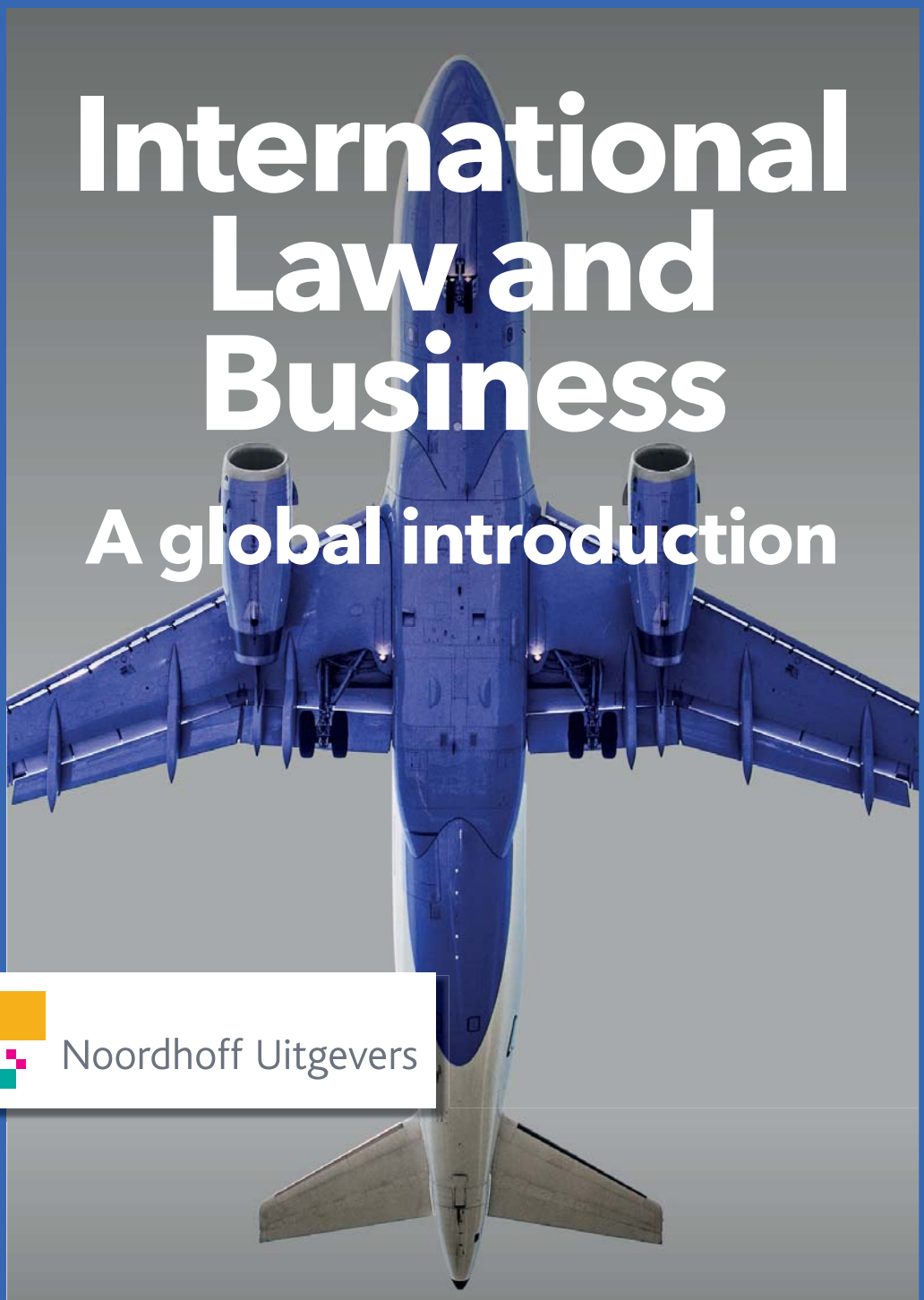
International Law and Business

A global introduction



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Mr. Dr. B.F.W. Wernaart

First Edition

International Law and Business

A global introduction

Bart Wernaart

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Foreword

The idea to write this book evolved during the years in which I was simultaneously conducting my Phd research and lecturing my IBMS students. What I've noticed is that there are many books entitled 'introduction to international law' or 'international business law'. However, none of the existing titles were eagerly read by my students. I missed several elements that I tried to include in this book.

The first thing is a chapter about methods. This is quite unheard of in law, especially in the international context. However, I do believe that comparative methods can and should be used by business students when they take decisions in the sphere of export and international contracts. In fact, such methods seem to linger somewhere in academic circles and are quite endlessly debated. Instead, I think such methods deserve to be used in practice, and applied by business students all around the world.

Second, many books introduce law on a global level, and do not go any further than discussing international organizations that harmonize international law, such as the UN, the Bretton Woods Institutions, and the EU. What is missing, is a broader perspective in which there is not only room for other forms of economic integration next to the EU, but also a rich and colourful reference to national concepts of law. After all, the origin of most legal concepts can be found in national law, not in international law.

Third, I wanted to shift the European/American focus to a truly worldwide focus. There is more than just U.S., French, German and UK law, which are the usual countries that are discussed in the context of business law. It is true that these are the countries that have set the example in many was in developing legal solutions to problems. However, it would not do justice to the particularities of other legal systems, including Islamic, Asian, African, Latin-American and Australian law. There is much to learn there as well.

So, what I've tried to do is to give some real insight in how law works around the globe in the context of international business. I did so by discussing different solutions in law using examples from many different regions and countries, using colourful, funny, and I hope inspiring examples. Furthermore, I tried to do this in using understandable, clear language that can be read by business students who do not necessarily have a legal background. The book is set up rather broadly, so that it can be used by teachers through their entire curriculum.

Each chapter ends with a clear summary, and practice questions. I used three different kinds of questions, to make sure the student applies different aspects of his skills: open questions, essay questions and multiple choice questions. On the website www.internationallawandbusiness.noordhoff.nl the author will frequently post blogs, vlogs and other materials to keep this book as up to date as possible. Furthermore, extensive case studies that would be too voluminous to include in the main text are published on this site (and referred to in this book).

Please accept that each time when I use ‘he’, it might as well be a ‘she’. However, it would make the book less readable if I would use both.

Writing is a lonely occupation, but I am lucky with so many great and warm people around me. First of all, I would like to thank all my wonderful students. They ‘sharpen my knives’ every day when we engage in fruitful and inspiring discussions about international business law. Without them, this book would not exist.
Next to that, I would like to thank my colleague Therese van Oosterhout, my ‘partner in crime’ at our department. She read my draft chapters, gave here comments and gave me very useful feedback during the process.
Also, I would like to thank the management of Fontys IBMS (department Marketing and Management) and the Lectorate for facilitating my writing career in terms of time and genuine interest. A special thank you goes to Anthony Murphy, my team leader, for strongly supporting my writing career.

On a more personal note I would like to thank my parents and brothers for their ongoing support. And last, and most of all, a warm thank you to my beautiful wife, who is a shining star in my life and who gave birth to the most beautiful son in the world during the period this book was written. If you really want to know, our son was born halfway chapter 7, right before the section about the free movement of services.

Therefore, I would like to dedicate this book to our son Vik, who sat on my lap during the other half of the writing process. I hope you will become a man with a nuanced and respectful sense of justice. The world may be dark sometimes, but when one tries to understand one another, it is the most powerful key to justice and peace.

Bart Wernaart
Valkenswaard (the Netherlands), November 2016

PART 1
Introduction and methods

In this part, we will introduce international law as well as comparative methods in law in an international business context.
In chapter one, we will introduce the main characteristics of law and explain the main features of legal terminology. Also, we will portray the origin and sources of law.
In chapter two, we will explore comparative methods which can be used to compare different legal systems. This is done on a macro level, in which the legal families of the world are discussed, and on a micro level, in which particular phenomenon in law are compared.

1 What is law and where can we find it?

In this chapter, we will discuss how law is used in the organization of just behaviour. To this end, we will focus on the relations that are regulated by law, and the different branches of law. Also the meaning of just behaviour will be explained. We will discuss the three elements of 'just', that is: justice, opportuness and legal certainty. Furthermore, the origin of law will be explored. In this light, two views on law are explained: natural law and positivist law. Last, the sources of law that are generally used around the world are discussed.

1.1 The organization of just behaviour

In everyday life we are engaged in legal issues and act in compliance with many legally binding rules, as we might see in example 1.1. Such rules are necessary to organize just behaviour in a given society. Or in other words: to regulate what is just to avoid chaos. Law is a tool to create such rules.

I Law organizes just behaviour in a society. **Law**

Imagine a country in which people could choose randomly their side of the road: one would risk his life when participating in traffic, and probably the one with the biggest or strongest cars will dictate what happens on the road. To avoid traffic chaos, law defines how traffic participants should use the roads. One of these legal rules is the obligation to use a particular side of the rode. Usually, such rules are applicable in a given society. Such a society may have many different shapes and sizes. In the example, the

society is a state. However, there are also other forms, such as a small group of people, a city, a state, a region, or sometimes even the entire world. On all these levels, law can be used to organize just behaviour.

