* this latin maxim means 'the burden of the proof lies with the demander'. In legal disputes, the party making the claim (demander) must provide evidence to support their claim. Conversely, the defender may need to present evidence to refute the claim or support their defense.

The proof experiences a **back and forth movement**, because the burden of the proof may shift between parties during a trial, depending on the initial evidence presented and the legal context.

The judge's role is to remain neutral in the evidence-gathering process, not actively seeking proof but rather evaluating the evidence presented by the parties.

An exception to the standard proof requirement is the **legal presumption system**, where certain facts are presumed to be true unless proven otherwise. This includes simple presumptions (which can be rebutted) and irrefragable presumptions (which cannot be contested), as explained in Article 1351 regarding the authority of adjudicated cases.

1.6.2 Systems of Legal Evidence

There is **freedom of evidence** when evidence can be introduced in any form, as long as it is relevant and legally obtained. This is the case of criminal law.

In other cases, the system is **legally defined**, where proofs must follow specific rules for evidence, often requiring written form or other legally defined standards.

Civil law is a mixed system, where facts can be freely proved without strict formality, but legal acts must follow specific rules.

Written evidence Written evidence is crucial and often required for proving legal acts, with the law of March 13, 2000, and Article 1316 of the Civil Code defining what constitutes valid written evidence, in order to obtain its **binding nature**: *'a sequence of letters, numbers, printed or other symbols, a sequence that must be understandable and decipherable by others'*. The **function of the signature** is defined in Article 1316-4, as to identify the signer and express consent to the document's obligations: *'identifying the person who signs, expressing his or her consent to the obligations resulting from the document'*.

There are two essential conditions for the validity of written evidence:

1. The person must be identified.
2. The conservation of the document must guarantee its integrity.

Written evidence can be of several types:

- Authentic Acts: official documents prepared by public officers (like notaries or civil registrars) with legal power. These documents have a high degree of reliability and enforceability.
  - A notarial deed is comprised of a 'minute' kept by the notary and an authentic copy sent to the parties. When the copy is said to be enforceable, it authorizes the use of the enforcement agencies.
  - The document is considered valid until it is recorded as false for the observed information by the public officer and until the reality is proved for the other elements
- Private Deeds: documents signed by the parties involved, requiring a certain number of original copies and specific details:
  - Should be sign by the parties.
  - Be written with as many original copies as parties (Article 1325 of the Civil Code).
  - Commitment to pay should bear the amount of the quantity in numbers and letters.
  - Binding unless proved otherwise.

Electronic medium and signatures Electronic signatures and documents are **legally recognized**, with specific requirements for validity, identification, and integrity outlined in Articles 1367 and 1316-4 of the Civil Code, and enforced by the law of June 21, 2004.

There are **technical requirements**, and reliability and integrity of electronic signatures are ensured through technologies like asymmetric key encryption and third-party certifiers, as detailed in the Decre of March 30, 2001. The system must guarantee the document's unaltered state and authenticate the signer's identity.

The technical solution must not result in any alteration of the document.

The verification is based on an electronic qualified certificate, which guarantees the authenticity of the signature.

There is a large number of technical rules, and the qualification of the third party is equivalent to a presumption of respect of those rules.

1.7 Electronic Archives

Traditionally, and original copy is a document that is officialy signed by the parties involved in a legal deed. In the context of electronic documents, an **original copy** refers to a digital version that serves the same legal purpose as a paper document. The original copy has **legal importance ad probationem/ad validatem**, which are latin terms referring to the legal significance of documents for the purpose of the proof (ad probationem) and for fulfilling legal requirements to validate a deed or contract (ad validatem).

The Article 1375 of the Civil Code adapts the requirement for mutiple original copies to the digital age. It stipulates that for electronic contracts, the requirement is met if the deed is established and maintained in a way that complies with articles 1366 and 1367 of the Civil Code, ensuring that each party can access of obtain a copy of the document.

1.7.1 Validity of the Copy

The Article 1379 of the Civil Code says that a copy must be an identical and durable reproduction of the original, not signed (as that would make it another original), and must maintain the same legal value as the original. The copy must accurately reproduce both the form and content of the original document.

The **Afnor Z 42-013** standard specifies requirements for electronic archiving systems, ensuring that all necessary information is preserved accurately and reliably, making it retrievable for its intended purposes.

However, if the original copy exists, the judge may require it.

1.7.2 Other Forms of Evidence

- **Evidence through a witness**: witness statements are considered based on predetermined rules in the Code of Civil Procedure, with the judge assessing their admissibility and weight.
- **Evidence by the presumption of facts**: Article 1382 allows judges to consider presumptions based on serious, precise, and corroborating evidence, but it is not binding on them.
- **Proof of admission**: admission in judicial inquiries is considered irrevocable and binding, unlike admissions made outside of court, which are not binding. This is, if you admit to be guilty in front of the court, then you are legally guilty.
- **Proof by oath**: legal mechanism where a party to a legal proceeding is asked to affirm the truthfulness of their statements or claims under oath. This method of proof relies on the solemn declaration or affirmation made by a party or witness, asserting the truth of certain facts or denials in dispute. There are tipically two types of oaths used as proof:
  - **Decisive oath**: requested by one party for the other to take. Its probative strength is absolute.
  - **Additional oath**: may be requested by the judge to complement other evidence, not absolute in its probatory value.

1.7.3 Use of Evidence

Statutory facts are those that must be established or proven in court to meet the legal criteria set by statutes for various purposes, like determining legal rights or liabilities, qualifying for exceptions or exemptions, or triggering or preventing legal actions. For example, in the context of family law, statutory facts might include

the circumstances of a marriage or the parentage of a child, which are relevant to legal issues like custody, support, and inheritance.

The use of evidence in statutory facts is characterized by being free for civil status or filiation: this means that for matters concerning an individual's civil status (e.g., birth, marriage, death) or filiation (determining parent-child relationship), the law allows flexibility in the types of evidence that can be presented, except in certain cases where specific legal restrictions may apply.

Proof by legal documents (article 1341 of the Civil Code): legal documents are the primary source of evidence for asserting claims or defenses in court. These documents need to meet certain legal requirements to be considered valid.

In principle, documentary evidence is needed:

- In principle, **a legal document is necessary**: generally, a written document is required to prove a legal act or transaction, reflecting the principle that written evidence provides a clear and durable record of agreements, rights and obligations.
- Exceptions - **Oaths and Admission**: in situations where a legal document is not available, an individual's oath (solemn promise regarding the truth of the information provided) or admission (a party's acknowledgement of a fact) can be accepted as evidence. In commercial litigation, the rules are more indulgent, allowing a wider range of evidence to be used (free evidence).
- **Prima Facie Evidence** (Article 1347): refers to evidence that is accepted as sufficient to proof a fact unless contradicted and overcome by other evidence. It includes situations where:
  - It was materially or morally impossible to create a legal document at the time of the transaction.
  - A legal document was lost or destroyed due to force majeure (an unforeseeable and unavoidable event).

  A legally defined copy is a copy of a document that meets legal standards. This can serve as evidence in the absence of the original.
- Acts involving less than 1500€ can be proved by any means, offering flexibility in how evidence can be presented in smaller claims.
- Proof against or beyond a legal document: if evidence is presented that contradicts or extends beyond what is contained in a legal document, another document is required to support the new evidence, regardless of the monetary value involved.

1.8 The Legal System

References

[1] Karim Tadrist. Law & intellectual property. Lecture Notes.