

Law in the Economy and in Business LEB – Course 1405

NOVA

School
of Business
& Economics

Shaping
powerful
minds

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Course 1405 (4 Credits)

- No Practicals

- 1- Introduction-the future of the Law
- 2- PERSONS
- 3- A LEGAL GRID TO SOLVE PROBLEMS
- 4- LAW vs. MORALITY
- 5- GOVERNMENT, LAW & CASE-LAW
- 6- COURTS
- 7- PROPERTY & CONTRACT
- 8-The EU Data Protection Regulation
- 9- CURTAIN: The Merchant of Venice

What is the Course about?

(i) Explaining the relationship between the probability Economic Success in a certain part of the world because of the Legal Framework of that place on the planet.

GOOD LAW

- Attracts business
- Business exists **BECAUSE OF the Law**
- Examples:
 - Delaware USA: corporate and competition Law
 - Aberdeen, Scotland: Oil and Gas

BAD LAW

Does not attract new business, and furthermore **Stifles** business that already exists.

Business exists **IN SPITE OF** the Law.

What is the Course about?

It is **NOT** about attempting to transform you into lawyers: Therefore we teach a different Program: (ii) Fundamental ideas that will foster understanding of legal **METHODS**

ECONOMIC approach

I have a 70% probability of being awarded a claim of 100€:

My expected return is 70€ because probability is between 0 and 1

Therefore $0.7 \times 100 = 70$

Legal approach

We may win (probability),

We should win (merit),

Yet the judge may depart from mainstream arguments

I have no idea what the ODDS are.

How is the evaluation structured?

- 2 Written assessments
- MT TEST = 6/20
- Holds for both 1st and 2nd call of Final exam
- BOTH, besides direct questions, may consist of Multiple choice questions, with calculation.

FINAL EXAM = 14/20

FIRST CALL

SECOND CALL

Cutt-off minimum grade
6/14

How is the evaluation structured?

- JUST FOR STUDENTS FROM PREVIOUS SEMESTERS

IMPROVEMENT EXAM
20/20

Bibliography

1- Main textbook:

Law, A Very Short Introduction,

Raymond Wacks, Oxford University Press (available in the library), latest edition

2- Chapter:

The Economics of Litigation Handbook of Economic Analysis of Law,

S. Shavell, Belknap, Harvard, chapter 4 (**reprografia/ copy shop**)

3- Chapters:

Law's Order, What Economics Has to Do with Law and Why it Matters,

David Friedman, Princeton; chapter 5, 10 and 12 (**reprografia/ copy shop**)

3- Play:

The Merchant of Venice

William Shakespeare, Recommended edition: Oxford School Shakespeare (available in the library) or electronic version:

<http://www.gutenberg.org/ebooks/1114>

Bibliography

4. An EXAMPLE of a Constitutional TEXT

The ENGLISH VERSION OF the PORTUGUESE CONSTITUTION

You can Download it from the official site of the Parliament:

Assembleia da República

<http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>

Program + Bibliography

- 1- Introduction
 - 2-PERSONS
 - 3- A LEGAL GRID TO SOLVE PROBLEMS
 - 4- LAW vs. MORALITY
 - 5- GOVERNMENT, LAW & CASE-LAW
 - 6- COURTS
 - 7- PROPERTY & CONTRACT
 - 8- The Merchant of Venice
- 1- Introduction
 - 2-Slides available + Wacks ch 3
 - 3- Slides available
 - 4- Wacks ch 3
 - 5- Wacks ch 1+ Constitution
 - 6- Wacks ch 4 & 5 + Shavell
 - 7-Wacks ch2+ Friedman
 - 8- The Play + Wacks ch 6

Office Hours

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New Issues

- In Law, Latin Expressions are used
Why? Latin is the mathematics of Law. It is like (in maths) stating that Δ = variation
- In both MID-TERM and FINAL EXAM there will be questions related to these (simple) Latin Expressions

Latin for week 1

- *Jus* = Law
- *Ab origine* or *Ab initio* = From the origin or From the beginning (since this is the first lesson),
- *Abundantia Cordis*= With magnificence of heart, with abundance of sincerity and frankness (you will only learn if you commit yourself)

DECONSTRUCTING FIRST

- I want you to forget your prejudices
- Concerning Law:
 - FIRSTLY: You must now READ the information you will receive
 - SECONDLY: evaluate the effect of what **you** have learnt on the Economy.
 - And ALWAYS of any rule....On any Economy for that matter....

There is a main difference

- Between what the Law is effectively and (what you think) the Law should be:
 - The first concept is called, in Latin, *De Lege Lata* or *De Lege Data*: This means the concrete solution that a given legal system has adopted for the given legal problem, only lawyers know what it is, the public has vague and general impressions that are not based on any real knowledge
 - The second concept is called, in Latin, *De Lege Ferenda*: This means the abstract solution that each one of us thinks would be appropriate if we were in charge: i.e. the prime minister
 - The problem is we confuse both concepts when we speak about the law. Therefore, we are not scientific

When you finish this Course

You will be scientific when
you talk about Law.

LBE, Week 1, Class 2

The System of Courts in the western Legal Tradition

It is usual that in the WLT we find

- At least 3 types of courts

			Criminal	Civil	Tax
Supreme courts	Law				
Appellate Courts	Law & (maybe) Fact				
Trial courts	Facts				

In the PT System
We have 2 Pyramids of Courts

The Civil & Criminal Courts

- These Vertex at the Supreme court of JUSTICE
- We rarely have a JURY

The Administrative Courts

- These Vertex at the Supreme Court of Administration
- We call them the administrative & tax Courts
- We do not have a JURY

In PT, We also have a Constitutional Court

- It has a very specific function
- In most cases it makes sure that the LAW we apply
- Mostly **Statute Law** (written law) (coming from Parliament or Government)
- Does not BREACH the principles of the National CONSTITUTION
- The Constitution establishes LISTS of Rights that must be Protected by the courts regardless of the wishes of Governments (that change more or less every 5 years)
- Therefore, in case of conflict, Constitutional law is STRONGER than ordinary Statute Law

Within the EU territory

- All Legal systems (regardless of their specificity)
- Are also subject to the Higher Authority of (at least) 2 International Courts
- The First one is [The ECJ: European Court of Justice](#) (this one sits in Luxembourg)
- The Second one is [the ECHR: European Court of Human Rights](#) (this one sits in Strasbourg (France)

The ECJ

- The ECJ sits at the head of a very articulated system
- of the so-called Lisbon Treaty
 - This treaty in fact comprises 2 Distinct Treaties
 - The TEU (Treaty of the European Union)
 - The TFEU (Treaty of the **Functioning** of the European Union)
 - The most important Article for us is **Article 267 TFEU**. It allows the national judge (in Civil, Criminal and Administrative Cases) to ask the ECJ for Help and advice on how to solve a case.

Article 267 TFEU

- Article 267
- (ex Article 234 TEC)
- The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
 - (a) the interpretation of the Treaties;
 - (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
- Where such a question is raised before any **court or tribunal** of a Member State, that court or tribunal **may**, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
- Where any such question is raised in a case pending before **a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law**, that court or tribunal **shall** bring the matter before the Court.
- If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The ECHR

- The ECHR Sits at the head of the
- European Convention of Human Rights
- 2-Life
- 3-Prohibition of Torture
- 4-Prohibition of Slavery
- 5-Liberty and Security
- **6-Right to a fair trial – so-called DUE PROCESS**
- 7-no punishment without Law
- 8-Private and family life
- 9-Freedom of thought, conscience religion
- **10-Freedom of Expression**
- 11-Freedom of Association
- 12-Right to marry
- 13-Right to effective remedy
- **14-Prohibition of discrimination**

The process to access the ECHR

- ARTICLE 34 Individual applications
- The Court may receive applications **from any person**, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.
- ARTICLE 35 Admissibility criteria
- 1. The **Court may only deal with the matter after all domestic remedies have been exhausted**, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
- 2. The Court shall not deal with any application submitted under Article 34 that
- (a) is anonymous;
- or(b) is substantially the same as a matter that has already been...

The Difference between access

To the ECJ

- (i) a question is raised before any **court or tribunal** of a Member State, that court or tribunal **may**,
- (ii) before **a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law**, that court or tribunal **shall**

To the ECHR

- **Court may only deal with the matter after all domestic remedies have been exhausted,**

Course 1405

Law's **Roots** and its relationship with **Morality** (Part I)

By Whom and Where Legal Rules are Made

Law's Roots (1-35)

Law & Morality (67-85)

BIBLIOGRAPHY: Wacks, Raymond, Law a Very short
Introduction, Oxford

Did you know that

- “ Your job, your home, your relationships, your very life – and your death, all – and more are managed, controlled and directed by the law”

Latin for week 2

- Ubi societas ibi jus
- Where there is society there is law

I-So what is law?