EXAMPLE 1.1

Driving on the right side of the road

Article 13 of the Malaysian Highway Code (LN 165/1959) stipulates that: 'Vehicles should at all times be driven on the left-hand lane of the road, the slower the speed the further left the lane of the road.' The Malaysian Highway Code stipulates that all traffic participants have to use the left side of the road. This is historically determined due to the fact that Malaysia was a former colony of Great Britain. In Great Britain, people traditionally use the left side of the road. This can be traced back to practical considerations in medieval times: a majority of people is right handed, and when driving your horse using the left side of the road, one can easily draw a sword with their sword arm, or – in more peaceful tidings – offer a greeting to passengers with the 'right' hand. In Canada, also a former British colony, the left side of the road was originally used as well. However, the Canadian changed their laws to facilitate smooth traffic flow (and trading) between Canada and the U.S.A., for in the latter country, the right side of the road is used.

To further clarify the concept of law, it is important to explain in what manner law organizes just behaviour, what relations are organized by law, and what different kind of branches of law we distinguish. This is done in the remainder of this section below.

1.1.1 Substantive law and formal law

Law organizes just behaviour by applying two different kinds of rules: rules on content (substantive law) and rules to maintain this content (formal law).

Substantive law

To organize just behaviour in a society we first need standards that define the 'rules of the game' that people are required to obey. These rules are about the content of what people are supposed to do, or not to do, such as driving on the right side of the road (and not on the wrong side of the road). In legal terms, we refer to these rules as substantive law.

Substantive law

> Substantive law is composed of legal rules that define the content of just behaviour.

Formal law

However, such substantive rules in itself are rather pointless when there are no means to maintain these rules. If there are no consequences when substantive law is violated, a society is depending on the good will of the people to obey the law. As lovely as that may seem, there will always be people who will challenge the substantive rules one way or another for various reasons. Therefore, a legislator will need to adopt different kinds of rules next to the substantive rules: formal rules.

Formal law

> Formal law is composed of legal rules that maintain substantive law.

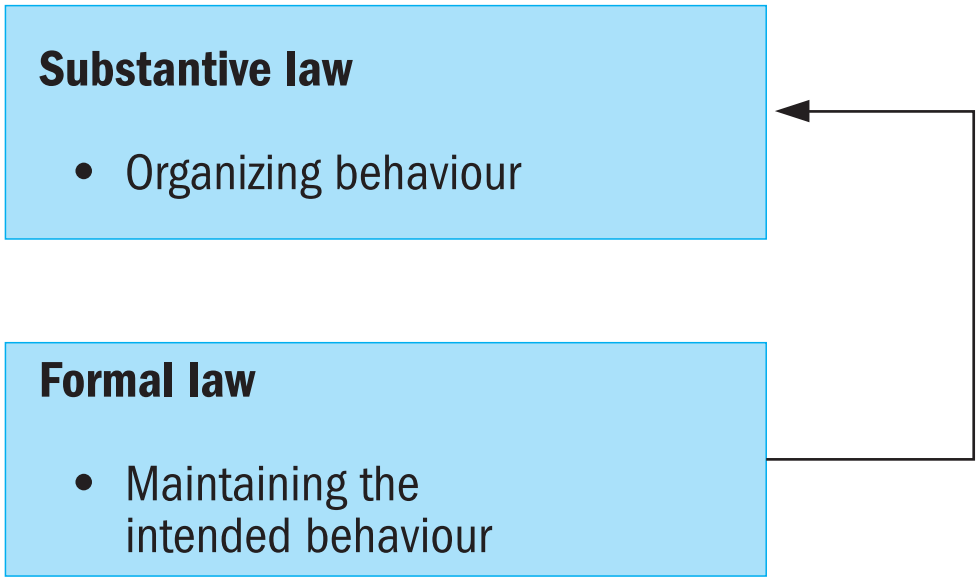
In example 1.2, we see an attempt of the Moroccan legislature to introduce a penalty system that aims to better maintain the substantive traffic rules. When a traffic participant risks losing his points when they break a speed limit, there is a stronger urge for this person to obey speed rules compared to the situation in which there are no legal consequences when driving too fast. This urge is probably even more instant when they risk losing their driving licence, paying a fine or ending up in jail. On top of that, the required traffic education when losing a certain amount of points is designed to make people aware of the need to obey traffic rules. The idea is that the speed limits and other traffic rules are better maintained by this penal system. In other words: the penal system includes formal rules in order to maintain the substantive traffic rules.

EXAMPLE 1.2

The Moroccan highway penalty system

In Morocco, traffic incidents are a major problem. To stimulate safer traffic with fewer casualties, the Moroccan legislature adopted a new Highway Code in 2010, with a refined penalty system (Le Nouveau Code de la Route au Maroc, 2010). Each driving licence holds 30 points (or 20, in case of a new licence). One can lose points when offending the traffic laws and regain points in case of good behaviour, such as following education sessions to improve traffic behaviour. Full credits are regained when traffic laws are not offending in 3 years time. Through this system, one might lose the ability to drive. Besides this approach, the more traditional fines and sanctions exist, and in case of grave violations of traffic law, one might even me imprisoned.

FIGURE 1.1 Substantive and formal law



1.1.2 Public law and private law

In this section we discuss which relations are organized by law. Substantive and formal rules are both created to regulate two particular relations within societies: the relation between the government and its citizens, and the relation between citizens. In legal terminology, the law that organizes these relations is called public law and private law respectively.

Public law

Public law

> Public law is the law that regulates the relation between a government and its citizens.

Public substantive law

In many societies it is usually the state that oversees the enforcement of the law, and decides when a citizen needs to be punished for not behaving according to its laws. On the one hand, these legal rules authorize a state to interfere when people are misbehaving. Simultaneously, these rules also restrict the power of a state: the state has to act in accordance with its competences laid down in these rules. In public law, we find both substantive and formal rules as we can see in the 'Moroccan highway penalty system' example.
In the first place, there are substantive rules in society everyone should comply with (traffic rules). They are adopted for the public wellbeing/good. When one offends such a substantive traffic rule, the state interferes, and punishes the citizen accordingly, in line with the appropriate formal rules. Regulating this relationship between the state and its citizens is one of the purposes of law, and is referred to as public law. The state adopts the substantive law for the benefit of society in general, and acts when one misbehaves, for the sake of society. This means that traffic rules, from a legal perspective, are rules between the individual and society.

Public formal law

In the second place, there are formal rules that regulate the legal procedures that need to be taken into account when a citizen misbehaves. Mostly, a state is not unlimitedly competent in punishing a citizen: formal procedures need to be followed, and evidence should be of a particular quality before a state may interfere in the life of a citizen. In the Moroccan case, the point system defines the 'rules of the game' and is not only a way to make citizens act in compliance with the substantive traffic rules. It also restricts the Moroccan authorities in their power: the rules are designed to make it clear under what circumstances a citizen loses or gains points. When these rules are taken into account by the Moroccan authorities, a citizen cannot not be punished randomly.

Private law

There is however also another relation that needs to be ruled by law. That is the relation between citizens.

Private law

> Private law is the law that regulates the relation between citizen or those who act as citizens.

It must be noted here that the meaning of 'citizen' is mostly understood in a broader way than just an 'individual' in the sense of a human being of flesh and blood.

In most legal systems, a company is considered to be an equivalent to an individual in terms of its capacity to legally act. After all, a company is not a government that acts on behalf of the public good. Therefore, private law also regulates the relation between an individual and a company, or between companies.
Occasionally, a government institution may also be considered acting as a citizen. This could be when a parliament orders food for their lunch break. In such cases, they do not act in their capacity as a government institution, but participate in business just as an individual would. The relationship between the parliament ordering food and the caterer is therefore also governed by private legal rules.

As stated above, one should obey traffic rules on behalf of the society in general. The idea is that when everyone acts in accordance with traffic rules, we could have safe traffic within society without too many problems. However, when someone breaks such a traffic rule, and as a result damages the property of someone else, the victim would want this damage to be compensated. In the newspaper article, there are several victims: the injured people, the owner of the house and the lawful owner of the car. The driver breaks several rules of public law that apply in Washington D.C. It will be no surprise that in the State of Columbia stealing is forbidden as well as driving your car into someone's house. For instance, the Code of Columbia (§22-3211) stipulates that:

'A person commits the offense of theft if that person wrongfully obtains or uses the property of another with the intent:
(1) To deprive the other of a right to the property or a benefit of the property; or
(2) To appropriate the property to his or her own use or to the use of a third person.'

The penalty for first degree theft (in case the stolen property exceeds a value of $1.000) is a maximum fine of $5.000, and imprisonment for no more than ten years (Code of Columbia, §22-3212).
The victims however would probably be not too impressed by the fact that the driver is fined by the authorities for breaking several rules, or even ends up in jail. This punishment for the illegal behaviour is after all on behalf of the society, and not on behalf of the victims: it is based on public law. However, it is in the interest of the victims to seek legal remedies against the driver directly in order to claim damage compensation. For this, we need private legal rules that enable a victim to make such claims. Not on behalf of society, but on his own behalf since he – and no one else – suffered the damage.

THE WASHINGTON POST, 10 MAY 2011

Car crashes into D.C. house, driver flees

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BY: THEOLA LABBÉ-DEBOSE

D.C. police are looking for a driver who crashed a car into a North-East home Wednesday morning and then fled the scene.

The accident took place in the 2600 block of 24th St. NE., near Douglas St. NE.

Shortly before 10 a.m., police say, officers responded to a 911 call of a hit and run accident.

When they arrived, they found the car – which has Maryland license plates – crashed into the house but the driver was nowhere to be found, said Officer Anthony Clay, a police spokesman.

There were three people in the house at the time of the crash, but they were not seriously injured, said D.C. Fire/EMS spokesman Pete Piringer.

One of the occupants, described as an elderly female, was taken to a hospital for further evaluation; the other two were examined at the scene but were not treated for any injuries, Piringer said.

Police are investigating whether the car was stolen, possibly from Prince George's County, Clay said.

In the example 1.3, two legal issues are at stake. In the first place, the shop delivered the wrong product to Miranda. This legal issue is between the company and Miranda. In the second place, Miranda causes injuries to the shop employee. This legal issue is between two individuals: the employee and Miranda, although perhaps the company might also be involved because the employee was hurt while performing his job for the record shop.

Private substantive law

We need some substantive rules that regulate the relation between the quarrelling parties to solve these issues. When considering the Sales of Goods Act of Ontario (Ontario Sales of Goods Act, R.S.O. 1990, Chapter S.1.), Article 29 (3) stipulates that:

> 'Where the seller delivers to the buyer the goods contracted to be sold mixed with goods of a different description not included in the contract, the buyer may accept the goods that are in accordance with the contract and reject the rest, or may reject the whole.'

Besides, Miranda could have invoked Article 33 of the same Act, which emphasizes that:

> 'Where goods are delivered to the buyer that the buyer has not previously examined, the buyer shall be deemed not to have accepted them until there has been a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.'

In other words, Miranda did not have to accept the delivery of the wrong product, and could easily claim her money back and/or buy the right product. Regarding the injury and damage of the shop employee, the Canadian courts have developed the construction of 'tort' in their case law throughout the years, in which rules are developed for compensating damage to the victim of a wrongful act. In this case, the employee will

probably claim compensation damage from Miranda, based on the particular form of tort that is defined as 'battery', meaning that someone intentionally made unwanted contact with another person, such as a punch in the face, and from this, damage resulted.

Private formal law

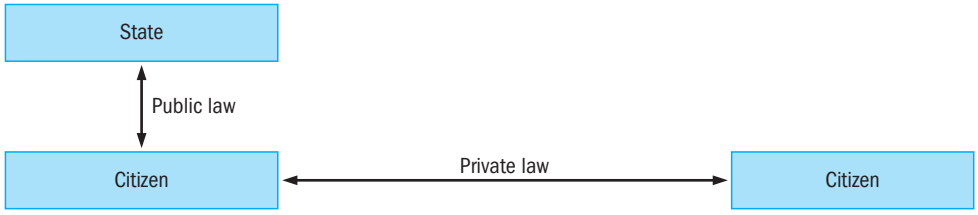
And also here, rules to maintain the law are necessary. To this end, in Ontario, there are several legal standards that regulate the proceedings when one individual seeks legal remedies against the other in court. For instance, 'Ontario Regulation 258/98,' regulates the procedure for small claims, while the 'Rules of Civil Procedure. O. Reg. 575/07, s. 6 (1),' regulate procedures before the higher courts (the Court of Appeal and Superior Court of Justice).

EXAMPLE 1.3

Justin Bieber v. the Foo Fighters

Miranda (Ontario, Canada) is a big Justin Bieber fan. As a true 'Belieber', she sleeps in front of the closest record shop on the eve of the release of Bieber's newest record: a real music fan still wants the real 'physical' record after all. When the shop opens at 9 AM, she – amongst many other Beliebers – risks her life in the crowd to get the newest record as soon as possible. She pays 30 U.S. dollars, and is the happiest person on earth when she holds her own copy of the record. The shop employee shouts at Miranda to leave quickly, because there are many more girls waiting in line that want to purchase the record. Miranda therefore leaves the place without opening the CD box. At home however, her euphoric feeling radically changes when she discovers that the shop employee accidentally put the wrong record in the box. Miranda now owns a Justin Bieber CD box, with a record of the latest Foo Fighters album. Of course, she is extremely upset and wants the record shop to provide her with the correct disk: the one she actually paid for. However, when she returns to the shop, it is so busy with screaming Bieber fans that she is unable to discuss the problem properly. She therefore cannot constrain her anger anymore, and punches one of the shop employees in the face. The employee needs medical treatment as a result of Miranda's outburst.

FIGURE 1.2 Public law and private law



1.1.3 The branches of law

So, we need substantive law to define the content of just behaviour, and formal law to maintain this just behaviour in society. Both types of law are necessary in regulating the relation between a government and its citizens

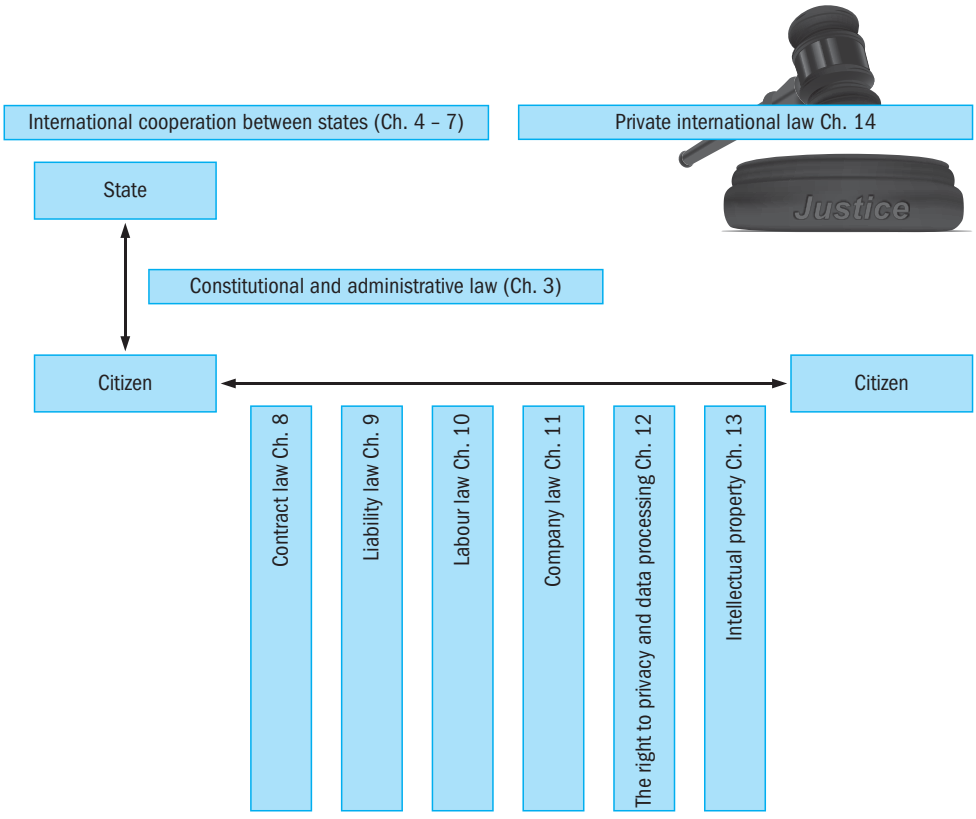
(public law) and between citizens (private law). In legal sciences we usually further subdivide law in more detailed categories. This subdivision is based on the topic or issue that is dealt with by this particular branch of law. In this book, the chapters are similarly categorized. In this section, the branches are briefly touched upon, while in the following chapters their meaning will be further explored.

On an international level there is an increasing international economic cooperation. While this is in the first place an affair for states among themselves, the effects of this cooperation has profound impact on citizens and companies. While the form is that of public law – states engage in these kinds of cooperation on behalf of the public good within their society – the effects are sometimes also noticeable in the relation between citizens. Therefore, it is not easy to categorize this particular branch of law in either public or private law.

Furthermore, there is a law that is designed to regulate the affairs of a state and its relation with citizens: pubic law. In each state laws are adopted that regulate the way a state is governed and the fundamental rights their citizens are entitled to. This is referred to as constitutional and administrational law.

Then, there are several branches of private law that relate to doing business. There are laws that deal with contracts, liability, labour contracts, the legal form of a company, privacy, and intellectual property.

FIGURE 1.3 Branches of law



Also, there are legal rules that define how to settle a dispute between citizens in both public and private law. Such rules are of course formal rules, because they facilitate maintaining substantive rules in cases where substantive law is violated. For instance, there are rules that regulate where to settle a dispute (jurisdiction) under which law and how to execute a verdict. We call these rules private international law.

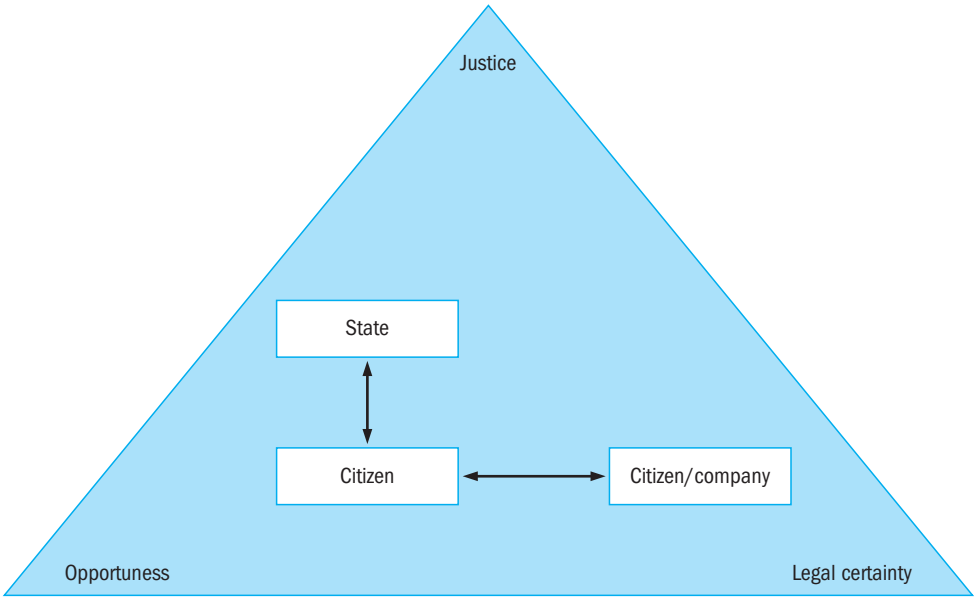
Please note that there are more branches of law that are not discussed here because they are not that relevant for this book. Take for instance criminal law, or the law that regulates court proceedings.