- Think of a satisfactory definition
- But always rememebr that it is a SUM (in the Western legal Tradition, WLT)
- Of the **Statutes** that come from Parliament
- And the **Rulings (decisions)** of the Courts
- The **Weight** of Statute vs Ruling will differ significantly from State to State

Law according to

- Natural Lawyers
 - Universal moral principles in accordance with nature
 - Ex: no abortion/adultery
 - This view dates back to ancient Greece
- Legal Positivists
 - Law is nothing more than a collection of valid rules, commands or norms that may lack any moral content

An example of a “natural law
criteria v Positivistic criteria”

See Sofocles

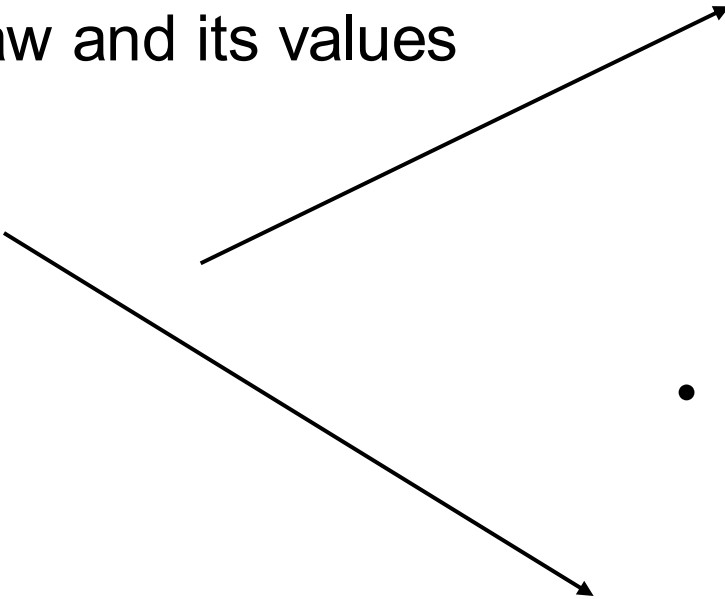
The Greek tragedy of Antigona

- 2 Princes who are brothers (Eteocles & Polinice) decide to dispute a throne by combat & they are both killed.
- Their Uncle (Creonte) inherits the throne, orders burial rites with full honours for Eteocles, and (a threat of death is declared) forbids anyone from touching the body of Polinice—whose corpse is left to rot
- *Antigona* (their sister) tries to persuade Creonte to bury her brother
- lack of burial rights doomed the soul to wander for 100yrs on the banks of the river that lead to the land of the dead without being able to cross to the other side

Excessive punishment is not justice, the standard of justice is Divine, not human

- Unable to accept the punishment as “fair”, as LAW
- Antigona steals the corpse, BUT as she is arranging burial she is arrested.
- The king orders her to be buried alive
- Her sister (another one) offers to take her place but Antigona does not accept.

However, (All) Formalism is, ultimately (a) Fragile (position to defend).

- We should not neglect the CONTINGENT nature of Law and its values
 - Fragility when we say it **ALL** comes from nature/God (since we write it)
 - Fragility when we say it **ALL** comes from Man.(since not everything written is accepted as “fair”)
- 
- ```
graph LR; A[• We should not neglect the CONTINGENT nature of Law and its values] --> B[• Fragility when we say it ALL comes from nature/God (since we write it)]; A --> C[• Fragility when we say it ALL comes from Man.(since not everything written is accepted as “fair”)];
```

# So to the question: what is Law..?

- The answer seems to be a juxtaposition of:
- Contingent elements (positive)
- Requirements of inherent fairness (natural)

## II-

Now, back to your textbook let's consider the Genesis of the Law ( Ch 1 , page 3)

- II.1 Custom
- II.2 Codes :
  - Hammurabi (in Stone)
  - The Roman Tables (an attempt in Bronze)
  - Justinian, (on Paper)
  - The teachings at the University of Bologna
  - Napoleon, the BGB ( smaller, more practical codes)

## II.1 Custom before Codes

- In the form of general CODES the Law first appears around 3000 BC
- Since prior to the advent of writing, laws existed only in the form of custom
- CUSTOM ( all who know yet ONLY those who know)
- retards the capacity of rules to provide lasting/extensive application

## II.2 CODES: More Latin for week 2

- CORPUS JURIS
- A coherent collection of Laws/rules that make sense when read together.
- These rules create, SYSTEMS of law.

## II.2 Why are CODES important?

- The Code of Hammurabi, King of the Babylonian Empire, 1760 BC
- The Ruler proclaims a systematic (organised) corpus of law to his people
- so that they are able to know their rights & duties
- This is a first appearance of the **principle of publicity**

## II.2 Codes are VISIBLE + MAKE POLICY CHOICES

- This Code is today a Black **Stone** Slab (in the Louvre Museum)
- -282 Laws
- A)
  - -Punishment to be inflicted on false witness (Death)
  - -Builder whose house collapses killing the owner (Death)
- B) Code is almost devoid of defences or excuses ( a very early example of **strict liability** ( *Responsabilidade objectiva*)).

## II.2 Roman Law I (an attempt in Bronze) (450 BC-300 AD)

- To resolve disputes between higher/lower ranked citizens  
PATRICIANS /PLEBIANS
- The Romans issued in Tablet form a COMPIATION of Laws known as the 12 Tables: a Commission of 10 men (DECENVIRI)
- 10 Bronze Tablets + 2 later ones
- :To Draft a Code of Law binding on all



## II.2 Roman Law II (an attempt on paper)

- The Romans wrote about the tables and
- 1- The sophistication + proliferation of authors made the output hopelessly unwieldy
- 2- This called for a systematic comprehensive codification **CORPUS JURIS CIVILIS** ( Digest/ Codes/Institutes) 1,000,000 words
- 3- Bologna 1088 AD Corpus + Canon Law

## II.2: 18th Century: More Concise Codes

- Napoleonic Code 1804
- Spreads to
  - Western + Southern Europe
  - Latin America
- Germany 1900
- BGB
- Spreads to
  - China
  - Japan
  - Taiwan
  - Greece
  - Baltic States

## III: The Western Legal Tradition (WLT)

- III.1 Distinctive Features
- III.1 the Rule of Law (Estado de Direito)
- III.2 The legal systems it ( WLT) includes
- III.3 The differences between Common Law ( UK/US) and Civil Law (continental law)
- III.4 Religious Law
- III.5 Customary Law

### III. 1: The distinctive features of the WLT

- 1-demarcation between institutions
- (i.e. separation of powers)
- 2-the nature of legal doctrine (Theory) as
- Source of law and a basis for teaching and practice
- 3-law as a coherent body of rules with its own internal logic
- 4- specialized training of lawyers and other legal personnel

# III.1 The ideal of the RULE OF LAW

- Please be aware that that this concept is translated as “*Estado de Direito*”.
- At its basis is the requirement that access to power the exercise of power **is subject to accountability** (“*prestar contas*”) and may/must be able **to be checked** by Parliament and (especially by) the Courts.

# III.1 “the rule of law” in your text book

- 1-Reference to the **Magna Charta 1215** rejecting idea of unchecked, unaccountable royal power.
- In our days any charter or bill of rights or constitution, serves as an equivalent text: a list of basic requirements that government ( whichever its form) must respect.
- 2-**1885 Albert Dicey**, attempting to explain what the (unwritten British Constitution was defined **the concept of the RULE OF LAW** as being:
  - A) supremacy of regular law vs arbitrary power ( i.e) law must be ‘produced’ by Parliament according to a standardized process.
  - B) Equality before the law of all classes of Persons and subjection of all persons to the jurisdiction of the ordinary Courts. i.e. Governments cannot create “private, separate, courts”
  - C) the idea of “Constitution” as the rights of individuals as defined and enforced by the Courts. The living Constitution as the reality of Law.

# III.1 is the rule of law enough?

- Although Wacks agrees with Dicey and reminds us that the law should have a **prospective function**:
- You can plan your life (for the future)
- He reminds us that it is still possible for legal systems to formally comply with the rule of law and remain “Wicked”.

## III.2 -Western Legal Tradition

- It is now important for us to observe Which different legal systems are included in the WLT:
- This means that these systems although carrying obvious differences are, in fact, philosophically, rather similar.
- Think about it: a Parliament is a Parliament and a Court is a Court whether we are in the UK, PT FR or Germany the US or Canada



# III.2 -Western Legal Tradition

## Civil Law

## Common Law

- **French**: Be Lux Quebec, It SP+ ex colonies, Brazil
  - **German**: Aus, Switz, PT (Brazil, Africa Macau, Cape Verde), Greece, Turkey, Japan, South Korea Taiwan ( Brazil +It)
  - **Scandinavian**: Swe Nor DK, Iceland
  - **Chinese**: Civil +socialist law
- England
  - Former British Colonies
  - US
  - Most of Canada

# III.3 The Differences between Continental Law (Civil law) and the Common Law (CL) (UK/USA)

- 1- CL is essentially unwritten
- 2-CL is casuistic: building blocks are cases, not texts
- 3-CL: Doctrine of the precedent, supreme position in the Legal system
- 4-CL: Trial by jury ( Civil + criminal): jury decides on the facts, judge decides on the Law
- Keep in mind that Characteristics 2 and 3 are the basis of what we call the LAW of the European Union or EU Law.

# III.3 Differences in attitude

**Common Law**, (only) when there is a Remedy is there a Right

- In England no litigation could commence without a WRIT ( written authorisation) on behalf of the King. The King would only help you in certain TYPICAL situations.

## **Writs as a pre requisite to any action**

- Writ is an acknowledgement that the legal system should provide a Remedy
- : if someone owed you money you had to obtain FIRST a writ of debt BEFORE you could complain to the Courts
- : if someone had invaded your land
- FIRST you had to obtain a WRIT of Right.

# III.3 Differences in attitude

- Although Wacks assumes that this is a Generalization, he states that, in the **Civil Law systems. People assert rights much more than remedies.**
- Persons complain Directly to the Courts stating, for example to have suffered a damage, and invoke a general right NOT to suffer damages (that can be of many types) and then they nurture the expectation that the system will provide a REMEDY.
- It is a very vague statement, however it is true that in the Common Law, access to the courts is more restricted. It is possibly true that within **Common Law** systems there are more prior checks on whether CLAIMS are meritorious.

# III.3 Same result, different paths

- In fact, one of the most famous WRITS introduced into the UK in the 17th Century
- “**Habeas corpus**” = you must produce the body (of a prisoner detained without trial) before a COURT
- Where Legal justification for imprisonment
- Would have to be put forth by the authorities and then validated by the judge.
- Is also present ( as a RIGHT to HABEAS CORPUS) across the systems of CIVIL Law of the Western Legal tradition. If you check it is included in Portugal at Constitutional level.