1.2 The meaning of just behaviour

We now know how law regulates just behaviour in society. What remains unclear so far is the meaning of the concept 'just'. To start with, there is no specific answer to that question, because the perception of what just is will differ per society. However, in general one could say that 'just' is defined by three basic values that are commonly shared in every society: justice, opportuness and legal certainty (Habermas, 1992), see figure 1.4. The exact way this balance is designed greatly determines the characteristics of the society's legal system.

Just implies a balance between the values 'justice', 'opportuness', and 'legal certainty'. **Just**

FIGURE 1.4 The functions of law



1.2.1 Justice

The first element of 'just' is the idea of 'justice'.

Justice

1

I Justice is the moral conviction of a given society expressed in law.

In many cases, the law expresses a certain moral conviction that is supported in a society. Considering the Ontario legal standards from the case 'Justin Bieber v. the Foo Fighters', we can observe that there is a moral conviction behind the applicable rules. For instance, when you buy something, and the product does not match the criterion you could reasonably expect, you do not have to accept the product; and when you deliberately cause damage to someone, you have to pay compensation damage. While such moral convictions are widely shared and appear in some shape or form in almost all legal systems around the world, there are other moral convictions expressed by law that are highly controversial. For example, the justice in the death penalty is a fiercely debated topic around the world, and there are very different views on the morality this penalty expresses, as you can see in case study 1.1 on the website.

One should however be careful in identifying law with justice as a synonym. In the first place, law usually expresses the moral conviction of the legislature. This does not mean however that this moral conviction is shared with all the citizens of that particular society. As we see in the case example 1.4, the legality of a same-sex relation is under dispute in Botswana. While the law forbids having a same-sex relation, a lobby group supporting those with lesbian, gay and bisexual preferences fights for its right of existence. Eventually, the high Court of Botswana had to balance different opposing fundamental rights in order to reach a verdict, allowing this organization to legally exist. As it seems, not everyone in Botswana agrees with the prohibition of same sex relations. On the other hand, the government sustains that such a relation is unnatural and should therefore be classified as a crime.
In the second place, law does not always express a moral conviction: sometimes law is a tool to effectively regulate something in society that needs to be done (opportuness), or to establish clarity on someone's legal position beforehand (legal certainty).

EXAMPLE 1.4

Same-sex relations in Botswana

In Botswana, having a same-sex relation is considered a crime under their penal code. Articles 164 stipulates that 'any person who has carnal knowledge of any person against the order of nature (…) is guilty of an offence and is liable to imprisonment for a term not exceeding seven years' (The Penal Code of Botswana). LeGaBiBo, (Lesbians, Gays and Bisexuals of Botswana), an organization that defends the rights position of people with a non-traditional sexual preference, tried to become an officially registered organization for years. Under Botswana law, the government may deny the registering of an organization when it is allegedly used for illegal purposes (Art. 7. Societies Act of Botswana). Based on this provision, the registering of LeGaBiBo had been denied several times due to the fact that this organization supported and promoted illegal sexual relations.

Simultaneously however, the Constitution of Botswana recognizes the right of freedom of expression, association and assembly (Art. 3, 12 and 13, Constitution of Botswana). LeGaBiBo appealed against the decision of the government to deny their status as a lawful organization within Botswana. Eventually, the High Court of Botswana ruled that 'the objects of LeGaGiBo as reflected in the societies' Constitution are all ex facie lawful. They include carrying out political lobbying for equal rights and decriminalization of same sex relationships. Lobbying for legislative reforms is not per se a crime. It is also not a crime to be homosexual. Refusal to register LeGaBiBo was not reasonably justifiable under the Constitution of Botswana nor under section 7(2)(a) of the Societies Act (…). It violated the applicant's rights to freedom of expression, freedom of association and freedom of assembly (…)' (High Court of Botswana, 14 November 2014).

1.2.2 Opportuness

Opportuness is the expression of effectiveness by a given society in law.

Opportuness

Sometimes, law is not used as a tool to express a moral conviction but rather a tool to effectively regulate something in society. For instance, the choice to drive a car on either the left side or the right side of the road seems a random choice, usually influenced by coincidental historical factors. The choice in itself is not an expression of morality or justice. It is simply something that needs to be organized from a practical point of view. It is an opportune way to effectively regulate traffic.
In most situations, justice and opportuness go very well hand in hand with one another. However, sometimes in a given society, something needs to be regulated by law from an effective or practical point of view while it is perceived to be an unjust legal standard. For instance, when states adopt laws that lead to downsizing and reforms during economic hardship, a majority of the population will probably disagree because they strongly feel that injustice is inflicted on them, as we can see in example 1.5. However, the legislature will most likely argue that there is no other way to effectively organize the addressed issues without the new approach.

EXAMPLE 1.5

The Greek economic and financial reforms
As a result of a financial crisis, the Greek authorities had to adopt severe laws and policies in the period 2009-2012 to improve their economy in compliance with European and IMF standards. During this period, the average retirement age was raised from 61 to 65, and later even to 65, while salaries went down drastically, up to 30 per cent (Greek Law 4093/2012). It will need no further elaboration that the average Greek citizen, to put it mildly, was unpleasantly surprised. This was expressed in a massive demonstration against these economic and financial reforms, and resulted in a dramatic loss of the elections of the then-government in 2014 and 2015. The radical left party Syriza won the parliamentary elections in

2015. It was generally believed that this victory was due to the fact that the electorate was very dissatisfied with the economic and financial reforms that were adopted by the previous government. While Syriza promised radical changes regarding these reforms, it soon became apparent that also the radical left party had to pursue most of the reforms, because it was economically simply impossible not to downsize drastically. Doing something else would result in a bankruptcy of Greece, and possibly their exit from the European Union. The consequences of such events would have unthinkable effects for the Greek society.

1.2.3 Legal certainty

Legal certainty

Legal certainty is the expression of legality in a given society.

A last function of law is that of legal certainty. The idea is that every citizen and the relevant government should be able to know the legal consequences of their actions beforehand, and not afterwards. This is also defined as the principle of legality. In order words: law should – to a certain extent – be predictable. This means for instance that a citizen cannot be punished for something that was not forbidden at the time of his actions. This also means that a government may not interfere in the life of its citizens without a valid legal ground that is applicable at that time.

This principle was the main cause for debate in the case of Amanda Knox, an American student accused of murder in Italy. As you can see in the newspaper article, Amanda Knox was sentenced to prison by an Italian court for murdering her roommate in 2009. However, in appeal, she was released of all charges due to invalid evidence in 2011, and she could as a result leave the country and go home to the U.S.A. However, in Italian society her name will probably always be linked to the murder of Meredith Kercher. It appears that the Italian crowd waiting outside the courtroom was not convinced that Amanda and her former boyfriend were innocent in this murder case. In the media at that time it was rumoured that she was involved in a rather extreme sex-game, that led to the death of Kercher (Malone, 2007). However, there was only circumstantial evidence, which was considered to be unreliable. Therefore, the Appellate Court held that it could not lawfully imprison someone based on this evidence alone (Court of Assizes of Appeal of Perugia, 3 October 2011). However, in cassation, the Supreme Court in Italy ruled that Knox was guilty nevertheless, and sentenced her to prison for 28 years and six months (Italian Supreme Court of Cassation, 30 January 2014). The new theory was that there was no extreme sex-game, but an argument over money. According to the Supreme Court, Amanda even delivered the final blow that caused the death of Kercher. Luckily for Amanda, the sentence was ruled in her absence, because she lived in the U.S.A. at the time the verdict was reached. Knox in turn, claimed that the evidence was suggestive, incomplete, and the court completed the picture of the crime scene with rumours and questionable testimonies of a co-defendant (Cuomo, C & Ford, D, 2014). Finally, on 27 March 2015, the Italian Supreme Court of last instance ruled that Amanda was innocent, and thereby gave a final legally binding interpretation to the case.

NEW YORK TIMES, 3 OCTOBER 2011

Amanda Knox Freed After Appeal in Italian Court

BY: ELISABETTA LEDO

With a rapt worldwide television audience looking on, an Italian court on Monday reversed the murder conviction of 24-year-old Amanda Knox, the American student whose sensational murder trial had reverberated on both sides of the Atlantic. The decision was read out a little before 10 p.m. to a courtroom heavy with tensions and emotions built up over the four years since the arrest of Ms. Knox and her boyfriend at the time, Raffaele Sollecito, for the killing of her roommate, Meredith Kercher. Mr. Sollecito's conviction was also overturned Monday.

As it became evident that she was being cleared of all charges, save one of defamation, a deeply stressed Ms. Knox slumped back in her chair and began to sob, before falling into the arms of one of her lawyers, Maria Del Grosso.

(…)

The joyful reaction of the defendants contrasted sharply with the looks of ashen disappointment by prosecutors and relatives of Ms. Kercher. They had flown to Perugia on Monday.

(…)

Lyle Kercher, the brother of the slain woman, said he was 'very disappointed.' He added, 'In any case, no one will give us Meredith back, but we are very upset.'

1.3 The origin of law

One could endlessly debate the ultimate source of law. However, two approaches in legal philosophy are traditionally distinguished regarding the origin of law: the natural law approach, which assumes that law emerges from nature, and the positivist approach, which assumes that law emerges from codified standards.

1.3.1 Natural law

In a natural law approach it is assumed that laws emerge from nature.

Natural law

This means that a law does not need to be codified (written down) first to be a law, but already exists regardless its appearances.

An example of this is the concept of human rights. Two of the most important international human rights treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In these treaties human rights are recognized for each individual. In their preambles, it is stipulated that: 'these rights derive from the inherent dignity of the human person' (ICCPR and ICESCR, Preamble). In the covenants, it is therefore assumed that people have human rights simply because they were born. In other words: human rights are inherent to mankind, also when they have not been written down and recognized on a piece of paper somewhere.

The advantage of a natural law approach is that law (and justice) is not depending on any formalization, and therefore can be applied because it is only reasonable to do so. The disadvantage is that natural law can be subdue to many different forms of understanding, leading to legal uncertainty. In this light, there is always the pitfall that someone believes to have a monopoly on the correct understanding of natural law and as a result imposes this particular understanding of law on others. Simply because he assumes that this particular understanding follows from the nature of things and is therefore the only reasonable explanation of law. One rather extreme example was the German concept of law during their Third Empire, where – amongst others – Jewish people were considered to be inferior to German people, as we can see in the example 'the racial laws in the Third Empire'. This alleged inferiority did not emerge from a written code but was rather assumed to be the truth due to the fact that German people were naturally superior to others. From this belief the so-called 'Nuremberg laws' arose that marked the start of the legal prosecution of the Jews (Reichsgesetzblatt I, 1935, pp. 1146-7).

1.3.2 Positivist law

Positivist law

In a positivist law approach, it is assumed that law comes forth from codification.

This means that law is only law when it has been written down first. The advantage of such an approach is that people know beforehand what the rules of the game are (in line with the principle of legality). Next to that, in most legal systems the forming of written codes is subdue to strict rules in which a certain degree of quality and consent of the people that are bound by this law is guaranteed. This is exactly what legal positivism stands for: to protect people against extreme understandings of natural law. However, the disadvantage of a positivist law approach is that written law is always two steps behind reality, because one cannot create rules beforehand that flawlessly provide solutions to every possible case. Usually, some flexibility is required, as we can see in example 1.6. Furthermore, it might lead to over-formalizing relations in society, when only written standards can be applied. This is also referred to as bureaucracy.

EXAMPLE 1.6

Theft of electricity in the Netherlands

In the Netherlands, 1921, a clever dentist found a way to manipulate the meter reading in his dental office: he used a knitting needle to block the disk that would rotate in case of energy consumption. As a result, the electricity bills were much lower compared to the actual energy that was used. The dentist was tried for theft, stipulated in Article 310 of the Dutch Penal Code:

'The person who takes any good which belongs completely or partly to another person, with the objective of unlawful appropriation of the good, shall be sentenced, as guilty of theft, to a prison sentence not exceeding four years or a fine of the fourth category'.

However, there was a problem, because electricity does not fall under the category of 'any goods', since electricity are mere moving electrodes, and

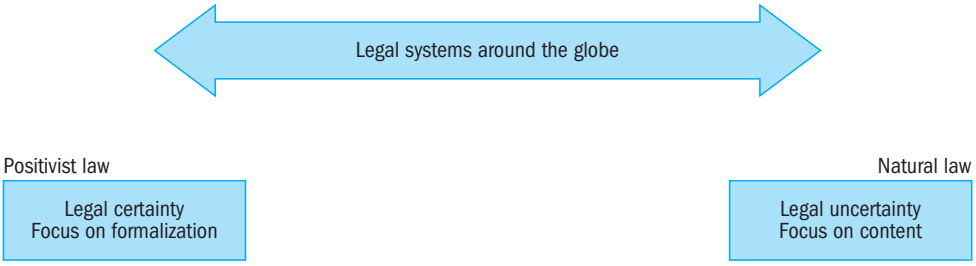
not tangible things. Here, the legislature that adopted the Penal Code, dating back to 1881, could not reasonably foresee that it would be possible to 'steal' non-tangible things such as electricity.
Now, the Dutch Supreme Court was in a difficult position. On the one hand, it was obvious that it was the intention of the original legislature to penalize theft in general, not necessarily restricting this to tangible items only. Besides that, not penalizing this behaviour would give all energy consumers a carte blanche to manipulate energy bills. On the other hand, widening the scope of an existing law beyond the rather clear content would violate the principle of legality, and would conflict with the role of a court in the Dutch trias politica, that is to apply law, and not create (new) laws.

Eventually, the Dutch Supreme Court considered that it was the clear purpose of the Penal Code to protect assets, and the code did not specify the concept 'any goods'. Especially the first argument demonstrates that the Court applies a principle (you do not take away what belongs to someone else) that transcends the content of the written standard and stems from a general sense of what should be right. As a result, the dentist was sentenced to three months in prison (the Supreme Court of the Netherlands, 1921). This case demonstrates that positivist law cannot per definition provide for legal solutions in each case, and the Supreme Court had to widen the scope of the article by applying a more general concept of theft that is reasonably assumed to be law, and can be applied in line with the more current technological developments. It must be noted here that in the Netherlands, this ruling was not received without concern, especially due to the fact that from a positivist point of view, the Court exceeded its authority and violated the principle of legality.

1.3.3 Between legal positivism and natural law

Natural law and positivist law are two opposing extremes in elucidating the origin of law, as you can see in figure 1.5. In most legal systems, one needs a bit of both to function properly in a balance that suits the involved society. This balance is not only different per legal system, but may also shift over time, as we can see in example 1.7. Somewhere between the two opposite origins of law, we can find the most used sources of law around the globe. These sources usually have features of both positivist and natural law, although the emphasis differs. In the next paragraph, these sources of law will be further explored.

FIGURE 1.5 Positivist law and natural law



EXAMPLE 1.7

The struggle of China

The Chinese legal system – one of the oldest in the world – is a complex merge of two opposing legal philosophies that were, to put it mildly, at odds for centuries. Both seem to lead to a radically different solution to achieve social order. On the one hand, there is Confucianism, emphasizing Chinese tradition, consisting of (in order of importance) the nature of things, moral precepts, rites, custom and (least preferably) law. When a society is organized according to these concepts, people will be able to experience shame, and as a consequence intrinsically do the right thing, which then leads to a community in harmony. It is the duty of a ruler to lead by example. From the perspective of Confucianism, law as in written standards lead to a hollow application of rules without any notion of what is right and wrong, and therefore can only lead to chaos. On the other hand, there is legal Positivism, or Legalism, advocating the adoption of written codes, to achieve order. Legal positivists of China have always been cautious in assuming that people are capable of acting in accordance with the principles of Confucianism. Instead, strong legislation is proposed to force people to behave properly, and put consequences on misbehaving. Also, the exercise of power should not be unlimited and therefore legislation is required to restrict the power of public authorities. Chinese law is a result of centuries of discourse between these two major legal philosophies, and therefore rather unique, especially compared to Western legal systems, with a focus on legal positivism (Lefande, 2000).

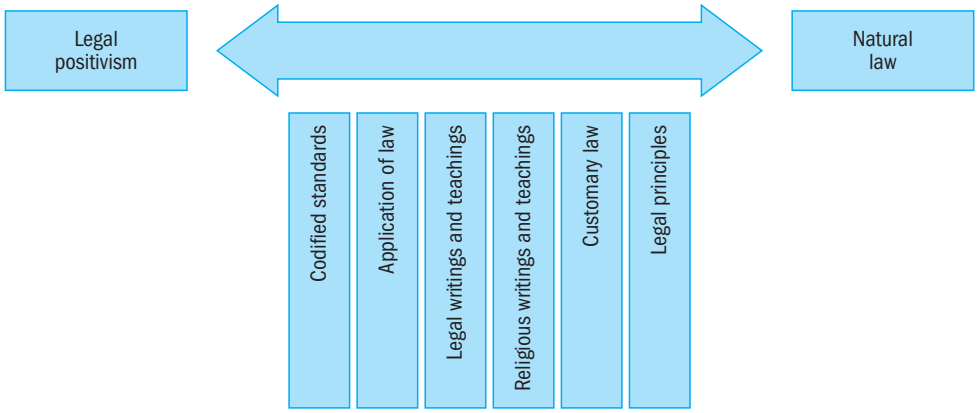
1.4 Legal sources

While any categorization of legal sources might be arbitrary, and perhaps do no justice to the rich variety of legal sources, the following sources are generally used: codified standards, the application of law, legal writings and teachings, religious writings and teachings, customary law and legal principles. It will come to no surprise that in each legal system there are differences in the usage and hierarchy of legal sources. It is impossible to discuss this in a general sense. To understand the exact usage of legal sources and the hierarchy between these sources, one would have to study this on the level of states, which we will do in this book in chapter 3. For now, we will focus on explaining the meaning of the legal sources in itself.