## III.4 Religious Law

- Important to investigate religious roots of legal Systems
- See, for example of co-existence of State Law with ecclesiastical law of the Catholic Church
- -Rise of secularism: the separation between Church and State
- On this issue we will Return to :CRUCIFIX in the Classroom and to the Testimony Of Professor Jospeh Weiler at the European Court of Human Rights in the *Lautsi* case
- <https://www.youtube.com/watch?v=ioylyxM-gnM>
- When we study External Constraints on Morality

## III.4.1 Religious Law

- Talmudic law
- Islamic law
- Hindu Law

## III.5 Customary law



## III.6 Mixed legal Systems

## III.7 Chinese Law

# IV-Now: what is the Law For?

- Now that we have seen where it comes from
- What is it FOR?

# The Functions of the LAW

- A- Law for **ORDER**: “ *solitary, poor, nasty, brutish + short*” Hobbes , on the Natural state of man ( p. 21)
- B- Law for **JUSTICE**: Aristotle: Treating equals equally + unequals unequally in proportion to their inequality
- C- to achieve this Justice requires 1) LAWS + 2) independent judicial system/ 3) Legal profession/ 4) procedural justice: fair trial

# V- Comment on Sources

- The Law does not fall from the sky
- Legislation--Common Law--Other Sources
- In the absence of some authoritative source, a law that purports to be a law will not be accepted as a law.
- “ what is your authority for that proposition?”
- Court/ statute ( legislation)/ article Civ code/ academic writings

# V.I Comment on( structural problem of) Legislation

- Often It **needs** Interpretation:
- *Vehicles must not enter the park*
- Motor car
- Bicycle
- Skateboard
- A-Literal or textual approach
- B-Purpose of the rule (peace + quiet of the park)

In order to save time for more important discussions, the University of Harvard clarifies ex ante...



# When the structural problem is not there

- *in claris non fit interpretatio*



# Revision I-Latin

- Jus
- Ab initio/Ab Origine
- Ubi Societas ibi jus
- Corpus juris
- Decemviri
- Habeas Corpus
- In claris non fit interpretatio

# Excercise II

- What was the Code of Hammurabi?
- What were the twelve roman tables meant to achieve?
- What do the Code of Hammurabi and the XII tables of Roman Law have in Common?
- Explain what the Role of the CORPUS IURIS CIVILIS ( CJC) was in the shaping of modern law
- Wher the Code Napoleon and the German BGB more or less wieldy than the CJC?
- What are the defining Features of the Western legal Tradition (WLT)?
- What is the rule of law?
- Explain what the Writ of debt and the Writ of right existed to protect.
- Define *Habeas Corpus* and then explain its purpose.
- Where is *Habeas Corpus* included in the PT Constitution

LBE, Week 4, Class 2

# An Introduction to the Concept of Legal Personality

# PLAN

1- INTRODUCTION

## **2- PERSONS**

3- A LEGAL GRID TO SOLVE PROBLEMS

4- LAW vs. MORALITY

5- GOVERNMENT, LAW & CASE-LAW

6- COURTS

7- PROPERTY & CONTRACT

8- CURTAIN: The Merchant of Venice

When we study Law we think immediately of Rights and Persons

- Rights may be classified into 3 types along a time-line
- **First generation**: so-called **negative** civil rights such as not to be interfered with : speaking freely for example or physical integrity rights
- **Second generation**: **positive** rights, a claim to education, health or justice
- **Third generation**: rights of **solidarity**, participation in development and the enjoyment of natural resources, a healthy environment and disaster relief

Who are the PERSONS connected to these Rights?

Lets take a look at the Oxford Dictionary of Law (ODL)

- **Legal Person** : *A natural person ( i.e. a human being) or a juristic person*
- **Juristic Person** (artificial person) an entity such as a *corporation* that is recognized as having
- **legal personality**, i.e., it is capable of enjoying and being subject to legal rights and duties.
- It is contrasted with a human being that is known as a **natural person**.

# Still from the ODL

- **International Legal Personality:**
- Legal personality is principally an acknowledgment that an ENTITY is capable of EXERCISING certain rights and BEING SUBJECT TO certain duties on its own account under a particular system of law.
- In municipal systems, the individual human being is the archetypal “person ” of the law, but certain “entities” such as limited companies or public corporations are granted a personality DISTINCT from the individuals who create them.
- Further they can enter into legal transactions in their own name and on their own account.



## In an international context

- Under international law
- the State is the typical “legal person”,
- and other entities may be “Subjects” of international law so far as they can enter into legal relations in the international sphere.

# A Brief Look at some parts of the world: 2 superpowers

## India

- World's oldest form of surviving social stratification
- four types of beings: the Brahmins, the Kshatriyas, the Vaishyas, and the Sudra.
- Plus the Dalits, the Untouchables.
- The Caste System in India has been outlawed since 1955. However, there are people who believe that the Caste System is still informally in place. In some rural areas of the country, marrying or associating outside of one's caste still isn't the norm.

## China

- Alongside citizens you have Beings named Heihaizi. (literally translates as Black Child)
- These children were born outside the 1 child policy.
- The rule disappeared in 2015.
- A **Black Child** is deprived of a **Hukou** - a legal document that serves as an identification, similar to a social security number through which one can access government benefits.
- To legalize such children a "social maintenance fee" must be paid.
- They do not have a right to pursue education, access to health care, a formal job or a legal marriage.
- However, a fee can be paid for ex, just to go to school.
- *Chen v Holder*, US Supreme court case of 2009, Decision April 2010
- since Chen was still allowed to attend school and that he was never openly confronted by Chinese government officials, his evidence of persecution was not strong enough

## The Western legal Tradition is very Different

- It does not accommodate that domestic law might distinguish
- **one national human being from another** as concerns legal status due to social standing.
  - European Convention on Human Rights
    - Article 14
- The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national **or social origin**, association with a national minority, property, birth or other status .

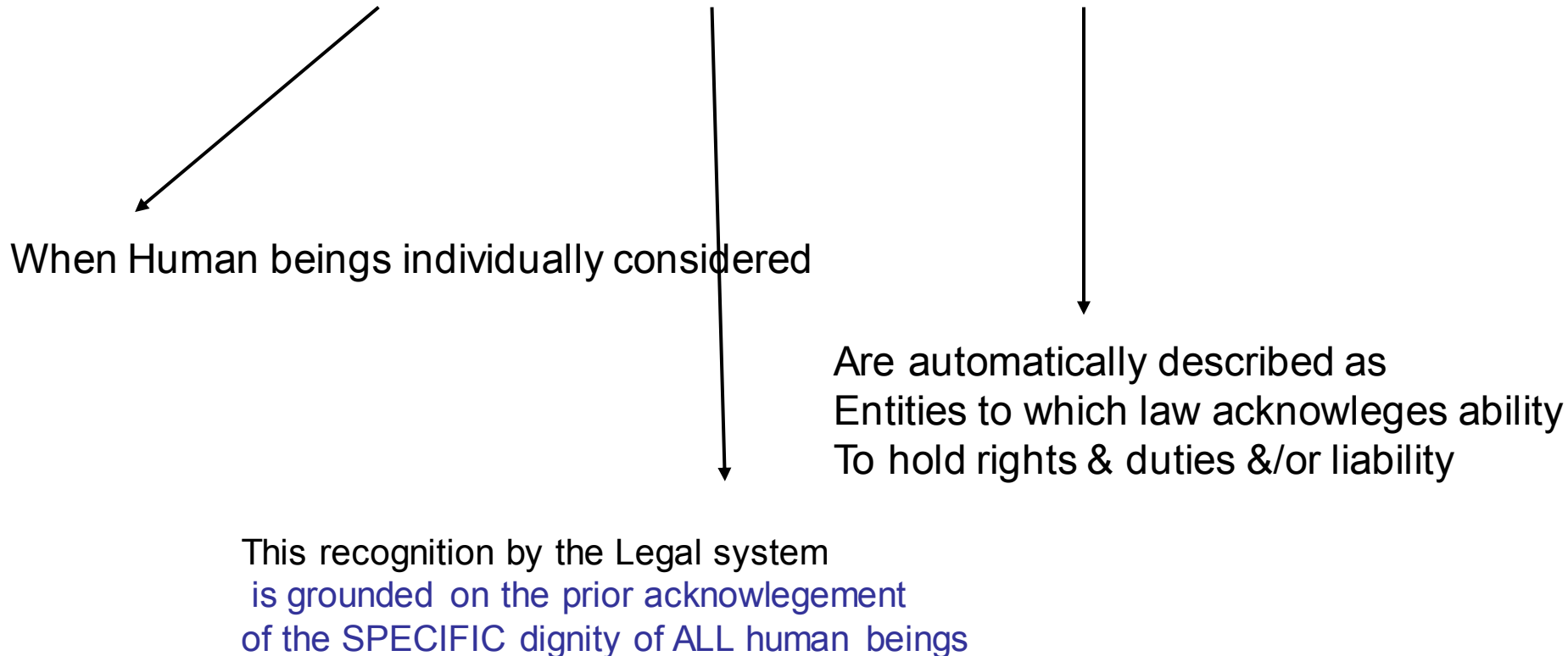
Continental Doctrine i.e., Portugal  
refines and reorganizes this criterion

- In Portugal, the description of *persons*, (*all persons*) is quite articulated:
- 2 main Concepts are laid out
- The first one is (i) Legal Personality
- The second is (ii) Legal Capacity
- that is is turn subdivided into Legal Capacity
- A) of enjoyment
- B) of exercise

# The acquisition of Legal Personality

- Natural Persons as

## Legal subjects



If the grounding concept is (i) Dignity (ii) of the Human Being, What is a Human Being?