All sources have elements of both positivist law and natural within them, however the balance is different, as you see visualized in figure 1.6.

Let's take a closer look at the two extremes: codified standards and legal principles. In codified standards there is naturally a strong emphasis on legal positivism, because written codes are exactly what positivist consider to be the source of law. In legal principles, there is a strong emphasis on natural law, because a principle is usually an abstract value that represents a foundation in law, which naturally applies without the need to be codified. However, one might argue that a codified standard needs a bit of natural law, and a legal principle might need some legal positivism to actually work.

FIGURE 1.6 Sources of Law



A codified standard can never be fully comprehensive and offer a clear solution to each individual legal conflict. There is always a need for a certain room for interpretation, as we saw in the case 'Theft of electricity in the Netherlands'. This means that written standards always need a certain flexibility, so that they can be applied in various cases. In other words, the written text needs to leave some room for elements of natural law that create this flexibility that is necessary to apply the law on various – differing – cases.
On the other hand, a legal principle is sometimes considered to be too vague and imprecise to apply to a real case, and in the eyes of a positivist may not be legitimately applied without the consent of a legislature. Therefore, a legal principle might need some support in written standards in order to be specific enough to be effectively used.
These two sources of law seem to unite in Article 307 of the German Civil Code, that stipulates:

'(1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.

(2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision

1 is not compatible with essential principles of the statutory provision from which it deviates, or

2 limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised.'

In fact, the legal principles of reasonableness and good fate are now codified in the German Civil Code for the specific context of a business contract. On the one hand, these codified standards are rather flexible due to their general wordings as principles. Therefore, the provision can be used in a wide range of cases. On the other hand, the principles – that come forth from natural law – are now formalized in the legitimate form of a written law, and fine-tuned on the particular situation of a business contract

and its scope is narrowed down a bit. This example shows that in a way, positivist law and natural law approaches may also complement rather than oppose one another.

1.4.1 Codified standards

As considered above, legal positivists assume that the codification of legal rules is the ultimate source of law. In various parts of the world, the codification of law developed as an important source of law.

Codified standards

Codified standards are written rules produced by a legislator.

The first known codified standard is the famous Code of Ur-Nammu, a penal code applied in the Mesopotamian empire. The code was written around 2100 BC. Later, also in Mesopotamia, the Code of Hammurabi was enacted in 1754 BC by the Babylonian King Hammurabi, stipulating crimes and their punishment. In China, the so-called 'Tang Code' was one of the first known penal codes and dates back to 624 AD (Gernet, 1972), establishing a more consistent judicial system with clear punishments to certain crimes.

On the European mainland, especially private law gradually developed through history with a starting point in the Roman Empire. Arising from unrest between the social classes in ancient Rome, the Twelve Tables of Rome mainly provided for procedural law to settle a conflict between citizens, as you can see in case study 1.2. on the website. Where this was sometimes still a rather bloody occasion (most procedures were founded on the 'eye for an eye' principle), the area of private law evolved gradually during the Roman period as a distinct and codified legal subject, apart from public law (Stein, 1999). For instance, in the earliest days of the Roman empire, concepts of law were developed that could be classified as family law (Lex Canuleia), the ownership of land (Lex Licinia Sextia), and tort law (Lex Aquilla). Where such laws were rather casuistic in their approach in the early days, a more coherent and systematic approach in law emerged especially in the East Roman Empire (Byzantium), through famous codes enacted by emperors, such as the Corpus Iuris of Emperor Justinianus, adopted around 530 AD. The influence of the Roman concepts of codified standards in private law cannot be underestimated.
After the collapse of the Roman empire, the Roman laws were carefully studied by legal scholars and rulers who wanted to draft their own legislation.

During the enlightenment in the 19th century, a so-called codification movement spread through Europe. Enlightened thinkers no longer accepted the totalitarian reign of kings and emperors, or the divine power of God. Instead, they assumed that through reason a society could be based on a 'social contract', in which people willingly gave up power to a ruler in order to establish a peaceful and secure society in which they all could co-exist, but also had the right to rebel against this ruler when he abused his power. Law was a means to organize such a society. During that period, Roman law greatly influenced the Civil Codes of Germany, Austria, Italy and England and France. Especially the private law of the French empire under the reign of Napoleon Bonaparte is noteworthy here. A civil code was adopted in 1804 that regulated the settlement of legal conflict between citizens, which included rules on liability, commerce, property and civil procedures. While

the French empire eventually collapsed the influence of their private legal rules is still noticeable in the civil codes of most Western-European countries.

International codified standards

On the international level, written standards are usually created in the form of a contract between states. Such a contract is often referred to as a treaty.

Treaties

A treaty is a written contract between two or more states who consider themselves bound to its content relative to each other.

Next to the word treaty, other words are randomly used to address a contract between states such as covenant, convention, pact, agreement and protocol. In this section, we need to address what type of treaties exist, how states express their consent to be bound by a treaty and how the content of a treaty has legal effect in the domestic legal order of a state.

In legal terminology a distinction is made between a treaty between two countries, and a treaty between more than two countries. The first is named a bilateral treaty, while the latter is called a multilateral treaty.

Bilateral treaty

A bilateral treaty is a treaty to which two states are party.

Such treaties deal with matters that primarily relate to the interest of the two involved countries only.
For instance, a bilateral treaty could regulate certain aspects of trade between the involved countries. One example of this is the 'Agreement Between the government of Canada and the government of the Republic of Côte D'Ivoire for the Promotion and Protection of Investments'. The purpose of this treaty, signed in 2014, is to provide greater predictability and certainty for Canadian investors in Côte D'Ivoire. Amongst others, the two countries agreed that a favourable climate should be created for Canadian investors in Côte D'Ivoire. To this end, investors should be treated equally compared to national investors in Côte D'Ivoire (Art. 4). Also, a dispute settlement procedure was adopted (Section C).

Another matter that might be dealt with in a bilateral treaty is for example the usage and maintenance of a river that flows through the territory of both countries, such as the Columbia River Treaty between the U.S.A. and Canada, signed in 1964. In this treaty the building of energy dams and flood control is regulated for both countries.

Sometimes, a bilateral treaty is used to determine the exact state boundaries. For instance, Mexico and the U.S.A. agreed in the 'Treaty to resolve the pending boundary differences and maintain the Rio Grande and Colorado as the international boundary' that the two said rivers determine the exact international boundaries between the countries.

Multilateral treaty

A multilateral treaty is a treaty to which more than two states are party.

Such treaties deal with matters that relate to the interest of more than two countries. The scope can range from a handful of countries only to a near-global level when most countries in the world are a Member State. Multilateral treaties may deal with varying topics that need to be dealt with on an international level.

For instance, also here aspects of trade can be regulated through a multilateral treaty. Several forms of free trade have been established in regions around the world. Amongst many others, a free trade zone is established between Canada, the U.S. and Mexico (NAFTA), an economic and monetary Union in Europe (European Union), and a customs union in the Caribbean (CARICOM). Also the world's most important financial institutions are established by multilateral treaties, such as the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank (WB).
Furthermore, treaties are adopted that recognize and clarify human rights, such as the International Convention on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on the Rights of the Child (ICRC) and many others.

Also, boundaries and the access of territory are regulated by multilateral treaties. For example, 'the Convention on International Civil Aviation' regulates amongst others the access of civil flights in the territory of the Member States. The 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies' regulates that space cannot be claimed as national territory, and cannot be used for military purposes.

While the approach differs per country, the state's consent to be bound by a treaty is usually expressed in two steps: the signature and the ratification of the treaty.

Signature

The signature of a treaty implies the consent of the responsible negotiator on behalf of the state to the treaty.

A treaty is drafted during a negotiation process of the involved states. These states are represented by an authorised negotiator. This could be – depending on the significance of the treaty – a high official, or a member of the government such as a minister or a head of state. In most legal systems, the signature on behalf of the state must be approved by a legislative body, to guarantee some political control over the performance of the negotiator.

Ratification

The ratification of a treaty implies the consent of the responsible Legislator on behalf of the state to the treaty.

Usually, when the legislature consents to the signing of the treaty, the state expresses the final approval, and considers itself bound to the treaty. As you can see the example 1.8, the Danish Constitution is a good example in which the two steps are separated: the government has the authority to negotiate and sign treaties and the parliament needs to ratify them.

EXAMPLE 1.8

Denmark and the signature and ratification of treaties

Article 19 of the Danish Constitution stipulates that the King – in practice always represented by the government – has the authority to 'act on behalf of the Realm in international affairs'. This means that the government will be responsible for participating in the negotiations and sign the treaty on behalf of Denmark. However, the same Article underlines that the King 'shall not undertake any act whereby the territory of the Realm shall be increased or reduced, nor shall he enter into any obligation the fulfilment of which requires the concurrence of the Folketing or which is otherwise of major importance; nor shall the King, except with the consent of the Folketing, denounce any international treaty entered into with the consent of the Folketing.' This means that the Folketing – the Parliament – needs to approve in a majority of the cases whether they agree with the signature of a treaty. Only then, Denmark will consider itself to be bound by the signed treaty. Ratification therefore follows in most cases from the consent of the parliament (Harhoff, 1996).

Once a treaty is signed and ratified, the content of this treaty somehow needs to become a part of the domestic legal order. In essence, there are two approaches in law regarding the effect of international law in the domestic legal order: monism and dualism. The main question in this context is whether or not international law, once it has been ratified, is considered to be a part of the domestic legal system, or needs to be transformed first.

Monism

> Monism is an approach in law in which it is assumed that the content of a signed and ratified treaty is automatically part of the domestic legal order.

In a monistic legal system, the international law is automatically a part of the national legal order, and any contradicting national rules will – from that moment on – not apply. For instance, Japan, Mexico, Portugal, Spain and Switzerland are predominantly monistic states (UNIDROIT, 2006).

Dualism

> Dualism is an approach in law in which it is assumed that a signed and ratified treaty needs to be transformed into domestic law first before it forms part of the domestic legal order.

In a dualistic system, a transformation is required in which the national legislature usually adopts the content of the treaty and simultaneously alters any contradicting domestic legal standards in line with the treaty. For instance, Canada, Italy, the Russian Federation and Great Britain are predominantly dualistic countries (UNIDROIT, 2006).

Monism and Dualism in its purest form will hardly appear. They are rather two extremes on a sliding scale. Mostly, the constitutional system of a country has elements of both but the focus tends towards monism or dualism (Wernaart, 2013 1). A clear example of this is the situation of

Brazil, which might seem a dualistic country at first glance, but certainly shows elements of monism as well (example 1.9).

EXAMPLE 1.9

Brazil and international law

The Constitution of Brazil stipulates that the President is authorized to sign international treaties (Art. 84), while the Parliament needs to ratify them before Brazil is bound to them (Art. 49). So, once again a clear distinction between the signature and ratification. However, before the treaty becomes part of the domestic legal system, it is required that the president incorporates this treaty into the domestic legal order through a presidential decree.

The Supreme Federal Court of Brazil ruled that without this incorporation the treaty will have no effect in the domestic legal order, even if it has been signed and ratified in accordance with the Constitution (Supreme Federal Court, 1998). However, it would be incorrect in categorizing Brazil as a purely dualistic country: the decree of the President is usually nothing more than a short foreword followed by the exact text of the ratified treaty. In practice therefore, the purpose of this presidential decree is to merely publish the content, rather than actually transforming the content in the domestic legal system by altering contradicting national law.

In answer to the question whether Brazil was monistic or dualistic, the Supreme Federal Court replied that 'it is the Brazilian Constitution – and not in the doctrinal controversy that agonizes monists and dualists – that one should search for the normative solution for the question of incorporation of international Acts in the Brazilian internal positive law system (Supreme Federal Court, 1997; Santa Cruz Oliveira & Angela, 2015).

Domestic codified standards

In the domestic legal order of a state, the authorized legislature will adopt written codes in various levels. Usually, written standards appear from a centralized level, adopted for a nationwide use, to a decentralized level, adopted for more local use. The exact type of rules and its scope will differ per state and greatly depend on its constitutional organization. A state with a very clear hierarchy in written legal standards is Belgium, as you may see in example 1.10.

EXAMPLE 1.10

The complexity of Belgium

Belgium is a federation, with a central federal government. However, due to differences in language area's and economics, Belgium is subdivided in federated areas, each with their unique and exclusive authorities: three Communities were established to preserve the cultural identity of the language groups, and three Regions were established that reflect the different economical area's within the country. The Federal Government, Communities and Regions have exclusive legal competencies on different

areas and their legislation is equally important. The laws of the Federal Government are named 'statues', the Communities adopt 'decrees', and the Regions enact 'ordinances'. Next to that, on a lower level, Belgium is subdivided in Provinces and Municipalities, who also adopt their own lower legislation.

Due to this complexity in legislative competencies, Belgium has a very specific legal order of written standards. Overall, the principle is applied that a lower written standard may not contradict a higher legal standard. The judiciary therefore is not allowed to apply lower legislation that contradicts higher legislation.
In Belgium, a predominantly monistic country, international standards are considered to be the highest written standards. Second in this hierarchy, there are the statues, decrees and ordinances adopted with a 2/3rd majority are the highest in hierarchy. Third comes the statues, decrees and ordinances adopted with a normal majority. Fourth, there are the Royal Decisions (executive decisions from the Federal Government) and executive decisions from the Communities and Regions. On the fifth place, we have the Provincial Regulations. Lowest in hierarchy are municipal regulations (Wernaart, 2013 2).

1.4.2 Application of law

A second source of law is the application of law. In the end, a legal standard – either codified or not – needs to be applied in specific cases. Usually, the application is not an automatic process in which the legal standard can be applied just like that. After all, a legal standard will always be some sort of a generalization of the context in which a case appears that needs to be concretized in a specific case. The applicator of the legal standard will then always provide a certain interpretation of that standard. In doing so, the legal standard is further nuanced and specified. This interpretation in itself can be a source of law when it is accepted as a valid legal reasoning.
On a worldwide scale most law application is performed by courts and tribunals, the administration, and the military.

Courts and tribunals

In most countries, the judiciary is responsible for applying the law in cases of dispute regarding its specific meaning. The particular way a court understands and applies the law can be a legal source in its own right. Other courts – or even the same court – may consider a previous court ruling when they are confronted with a similar type of case. This way, established reasoning patterns may evolve that can be qualified as 'case law'.

Case law

Case law is a chain of authoritative legal rulings in which the same reasoning pattern of the court is applied in similar cases.

In some legal systems, such a chain of rulings is called a precedent. When courts apply the same legal reasoning in similar legal issues, the unity of the judiciary is preserved, and it serves legal certainty.
Especially in Anglo/American legal systems, where case law is a very important source of law, the principle of *stare decisis* applies.

Stare decisis

Stare decisisis a legal principle in which courts have to follow the legal reasoning as applied in previous cases.

This usually means that lower courts may not rule in contradiction with the legal reasoning of a higher court in a similar legal matter. Besides that, it is assumed that in case of equal courts, the precedent of a previous ruling should be respected. This way, case law is a consistent source of law. Take for instance Example 1.11: the precedent that a therapists – under circumstances – has a duty to warn a possible victim of one of his patients is a legal norm that has been applied ever since in the State of California (Smith, 2010). The rule is considered to be a permanent part of the tort-law regime, and is now even codified by the legislature of California (California Code § 43.92).

EXAMPLE 1.11

'Crime passionel' in California

Prosenjit Poddar, a student from India, studied at the University of California in 1967. During his stay he met a girl named Tatiana Tarasoff during folk dancing classes. They spent some time together, and on one night even kissed one another. Because of this, Poddar believed that Tarasoff was interested in a relationship with him. However, Tarasoff had to admit that this was not her intention, and even was with other men from time to time. Poddar was extremely disappointed, and fell into a depression. He even sought professional psychological help from Dr. Moore, who diagnosed him with paranoid schizophrenia. Poddar confessed to Dr. Moore that he wanted to kill Tarasoff. Promptly, Dr. Moore requested that Poddar would be detained because he was a dangerous person. However, during the short detention, Poddar seemed to act normally, and was set free on behalf of the superior of Dr. Moore. From that moment on, Poddar stopped seeing his psychologist. A few months later, on the 27th of October 1967, he killed Tarasoff. Due to a procedural error, Poddar was set free and returned to India, out of reach for the relatives of Poddar. Instead, these relatives sued the hospital, for failing to warn Tarasoff and her relatives of the possible danger.

In example 1.11, the main legal question that needed to be settled in court was whether or not the therapists, being public employees, were immune from liability for failure to warn. After all, Article 820.2 of the Governmental Code of California stipulates that: 'Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.' In casu however, the Supreme Court of California ruled that the defendant therapists could not invoke this protection. Referring to a previous case, Johnson v. State of California, the Court had ruled before that this immunity for tort for public employees should be restrictively understood, and the 'immunity's scope should be no greater than is required to give legislature and executive policymakers sufficient breathing space in which to perform their vital policymaking functions.'

In the same court ruling, a parole's officer failed to warn foster parents that their child had a background of violence. According to the court, not informing the parents could hardly be characterized as a policy decision. A parallel was found with the case of Tarasoff, in which the failure to warn could not be considered as a policy decision for which a public employee should enjoy adequate freedom to make a decision without the risk to be held liable for its policy. Therefore, the Court ruled that the therapists were not immune from the protection stipulated in Article 820.2 of the Governmental Code of California. As a result, the therapist had a duty to warn the possible victim.

The Administration

Administration

The administration is the branch in the public sector that executes the law within the boundaries of its competences.

For instance, in some countries a minister on education may decide on new policy rules in bachelor education programmes, a town council may grant permission to build a new hospital, or a tax agency decides the exact amount of tax a citizen should pay. The administration is organized rather differently around the globe. However, members of the administration all have in common that they are in the service of the public sector and are entrusted with the power to execute the law in given situations.

In some countries, entrusting power to the administration is formalized in written standards while in other countries such power arises from established practices. Whatever the source may be of this entrusted power, there will always be a certain margin in which the administration may operate to execute the law at their own discretion.

Margin of discretion

The margin of discretion is the room allowed to the administration to execute the law at their own discretion.