- Human Being is the concept of Departure
- Legal Personality is a concept of Arrival



# Define HUMAN BEING

- Biological definition
- Legal Definition

## This issue is discussed in literature as well

- That is one of the reasons we are discussing Shakespeare this semester
- Some people are very quick to accuse Shakespeare of Racism v the Jewish community
- However, when we take a close look, observe what is said:



## Shakespeare, on Law

- In the face of the social conditions of the Jewish Community, the Ghetto, the Curfew, access to the Courts...
- ***“Hath a Jew not eyes, hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, warmed and cooled by the same winter and summer as a Christian is?”***

## In the world as we know it

- A Positive & contingent rule governs the moment in which we acquire Legal Personality
- Take PT as an example
- Human Beings normally **acquire** Legal personality with **complete birth (and alive)** and loose it upon **death**.
- What do these words mean?
- **Complete Birth (and alive)** (“*nascimento completo e com vida*”).
- **Death** (“*morte*”).

# The conclusion is

- You need to be ALIVE to be acknowledged any RIGHTS at all
- Of course this vision leaves the (legal) protection of unborn Children (foetus) outside the equation.
- The Civil Code then goes on to open an exception.

## 2 tiers of protection:

- It acknowledges that another human being may desire to give a GIFT to an unborn child.
- Furthermore there will be a national LAW that regulates abortion and that provides after how many days since conception is the so-called “right to life” acknowledged
- (a first-generation right, life that is not to be interfered with)

# Personality of Unborn Children

- In certain cases the legal system protects the “conceived but yet unborn” child, by attributing personality to the unborn child (the so-called *nascituro*),
- This, for the purpose of being the holder (titular) of a **legal expectation** to inherit.
- However, for the act of inheritance to take place, there is a future yet uncertain event (a **condition**) that has to occur: birth (with life).

In the western legal tradition however, there is literature that argues against this type of protection, and instead defends Infanticide & more...

- Recently a study that purports to be scientific ([Giubilini & Minerva](#))
- [After-birth abortion: why should the baby live? | Journal of Medical Ethics](#)
- *jme.bmj.com › Online First -*
- *human beings achieve their moral status in virtue of the degree to which they are capable of laying value upon their lives or exhibiting certain qualities or being desirable to third-party family members.*
- Argues in Defence of after-Birth Abortion of both handicapped & healthy children
- At the discretion of the parent/s
- The argument is that Both the foetus & newborn are “non-persons “ since they are [without conscience](#).

# *Journal of Medical Ethics (Oxford)*

- New-born(...) does not have the “*moral status*” of actual persons and are consequently “*morally irrelevant*” for
- (...)
- A certain length of time after birth.

## Having Grasped Legal PERSONALITY

- Lets Look at the SECOND PART OF THE CRITERIA
- Legal PERSONALITY (of the Human Being)
- Legal CAPACITY (of the Human Being)



# Capacity (more detail)

- We will now contrast a **quantative** concept: Legal capacity, with the **qualitative** one: Legal personality.
- Still **on capacity** we have to distinguish **two**
- **Perspectives**: If capacity is measured by the variable n° of situations (Rights, expectations and /or Duties, liabilities burdens) that a subject may be the holder of

## PERSPECTIVE 1 -A connection- Person-Right, the Ability to ENJOY

- Capacity as an abstract connection between beneficiaries and specific positions :
- *Rechts-fahig-keit* (german)
- *ability to be the holder of rights*
- Here we ascribe and or correlate a position to a beneficiary (it belongs to X)

# A **first** perspective is:

## Capacity of enjoyment (of rights)

- Abstract perspective of Legal capacity, flows from the concept of inherent dignity of any person
- Potentially almost All Legal persons can benefit from the ENJOYMENT of active situations (take property for example)
- Anyone may benefit from the situation of sitting outside in their own garden on a sunny day (even someone who has a severe mental disability) OR ( someone «18 yrs)
- Therefore we call THIS capacity, **capacity of enjoyment**: capacidade de gozo

## Article 67, PT Civil Code

- Human Persons may be the subject of (actors in) any legal relationship, unless there is an impediment (a rule that states the contrary).
- It is necessary that exceptions to this rule are consigned in law.

## Perspective 2 – An ability to MANAGE

- Capacity is (from another perspective) the ability to act, to *exercise* rights and to comply with duties:
- *Handlungs-fahig-keit* (german)
- *Ability to be the handler of rights*
- It's the ability to engender action thereby transforming the legal sphere of oneself and that of others

A second perspective is  
Capacity to exercise (rights) without assistance

- Another very different matter is to acknowledge persons capacity to rationally exercise their rights
- It is not about knowing which/how many rights/duties may be allocated to each person or entity but rather to know to what extent each person is
- admitted to exercise those rights
- and comply with those obligations
- without assistance.

## Natural ability of understanding & wanting on a mature judgement basis

- Should we allow a minor to sell property?
- Should we validate a transaction in which one of the parties suffers from a mental disability?
- Someone who is “senile” makes a will, is it valid?
- This capacity is referred to as **capacity to exercise Rights:**  
“*capacidade de exercício*”

# Examples

- **Minors**- representation of Parental Authority or legal Guardianship
- Individuals **judicially disabled** (ruling proffered by court)
- (I) people with mental disorder
- (ii) Severe hearing loss or muteness
- (iii) Blindness
- **Person unable to govern herself or her personal assets**



# PERSONS

- Are normally endowed with a comprehensive **capacity to exercise** from the moment that they come of age (18yrs)
- Until persons come of age they are usually REPRESENTED by their parents or guardians (also called *tutors*)
- There may however be exceptions!

# Who helps persons with diminished capacity?

- The Legal system has created a substitution mechanism to protect people with diminished capacity:
- Both substitution mechanisms must be sanctioned though a court of law.
- A) in the case of someone with legal personality, capacity of enjoyment but with no ability to exercise willingly and freely (with conscience) the rights that they are holders of, in their name and interest a TUTOR will be appointed
- B) Sometimes the inability is less extreme and a CURATOR will be chosen instead.

# TUTOR & CURATOR

- **Interdiction**: the absence of capacity of exercise is “corrected” by the TUTOR
- **Inabilitation** : (when the inability is less global) the will of the “*person without ability to perform a specific act*” is constrained by the (necessary) authorization of a CURATOR

# Capacity

**Personality: qualitative**

**Capacity: potentially a vast quantity**

- Of ability to make choices and carry them through
- You are Capable of being the holder, but you don't have to be so in practice

# Capacity (I and II)

## Enjoyment

### *Rechtsfahigkeit (GER)*

- It's OK to make you the focal point of ARRIVAL of these Abilities
- This concept is one where we Count, static, abstract possibilities

## Exercise

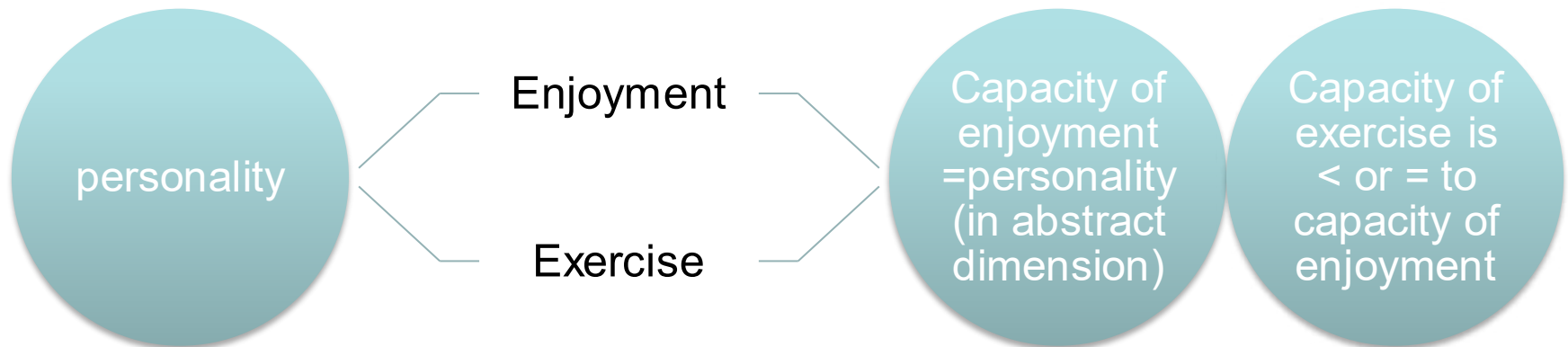
### *Handlungsfahigkeit (GER)*

- You are competent to manage all the Abilities we have ascribed you
- Without assistance
- This concept is where we measure ability to Transform the world by yourself ( or upon your orders)

## LBE week 4 Class 1

### Artificial Persons (a.k.a) Juristic Persons

# Personality & Capacity Enj & Ex



## Collective entities –because they “copy” human persons- are also an imperfect product of legal fiction

- What are they MADE OF?
- They are Composed by what we call a Prevalent or Preponderant substrate: (reality subject to certain kind of organization): either
  - -a group of individuals OR BY
  - -assets that individuals manage
- In order to protect certain interests the Legal system has acknowledged Legal Personality
  - in favour of ENTITIES that comprise several
  - individuals and/or assets



## Should these entities be awarded Capacity?

Regarding **capacity**: the capacity to hold rights and to comply with duties will be shaped on the

SCOPE of the entity:

**the purpose that the entity aims to achieve.**

- These entities must be allowed a certain share of **Capacity to enjoy** + their **capacity to exercise** must be technically articulated (high degree of detail)
- Collective entity's capacity is LIMITED to the **Convenient and necessary powers** to attain their objectives: **Principle of Speciality or Special capacity**
- How do they act?
- Collective Persons act (exercise their positions) through their Governing Bodies (órgãos).

## Collective Entities Mix Several Elements

- Intrinsic Elements

- 1-Substrate ( physical)
- 2-Formal Organization
- 3-Legal Personality

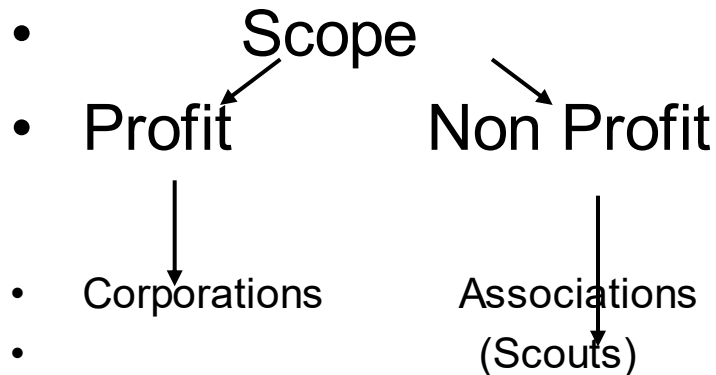
- Extrinsic Elements

- 4. Scope (purpose that it aims to achieve, ex: profit; charity purposes, education) Another word for Scope is Corporate Purpose:
- Determines (the need to construe a certain TYPE of ) Capacity
-

## ( example) Collective Entity Regulated by Private law: Substrate

- Mainly **Personal**

- **Associations**



- Mainly **Asset-based**

- **Foundations**

- **Altruistic purpose**

- (it is pursued in the interest of beneficiaries external to the founder of the Entity)

- **Allocation of a mass of assets** (endowment Fund) to a certain social purpose

# Requirements

## Organised substrate

Existence of people/assets  
To achieve certain goals  
Worthy of legal protection

Acknowledgement of **Legal Personality**  
to the Org. Substrate  
**Recognition**

## Registration

(ex: Portuguese Registry of Corporate Entities)

## **Collective Legal Personality is instrumental to the aims and interests pursued: this will define the SPECIAL CAPACITY**

- So unlike natural persons who have comprehensive **legal capacity**
- “*Collective Entities shall enjoy rights and are subject to obligations compatible with their nature*” Art 12 of the PT Constitution
- “*includes all rights & Obligations necessary or convenient to the pursuit of its purposes*”
- “*except those prohibited by law or inseparable from natural persons*”:
- ex family relationships: marriage, adoption Art 160 Civ Code

## Mitigation of the Principle of Special capacity (I)

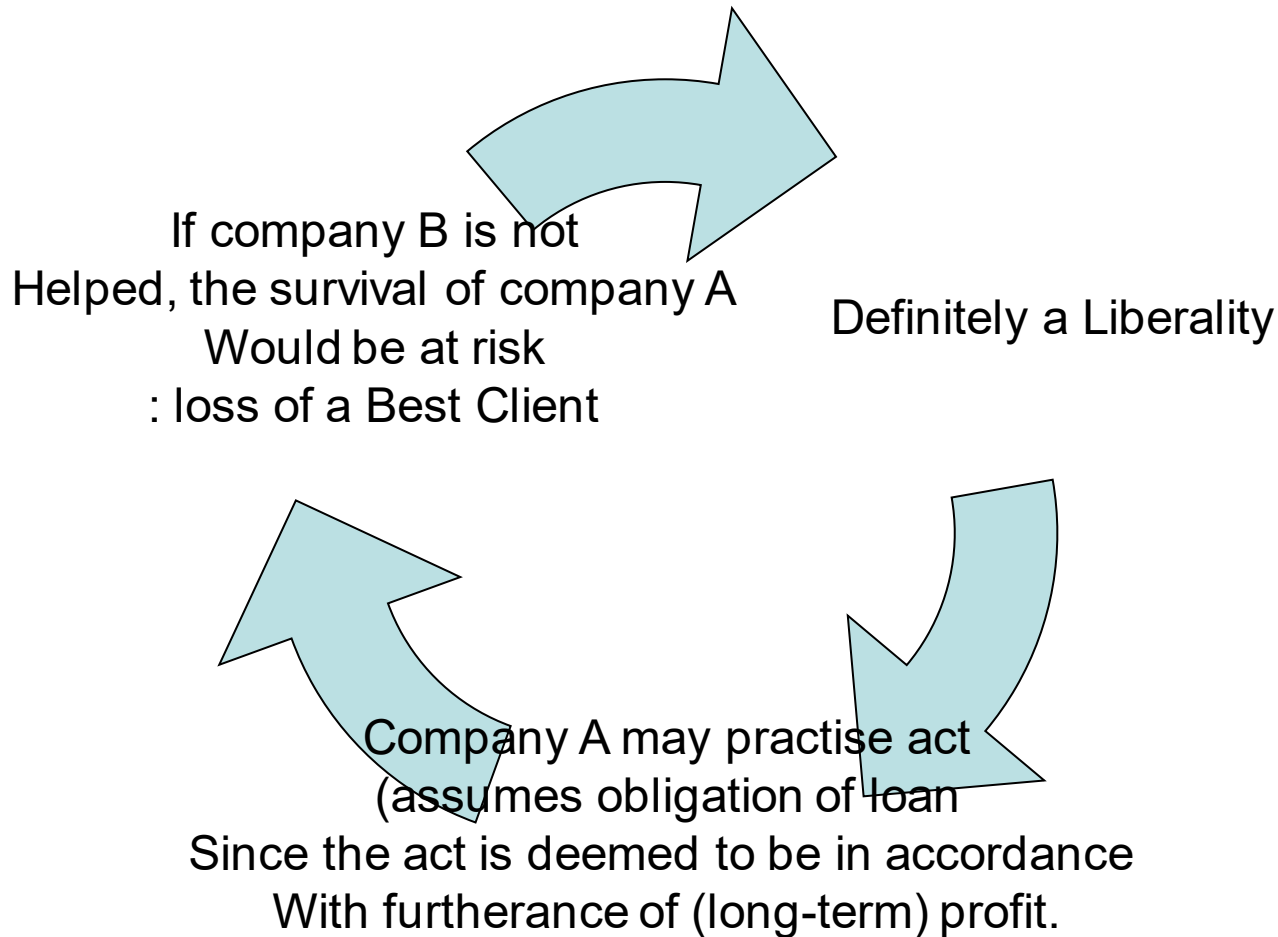
- Collective entities may ALSO practice acts convenient to the pursuit of its purposes which may OCCASIONALLY move away from its corporate purpose
- Example 1: a collective entity with non economic purpose is not precluded to practise occasional acts of commerce
- in order to raise funds to practice its charitable purposes

## Mitigation (II)

- Example 2 -A collective entity with profit-making purpose
- In principle Profit-making companies are not entitled to practise legal acts contrary to the achievement of profit by the Company (their purpose is to distribute profit to shareholders)
- (under threat of nullity due to lack of legal capacity of the company): donations; free loan credits;
- Except for Donations performed non-altruistically (publicity)
- Or  
Liberal act that may be considered usual practice depending on prevailing circumstances and the state of the company itself at the time (donations made at Christmas).

### Mitigation (III)

Company A lends money free of charge to company B considering that company B is an important client of company A





# The Brain

- 1-organise the various individual wills of its component members
- This Formal organization of “*voluntas*” becomes operative through what are known as
- **Corporate Bodies of Collective Entities**

# A Map (DNA) of the Corporate Bodies

- A Document known as “*The Articles of Association*” of a collective entity
- Settles
- (I) the procedures of Governance
- (II) The establishment of individual component members
- (III) The terms of the decision-making process

# Functional Powers

- Each Corporate Body is allocated a set of **Functional powers**
- for the purposes of the Legal Entity

# Part II-other traits of (possible) similarity to Human beings

- A- Agenda + Minutes
- B- Quorum
- C-Staggered Boards

# Case I

- Imagine that a Corporate Body is composed of 7 members with equal votes (it is easy to guess why 6 would not be a good number)
- A meeting is scheduled for Monday at 9am

# A1-Agenda

- On a certain day before Monday, a letter must have been sent to all component Members, giving them notice to be present on the assigned date
- A Topic named “Agenda” specifically describes what issue/s are to be discussed during the meeting
- *Q-If an issue that is not on the Agenda is discussed, is the discussion valid?*

# A2- Minutes

- A written (or otherwise recorded) description of every meeting of the corporate Body is recorded & filed in an appropriate standard-these are called Minutes (in PT: Minuta)
- *Q- If a component member of a Corporate body states that a certain issue was discussed yet there is no mention of it in the Minutes, what “truth” prevails?*

# B-Quorum

- On Monday at 9 am only 3 (of the 7) members are present.
- (i) does the meeting take place?
- (ii) If it does are they (the 3 that are present) able to decide anything?
- Try to apply the same logic to a human being: should a human being with less than 50% of her capacity present be allowed (by the law) to take (binding) decisions?



# B.1 (cont)

- Law defines two TYPES of Quorums
- (number of persons present as a % of the entire body)
  - (i) Functioning Quorum
  - (i) Deliberation Quorum

## B.2 Functioning Quorum

- Functioning Quorum : would state for ex that for the meeting to take place at least 60% of the members should be present
- $60\% * 7 = 4,2/7$
- This means that without 4,2 members the Body cannot even FUNCTION ( so let's assume that a threshold of 5 is established)
- In our case ( in which only 3 turn up) the meeting would have to be adjourned.

## B.3 Deliberation Quorum

- Let's take as a given that in fact, instead of the initial 3 members two more arrive therefore we NOW have 5 / 7
- the minimum threshold is met so the Body can FUNCTION= discuss
- But may it DECIDE?

# B.3 Deliberation Quorum

*Deliberation Quorum* now states that

- a valid DECISION must be taken by
- A) at least 60% of favourable +validly cast votes
- B) of Members present
- (very different from the expression component Members)
- So if there are 5 Members Present: 60% of favourable votes = we need 3 favourable votes
- What lesson should we learn that is very important if we are managers?
- even though the Body has 7 component members a valid decision may here be taken by 3 favourable votes, that mathematically represent less than 50% of the composition

# B.3 Deliberation Quorum

*Through the concept of Deliberation Quorum*

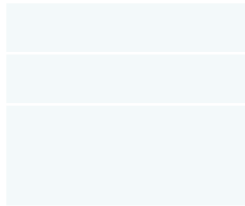
What lesson should we learn that is very important if we are managers?

- even though the Body has 7 component members
- a valid decision may here be taken by 3 favourable votes,
- that mathematically represent
- less than 50% of the composition.

# C- Staggered Board

- Assuming the Board is composed of 7 members and members renewal takes place every 3 yrs
- To ensure the continuity of decisions & to protect shareholders from abrupt changes in policy (*imagine an abrupt change in character*).
- Yr 3- 4 members max are renewed
- Yr 6- 3 members max are renewed
- Yr-9 -4 members max are renewed

# LBE Week 5.1



The Content of legal  
Relationships

# The 6 parts to Week 5

1- INTRODUCTION to the legal personality of Human Beings

2- INTRODUCTION to the Legal Personality of Artificial Persons

**3- The CONTENT of Legal Relationships between Persons  
(Rights and Duties and other things)**

4- The OBJECT- Do you want someone to do something or is it actually something you want?

5- The FACT – the moments in which Legal Relationships begin and end

6- The WARRANTY- Enforcing rules



# Introduction

- The Legal Relationship is a normative (legal) answer
- to a conflict of interests in (real) life
- The legal Relationship is ultimately also about adjudication, within a Conflict, one actor ( person) is vindicated, the other actor (person) is sacrificed.

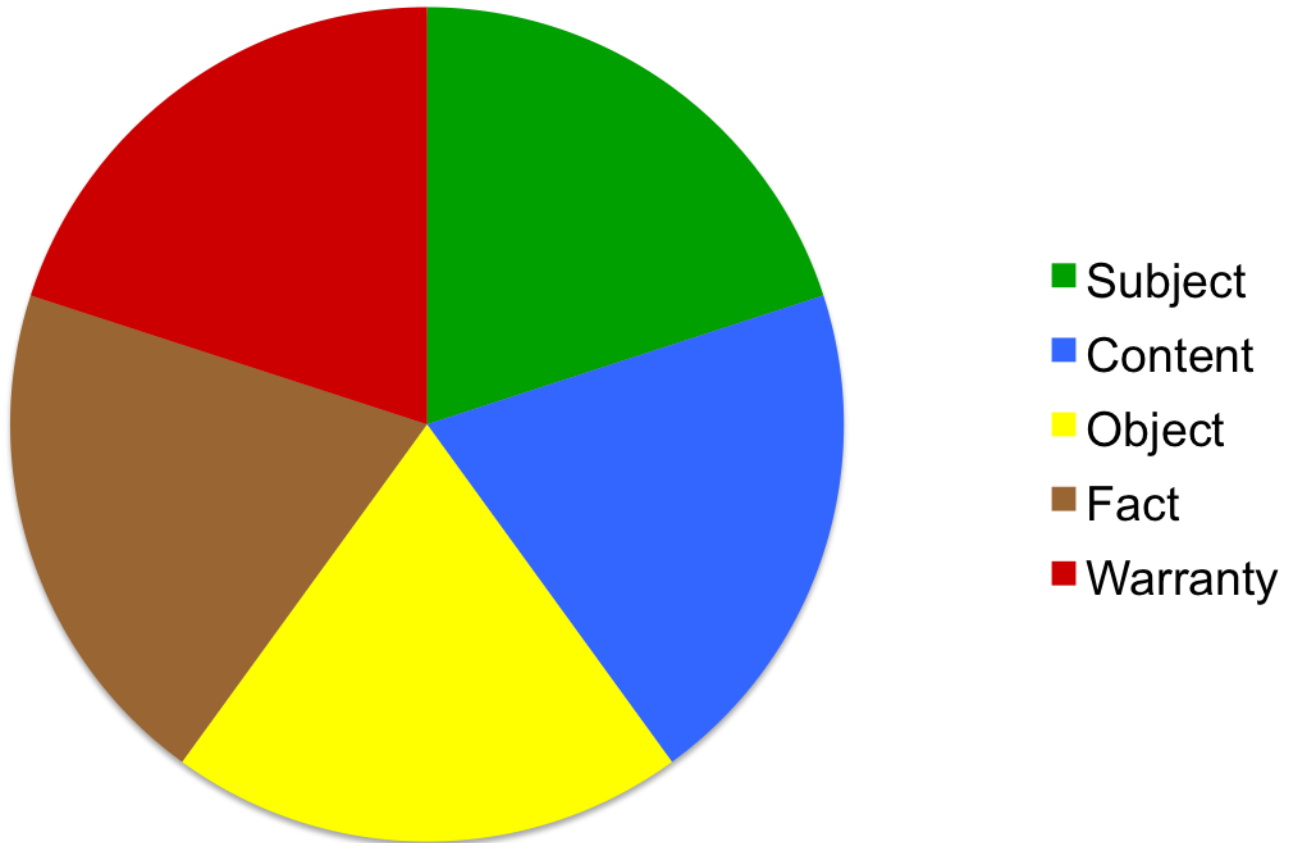
## Legal (and, on occasion, real)

- King Solomon
- Had no DNA testing available
- He chose a criteria (of identification of the mother) that most of us agree with
- But what if he was wrong?
- What if the “Real” mother would have in fact preferred “half a baby” to “no baby at all”?
- Solomon’s truth was LEGAL, Yet it was not necessarily TRUE

# In order to

- Get as close to reality as we can, when using the law (and especially in contractual relationships) that are extremely important for companies
- We use a “formula” that has 5 parts.
- We “chart” each of the 5 parts
- And then
- We put it all together,
- the SUM of the 5 parts= LEGAL TRUTH (regardless of whether it is indeed true or not)

## Legal relationships



1- when considering the subject: we control for who is involved

- A Human Being or
- A Non Human Legal Person
- Subjects involved in LR usually are **holders of** competing Advantages & Disadvantages

2- when considering the The Content- we control for the kind of Legal positions that compete with eachother within a relationship

- All of the (prevalent, All of the (subordinate,
- advantageous ) disadvantageous)
- positions positions

## A note on terminology concerning Advantages and disadvantages

- Some of the doctrine calls the Advantages ACTIVE situations (because these are mostly RIGHTS)
- and at the same time calls the Disadvantages PASSIVE situations (since these are mostly DUTIES)
- However this label can be confusing.
- **So we will not adopt it in this course.**
- Think about it. Legal subjects tend to hold BOTH rights and duties. Also, there is rarely anything “passive” about a duty. Much to the contrary a duty often represents the need to act, i.e., to engage in a certain behaviour.

So, moving on to Who is involved  
Compare:

- In Positions Type A
  - In your relationship of ownership with your mobile phone?
- In Positions Type B
  - In the agreement that Jaime's Mother sets up:
  - Maria (babysitter) reports to Rua da Paz n3 at 5pm on Mondays to take care of Jaime (6yrs) old for 2 hours for 10€/hour



## The classical list of ADVANTAGES:

| Subjective Rights                                                                                                                                                                                                    | Credit Rights | Potestative Rights    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|-----------------------|
|                                                                                                                                                                                                                      |               | i) constitutive       |
|                                                                                                                                                                                                                      |               | ii) capable of change |
|                                                                                                                                                                                                                      |               | iii) extinctive       |
|                                                                                                                                                                                                                      |               |                       |
| <p>Credit Rights and Potestative rights are also “subjective” since they are also correlated to an actor (person)</p> <p>We are just looking at ways to give a more in-depth analysis of variations of “Rights”.</p> |               |                       |

## (i) Subjective rights

- we say that subjective rights are rights that fall directly upon things
- or other realities treated as things,
- conferring on the **holder (titular)** of the Right:
  - (i) powers over things +
  - (ii) the right to demand an attitude of respect

Very often they are therefore **absolute rights**: They may be upheld by their holder vs anyone (*erga omnes*): it is a right “good against the world”  
(Ex the Right of Property)

## (case 1)

- By pure chance all of the week-end cottages in a village are white with yellow doors.
- Tomás paints his white week-end cottage purple.
- His neighbour, a rural purist, is quite disgusted and wants to go over and tell him that purple is an “inadequate” colour for the neighbourhood

## (case 2)

- Maria has always dreamt of owning a Hermès handbag.
- She is looking into the Hermès window and sees another girl buy 3 of her dream handbags.
- The girl exits the store and immediately takes out a pen and proceeds to cover two of the handbags in writing. The girl then transfers a leaking plastic bag of fresh fish into one of the written bags.
- Maria wants to stop the girl from “ruining” the third bag. Is this possible?

## (case 3)

- Bernardo is allergic to cats and hates junk. He believes that gardens should be kept tidy and beautiful all year round.
- Carlos, his new neighbour starts collecting scrapyard junk (sucata) on the front lawn of the house next to Bernardo and buys five cats who lie around Carlos's lawn all day. Bernardo now has to cover his face with a cloth both when entering/exiting his property in order not to sneeze.
- Bernardo wants to tell Carlos to get rid of both Junk and cats.

## (ii) Credit Rights

- It is the Advantageous position in situation regarding DEBT (relações obrigacionais)
- It is the right to demand a certain type of behaviour.
- from someone else
- EX: At the end of a month of work the employee earns a credit right vs the employer:
- the credit right is materialized in the monthly salary/wages

# Therefore in a relationship of labour:

| Employee                                  | Employer                                                         |
|-------------------------------------------|------------------------------------------------------------------|
| Passive<br>Duty to perform tasks assigned | Active<br>CREDIT RIGHT to receive performance the tasks assigned |
| Active<br>CREDIT RIGHT to receive wages   | Passive<br>DUTY to pay salary                                    |

### (iii) Potestative rights:

- these rights are linked to the concept of POWERS.
- The holder of these Rights may exercise them out of free will, **triggering legal change in the legal sphere of others** independently of the will of the latter.
- The passive subject is not required to cooperate and may do nothing to impede the exercise of these rights.



## (Case 1)

- *Any tenant (locatário) may oppose the renewal of a rental contract once the deadline has been reached.*
- Qualify this statement from the point of view of Active and passive situations involved.

## (Case 1 Correction guideline)

- Tenant: holds a potestative right of “opposition of contract renewal”
- Landlord: does not have any corresponding duty (remember that a duty requires that you “DO” something), rather he is subject to the will of the tenant.
- N:B Situations of lawful termination of contracts all imply potestative rights of termination

# Potestative Rights (cont.)

## Potestative Rights

- A) **Start something new Constitutive:** ex: setting up of an easement: Mr B (who has no other options of passage) demands that the neighbour A allows him to pass through his land
- B) **Change something Modificative:** Ex: change to a contract due to a change of circumstances ( raise in rent)
- C) **Put an end to something Extinctive:** Right to divorce that extinguishes relationship of marriage


# DISADVANTAGES

- (iv) Duties
  - The downside of a Credit/subjective right
- (v) State of Subjection
  - The downside of a potestative right
- (vi) Burdens
  - ?

## (vi) A Legal Burden

- The State informs you that you may deduct your medical expenses from your IRS statement
- If you attach a scanned copy of them
- A Notary informs you that your Uncle has left you a mansion , yet you must inform him in 8 days if you accept the inheritance.

# A Legal burden Comes before (some) Legal Rights

- If You don't comply with the Burden
  - You lose an advantage that is within your reach.
- 

# Summary for Today

|                                       |                          |
|---------------------------------------|--------------------------|
| (i) Subjective and (ii) Credit Rights | (iv) Duties              |
| (iii) Potestative Rights              | (v) States of subjection |
|                                       | (vi) Burdens             |

# Learning Objectives 1

- 1-legal truth not only may be different from the real truth, it very often is.
- In itself, this is not dramatic, it is law.



# Learning Objectives 2

- 1-legal jargon has a translation
  - 2-**law** allocates limited resources
  - 2.1- chooses areas
  - a) of interference (prevalent/subordinate interests)
  - b) of non interference (areas that the law does not impinge upon)
  - 3-**situations that persons find themselves in –not persons-** (individual, collective, complementary situations) are labeled advantageous/ **disadvantageous**
-

# Learning Objectives 3

- Write your own Case

One for each of the SIX Positions we have identified today.

To be able to differentiate them is very important for a manager: for each and every legal problem you must assess what you are entitled to/ subject to.

# LBE week 5 (part 2)

The object of the Legal Relationship  
Analysis of EXPECTED BEHAVIOUR and THINGS

## The Object-what is the LR on/about?

- What thing/behaviour is appropriate and adequate
- to satisfy a need
- or to enforce an interest
- that the LAW wishes to protect/sacrifice?
  
- Take note that most times, instead of wanting to receive something or even compensation,
- you want someone to perform/ BEHAVE in a certain way
  
- 3.1 the immediate object of the LR: behaviour/performance
- 3.2 the mediate object of the LR: the projection of the behaviour onto some THING

## Example of Content + Object of the LR

- Bernardo agrees with Antonio that he will pay up an old debt to Antonio
- How? by bringing to a certain place (NOVA, Carcavelos campus, room B137, Fri 8th March 2019, at 16.00)
- a painting valued at 1000€ that Antonio has been claiming.
- Content?
- Object: immediate object ?
- mediate object?

Content: The purpose is to consider for each subject (player) the sum of advantages/disadvantages

- Let' s consider ANTONIO
  - ANTONIO holds a Credit Right to receive value (money) :(here we have a temporally isolated active situation –because it was an *OLD* debt)
  - However the value (in this story) is going to be represented by a painting.
  - Does he (CURRENTLY) have any outstanding corresponding Obligations/duties? It is not likely, from the story it seems that ANTONIO has ALREADY Complied with those in the past (by lending BERNARDO money)
-

Content: The purpose is to consider for each subject (player) the sum of advantages/disadvantages

- Let' s consider **BERNARDO**
- BERNARDO has a Debt (here a DUTY to pay a certain value to ANTONIO (under the form of money or a thing: the correspondent DISADVANTAGEOUS situation in a loan:))
- Does he (currently)hold any active situations? It is not likely. In this story he seems to have received his part of advantages in the past (the money he borrowed from ANTONIO).

## Example 1

- We have said that in the example of BERNARDO that agrees to settle his debt with ANTONIO by bringing to a specified place on a specified date a valuable painting
  - The (minimum) CONTENT (week 5.1) of the LR is:
  - Filipa' s debt + Graça' s credit
-



CHANGING THE TOPIC  
TO THE ANALYSIS OF THE OBJECT  
WE WILL NOW MAP

EXPECTED  
BEHAVIOUR

- THINGS (involved)



## Regarding the analysis of the OBJECT of the LR

|                                                                                                                                 |                                                                                                                 |
|---------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|
| <p>Either we focus on the<br/>BEHAVIOUR<br/>(prestação)<br/>IMMEDIATE OBJECT<br/>Concerns Rights+Duties</p>                     | <p>Or we intend a material THING<br/>(RES)<br/><br/>MEDIATE OBJECT</p>                                          |
| <p>As in the duties of an employee<br/>( to PERFORM)<br/>As in the duty to DELIVER<br/>(entregar)<br/>As in the duty to PAY</p> | <p>As assets owned in the Law of<br/>Property<br/>AS IN THE SALARY<br/>AS IN A TABLE THAT HAS BEEN<br/>MADE</p> |

## Analysis of Legal BEHAVIOUR

- IMMEDIATE OBJECT:
  - The activity to which some are entitled and that others must perform or undertake
  - May Vary in nature:
-

## TYPES OF IO

| <i>De facere</i>                                                                     | <i>Non facere</i>                                                                                  | <i>De pati</i>                                                                                                                            | <i>De dare</i>                                                |
|--------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------|
| <p>Activity</p> <p>Ex: to build A HOUSE<br/>/draw up a contract / write a report</p> | <p>Ommissive activity</p> <p>Ex: respect of a prohibition to build/<br/>Refrain from something</p> | <p>To suffer the activity of others</p> <p>Ex To accept that a neighbour builds on his own land<br/>Even if you would prefer a garden</p> | <p>Conveyance/<br/>Delivery</p> <p>Ex: of shopping bought</p> |

## The Object

- We have already mentioned that
- The Immediate object in a situation= the behaviour the Players are expected to undertake
- Do not forget to always control for ALL Players involved

## Let' s Consider ANTONIO

- What behaviour might be expected from him?
- Well, at least that he (i)**URNS UP AT** the meeting, in this fashion he makes the Delivery feasible: BERNARDO, the debtor, cannot hand over a watch if no-one is there to receive it.
- We could also envisage a (ii)**duty to Receive the watch**: in this fashion she makes the delivery feasible: BERNARDO, the debtor, cannot hand over a watch if someone is there but refuses to receive

it

## Let's Consider BERNARDO

- What behaviour might be expected from her?
- he shares with ANTONIO the (i)duty to TURN UP AT the meeting
- Yet he is encumbered with further Duties, he has to (ii)Bring the painting with him + (iii)deliver /hand it over to Antonio.

## Immediate Object

|                        |                                       |
|------------------------|---------------------------------------|
| Antonio                | BERNARDO                              |
| (i) Turn up            | (i) Turn up                           |
|                        | (ii) Bring the painting with him      |
| (ii) Receive the watch | (iii) Deliver the painting to Antonio |



# Mediate Object

- Mediate object= the projection of the behaviour onto something:
- What is the real-world Object that all of the listed behaviour seems to converge on?
- the painting
- (and the money)

I - Antonio lends Bernardo **money**  
(Bernardo has a beautiful **painting**)

II- Bernardo is unable to repay Antonio  
in the **form of money**  
But agrees to pay though the **painting**

III- Antonio has a beautiful **painting**

## TYPES OF MATERIAL OBJECT

|                                                                                                        |                                                                                                            |
|--------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------|
| <p>1) Unreal Property or <b>moveable property</b><br/>(Coisas móveis)<br/>A car, a bicycle, a book</p> | <p>2) <b>Tangible</b><br/>(Corpórea) something that is embodied<br/>A jewel, a pencil</p>                  |
| <p>1A) <b>Real property</b> (imóveis)<br/>Land or a house</p>                                          | <p>2A) <b>Intangible</b> (incorpórea) usually called intellectual property, author' s rights/ a brand)</p> |

**Things AND Behaviour  
may or not be SUBSTITUTABLE**

|                                                                                                                                             |                                                                                                                |
|---------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|
| <p><b>Substitutable (fungível)</b></p> <p>When they may be replaced by other things/behaviour and the beneficiary will not feel damaged</p> | <p><b>Non-substitutable (infungível)</b></p> <p>When such replacement will cause damage to the beneficiary</p> |
| <p>António (repairman) is ill so he sends Bernardo to paint the wall instead of him</p>                                                     | <p>Alice is supposed to apologise to Beatriz, she may not send Carla to do so in her place</p>                 |

# LBE Week 6 Class1

FACT and Efficacy

Voluntary and Involuntary Actions

# THE FACT: life is Stirred and Shaken

- Finding the TRIGGER of Legal Situations/Relationships
- How did everything (legal) start?
- How did something come to be thrown onto me?
- How did something change?
- How did something end?

## Defining FACT

- FACTS are EVENTS to which the law attaches certain consequences.
- N:B a FACT is a simple event, its **legal consequences** arise from a (contingent) legal qualification.
- It is the The legal system that ( by contingent choice) converts events into legal consequence.

# THE FACT

- The legal Dimension is not STATIC:
- Legal situations/ relationships **ARISE**, are **TRANSMITTED** from one person to another, they may remain in the same person's sphere yet be subject to **CHANGE over time** and eventually may be **EXTINGUISHED**.

## Blending in a **SECOND CONCEPT**

- **EFFICACY:**
- When discussing the **FACT** we must relate to a second concept **AT THE SAME TIME:**



**EFFICACY (*Eficácia* (PT)) is a concept that is discussed  
TOGETHER with the FACT**

- Efficacy is the (**legal**) result of an EXISTING and VALID Legal rule
- In other words, valid and existing Legal rules are capable of producing RESULTS that we call **Effects**.
- **Note on PT THEORY:**
- Some authors speak of Efficacy as an autonomous element of the Legal Relationship ( we OPT to discuss it together with the fact)

# Description of Efficacy

| Constitutive                                          | Transmissive                                                                            | Capable of Change                                                                     | Extinctive                                                                             |
|-------------------------------------------------------|-----------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|
| Gives rise to a previously inexistant legal situation | Transfers an already existing legal situation from person A' s legal sphere to person B | Changes the CONTENT of a given legal situation that remains in the sphere of person A | Causes disappearance from the legal dimension of a previously existent legal situation |
| Act of foundation/ incorporation / birth              | Act of inheritance                                                                      | Change-inducing act of merger/ division /parenthood                                   | Death, payment, conveyance                                                             |

## The source of Efficacy: ACT or FACT?

- The source of efficacy :legal effects follow certain FACTS that are qualified as legally relevant. ( therefore a rule is created)
- FACTS are EVENTS to which the law attaches certain consequences.
- N:B a FACT is a simple event, it' s efficacy comes from a (contingent) legal qualification. The legal system converts events into legal consequence.

# Facts I

- Facts are Natural Events: Earth Wind Water  
Fire, life, death
- Examples
  - (i) earthquake or a flood
  - (ii) the passage of time
  - (iii) death

# Facts I

- Facts are Natural Events: Earth Wind Water  
Fire, life, death
- Ex: (i) if the flood (aluvião) carries away a piece of riverbank and deposits it further downriver, one owner suffers a sacrifice and another gains an advantage

# Facts I

- I- **ACTIONS OF NATURE:**
- You are the owner of a river-side property (lucky you)!
- 1km downstream your life-long enemy & neighbour JACOB also owns a riverside property (lucky him!)
- A raging storm tears off a piece of your property and deposits it adjacently to Jacob's land ( who is lucky now?)

# Facts I.I

- II- ACTIONS OF NATURE: the passage of time/ death
- Ex (ii) or If someone is missing
- (leaves the house to buy cigarettes/ goes windsurfing and does not return)
- (iii) how many years later may the family inherit?

# Facts II

- Do humans ever originate facts?
- Sometimes facts may also be originated by humans, yet these are **originated without consciousness (or intent)** that something is happening:
- **Facts, in this context are Re-named as: Involuntary acts**
- (i) an avalanche, a fire (nature)
- (ii) other accidents



## II-unintentional ACTIONS of Humans

- Imagine the unfortunate yet simple act of falling down some stairs... bad enough...
- make it worse by imagining that those stairs are in a shop...and you break an antique vase in the process.
- You have just rendered the shopkeeper short of 1,000 €
- You are the perpetrator, he is the victim:
- You are going to be sued for 1000€,
- in the end you will pay 1000€
- you will not be happy:
- this is not only a nightmare...it is also a legal relationship!

# FACTS III: ACTS may take on other forms

## VOLUNTARY ONES: A qualified extroversion of human will:

- We divide these **voluntary** Acts Into two main categories:
- 1) Acts (stricto sensu) or simple act: Agent **may choose** whether to act but has **no bargaining power as to the type of effects** produced by a simple act
- Ex: specific acts before a notary public
- Ex: a confession in court
- 2) Contract (negócio)
- Here we consider to have true declarations/statements regarding INTENT/ the will of the Persons involved
- The Agent **may choose BOTH**
- - whether to act
- - the type of effects his/her action will bring about.

### III-Intentional Actions of Humans –simple Act



- An Act of authorization before a notary public.
- Under the law of marriage, the dispositions governing assets MAY require the AUTHORIZATION of the husband
- for the practice of a certain act by the Wife
- EX the sale of an asset that BELONGS exclusively to her
- The husband, here does not ( MAY NOT!)choose the buyer, the price, the terms he is CONFINED to GIVE CONSENT or REFUSE CONSENT (the effects of consent are governed exclusively by law)

### III-Intentional Actions of Humans – CONTRACT



- In a shop you see a beautiful antique vase.
- It is something you have always wanted.
- He wants to sell it for 1000€. You want to buy it for 1000€.
- You offer to pay 1000€ over 3 months.
- He agrees.
- You have just made the shopkeeper richer by 1000€.
- There will not be a Trial.
- You are happy. He is happy. This is a contract.

## ACTS of human beings

|                                                               |                                                                                                                                                  |                                                                                    |
|---------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| <b>Involuntary</b> acts<br>of human<br>beings                 | <b>Voluntary</b><br>Simple act<br>(stricto sensu)                                                                                                | <b>Voluntary</b><br>Contract                                                       |
| Facts<br>(don't even<br>realize<br>something is<br>happening) | Agent <b>may choose</b><br>whether to act but<br>has <b>no bargaining<br/>power as to the<br/>type of effects</b><br>produced by a<br>simple act | -whether to act<br>- the type of<br>effects his/her<br>action will bring<br>about. |

## **The Introduction (to Act and Contract) stops here**

- However what we have just discussed is also relevant for the specific Chapter on CONTRACT
- That we will Cover during week 11
- (Wacks discusses it in pages 37-43)
- ( We will analyse Friedman's opinion of it as well)
- For now we will continue with a mere OUTLINE of what is to come.

## TYPES of Contract (we will return to this topic week 11)

|                                              |                                                                                                                                        |                                                                                                                                                         |
|----------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1) How many Agents are needed for Perfection | Unilateral                                                                                                                             | Bi-lateral<br>Plurilateral                                                                                                                              |
|                                              | <p>Is there such thing as a UC?</p> <p>(i) "I work for Richard Branson , but he doesn't know"</p> <p>(ii) See Carlill Case, Wacks.</p> | <p><u><i>Exceptio non adimpleti contratus</i></u></p> <p>This means that YOU (one of the parties) only have to comply when the other parties comply</p> |

## UNILATERAL CONTRACTS: a first analysis ( we will return in week 11)

- Is there such a thing as a “UNILATERAL” CONTRACT?
- In this area examples of a will, a donation are given by authors who say **YES**
- Be generous now and admit (even if only in theory) that:
- When we define a UC we understand that any deal (negócio) is necessarily BILATERAL yet observe that sometimes it only generates Disadvantageous situations for 1 of the parties involved



## Unilateral contracts ( first analysis cont)

- Consider a DONATION in its PURE form:
- Only The donor (who has decided to give) has a duty to convey (de dare) **so only here are there passive situations**, whereas the donee (beneficiary) once singled out only has the credit RIGHT to receive (the donation).
- N:B Conflicting Doctrine argues that this is not true: there is always a BURDEN on the Donee: to accept the donation.
- See also commodato/lending free of charge

## Unilateral contracts ( first analysis cont)

- What is important is that (for now) you grasp that we allow THEORETICALLY for the CONCEPT of UNILATERAL CONTRACTS
- It will mean that a situation that appears to be unable to bind TWO Parties
- (because it may appaer to you that since they will not have BOTH sat down and signed the same document at the same time – no “proper” CONTRACT exists)
- will actually be able to be enforced.

# Unilateral contracts ( first analysis cont)

- The Author of Your main Text-book, R WACKS, p 40
- Discusses this issue whilst attempting to call your attention to one of the most famous Cases in Anglo-Saxon Law: *The Carbolic Smoke Ball Case, it is an English case that also governs US Law*
- “ The Court held that the advertisement constituted an offer of a *unilateral* contract between the Company and anyone who, having seen the advertisement, acted on it.”

# Unilateral contracts ( first analysis cont)

- Obviously, at this point you are at least ABLE TO COMPREHEND that this is *legal* truth.
- The Court, itself identifies TWO Parties/ PERSONS
- 1- The Company
- 2- Anyone, who having seen the advertisement, acted on it (here Mrs. Carlill)
- The Court is qualifying the Companies' Behaviour as a UNILATERAL OFFER ( since it would be impossible to determine at every second who were the concrete beneficiaries) with, legal. BINDING Effects.
- It is thus, a CONTRACT (albeit a unilateral one) enforceable (the OFFER) in Court.

## Contracts (Deciding whether they exist) we have two concurrent theories to help us

- (i) Doctrine of Consideration
- R Wacks (P 37-43)
- Receiving Benefits from contracts
- (ii) Doctrine of Detrimental Reliance.
- R Wacks (p 37-43)
- Acceptable qualification of behaviour as CONTRACTUAL
- (offer + acceptance)