This margin can be larger or smaller, depending on the context. When the administration uses this margin of discretion to realize their policy goals, this is a source of law in itself. It is assumed that administrative powers must be used in line with principles of good governance. For example, the law should be executed for the benefit of the common good, instead of private gain of the administrator. The latter would come down to corruption. Another example is that the law should be executed without arbitrariness and with respect for equality, or that a law should be executed consistently. To guarantee equal and consistent law execution, the administration may adopt policy rules to make sure that all their agents approach the execution of law in a similar way.
An example of this is the Dutch drugs policy (example 1.12.): these policy rules set clear guidelines on the prosecution of hard drugs, and the tolerance of small amounts of soft drugs in order to separate both worlds. The Dutch citizens may have the reasonable expectation that the Public Prosecution Service – which is part of the Dutch administration – will apply these policy rules in a consistent way without randomness. This way, the application of law is predictable. The policy document that is used by the Public Prosecution Service when they apply the Opium Law is thereby a legal source in itself.

EXAMPLE 1.12

The Dutch drugs policy

In the Netherlands, the Public Prosecution Service has a margin of discretion in the prosecution of persons suspected of a crime. This means that the Service may choose to intensify the prosecution of certain crimes, or instead deliberately tolerate crimes by not prosecuting people for certain crimes. In the Netherlands, a toleration policy is adopted regarding the use and sales of soft drugs (note to the Opium Law, 2011). This means that while using or selling soft drugs is still considered a crime, soft drugs users or sellers may have the reasonable expectation not to be prosecuted for this crime. Soft drugs users are not prosecuted when they possess no more than 5 gram of marijuana, and coffee-shops will not be prosecuted when they possess no more than 500 gram of marijuana.

The main motivation for this policy is pragmatic: according to the Dutch government it is unrealistic to expect that all soft drugs use can be successfully banned. Also, the usage of soft drugs is not by far as damaging to health compared to hard drugs. Furthermore, criminality related to hard drugs is usually better organized and of a more serious nature compared to criminality related to soft drugs. Simultaneously, it appears that when both the soft drug and the hard drug world operate in the underworld, it is easy for soft drug users and sellers to end up in the hard drug circuit. In that case, the long-term consequences for health and safety are much worse compared with the situation in which they would remain in the soft drug scene. All the more reasons to separate those worlds. This is done by tolerating the usage and sales of a small amount of soft drugs while intensifying the prosecution of hard drug criminals. In applying their margin of discretion this way, the worlds are artificially separated. Soft drugs usage and sales are now not part of an obscure underworld scene, but rather tolerated and controlled. The Public Prosecution Service now instead allocates its resources to seriously prosecute hard drug criminals (www.government.nl, 2015).

The Military

In some countries, the military is authorized to apply the law, or parts of the law. In some countries this is institutionalized and regulated in their constitutional laws. The military is then a political power with constitutional competencies. For instance, in China, the military is considered to be one of the four constitutional powers in the country. In other countries, the military rules after a military coup. This means that the military simply took power by using its armed force, and since then rules the country. For instance, since 2014, the Thai Armed Forces are in effective control of the legislature, administration and judiciary of Thailand. The military took power after six months of political instability in the country (General Prayut Chan-O-Cha, 2014). One can have different opinions about the legitimacy of political power by the military. However, it is a fact that the military in some countries is involved with law application. For instance, in Egypt, the military has always been a significant power that is deeply involved with governing the country, including the creation and application of law, as you may see in example 1.13.

EXAMPLE 1.13

The Egyptian Armed Forces

Since the Egyptian revolution in 1952, it has been a tradition that the presidents of Egypt were all former officers with a significant career in the military. However, during the Arabian Spring in 2013, military backed Hosni Mubarak had to step down as president. He was replaced by a civilian president: Muhammad Morsi. However, the unrest in Egypt remained and his reign was only a short one. In the same year, after large protests of the Egypt people, the military intervened and forced him to step down. He was replaced by former general Abdel Fattahel-Sisi, and therefore military backed.

A new constitution was adopted, that considerably broadened the political powers of the military. For instance, since 2014, 'The Minister of Defence is the Commander in Chief of the Armed Forces, and shall be appointed from among its officers' (Article 201 Constitution of the Arab Republic of Egypt). In fact, this constitutional standard prevents any civilians to become the head of the army. It furthermore guarantees that the appointment of the Chief of the Armed Forces comes from within the military, taking this power away from the legislature, administration or the courts.

Civilians and the military courts

Another provision in the new Constitution stipulates that: 'No civilian shall face trial before the Military Court, except for crimes that constitute a direct assault against military facilities or camps of the Armed Forces, or their equivalents, against military zones or border zones determined as military zones, against the Armed Forces' equipment, vehicles, weapons, ammunition, documents, military secrets, or its public funds, or against military factories; crimes pertaining to military service; or crimes that constitute a direct assault against the officers or personnel of the Armed Forces by reason of performing their duties' (Article 204 Constitution of the Arab Republic of Egypt). This means that civilians can be tried in a military court when their alleged crime affects the said issues. It is believed that this competency of the military courts has been widely used ever since (Elmenshawy, 2014).

1.4.3 Legal writings and teachings

Legal writings and teachings can be a legal source in its own right. Scholars who are experts in law will regularly comment on legal developments, or collect and structuralize legal information. Such works and teachings can be used as a source of law.

For instance, in Bhasin v. Hrynew (2014) the Supreme Court of Canada consulted several books to find inspiration for their decision. This case will be discussed into more detail below, in the context of the legal principle of good faith.

In this case, one of the Judges considered:

'However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), vol. I, *General Principles*, at

para. 1-039; W. P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 – Commercial Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 – Law in Transition: Contracts* (1984), 125, at p. 148.'

1.4.4. Religious writings and teachings

In some countries, religious writings and teachings are accepted as a source of law. These counties are non-secular states.

Non-secular state

> A non-secular state is a state in which governance and religion are mixed.

For instance, in the Cairo declaration on human rights in Islam, Shari'ah law (given by God) is recognized as ultimate legal source: 'In contribution to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shari'ah'. This means that the writings and teachings of the Islam are considered to be the source of law.

A similar consideration can be found in the Constitution of Saudi-Arabia (Art. 1):

> 'The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its Constitution, Arabic is its language and Riyadh is its capital.'

Another example, but now involving Christianity, is the Preamble of the Constitution of Argentina, 'invoking the protection of God, source of all reason and justice.'

In some countries, religious sources are explicitly excluded as a legal source. In that case, religion is not involved in the governance of a state (including its laws). These countries are secular states.

Secular state

> A secular state is a state in which governance and religion are separated.

For instance, Article 4 of the Constitution of the Republic of Fuji explicitly recognizes that:
'Religion and the state are separate, which means:
(a) the state and all persons holding public office must treat all religions equally;
(b) the state and all persons holding public office must not dictate any religious belief;

(c) the state and all persons holding public office must not prefer or advance, by any means, any particular religion, religious denomination, religious belief, or religious practice over another, or over any non-religious belief; and
(d) no person shall assert any religious belief as a legal reason to disregard this Constitution or any other law.'

1.4.5 Customary law

I A custom is an established and accepted legal practice. **Custom**

From this definition we can learn three things.
First, a custom is a legal practice. This means that this source of law finds its origin in the interaction between people, and not in a written standard. The correlation between a written standard and legal custom is that a written standard is sometimes legal custom first, and is, after a while, formalized in the form of a written standard.
Second, a custom must be an established practice. This means that the practice must last for a while in a consistent way. This way, people can reasonably expect the application of this legal practice, for it has become a sort of a tradition. We use the Latin word *usus* to refer to this element of legal custom. **Usus**
Third, a custom must be an accepted practice by its users. The mere fact that a legal custom is applied for a long time does not necessarily mean that those who are involved with the application agree with it. Therefore, it is generally accepted that a legal custom can only be a valid source of law when those who are involved with its application are of the opinion that the custom should indeed be a legal rule. In legal terminology, we use the Latin words *opinio iuris sive necessitates* to refer to this element. **Opinio iuris sive necessitates**

In some legal systems, the use of customary law is not unlimited. Usually, customary law may not be in contradiction with certain applicable written standards and other sources of law. For instance, Article 2 (4) of the Constitution of Kenya stipulates that: 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.' In Nigeria, before applying a customary rule in court, the judge(s) will have to perform a validity test to establish whether or not the custom is in contradiction with other elements of applicable law. Example 1.14 shows into more detail how the elements of the definition of customary law appear in the Nigerian legal system.

EXAMPLE 1.14

Killing twins in Nigeria

Before Nigeria was colonized by the British, the domestic legal system consisted mostly of customary rules. These rules where orally transmitted from generation to generation, and could differ per region or tribe. However, during their colonial rule, the British established their own legal system in Nigeria based on the common law tradition. This included written standards and a legal doctrine established by court rulings (the application of law).

This does not mean that the traditional customary rules were now banned: they could still apply as long as they would not be contrary to rules that came forth from the British system. This explains why in Nigeria, since the departure of the British, customary laws still play a profound role in the domestic legal system (Asiedu-Akrofi, 1989). In the Nigerian Evidence Act, the law that regulates what evidence is valid in court proceedings, the effect of customary law is recognized. Article 18 stipulates that: 'A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence.' This means first that custom can be used as evidence in a case when it has been accepted before in equal or higher courts. The more a custom has been applied in the courts, the stronger the effect of the rule can be. This principle was introduced by the commonwealth Privy Council in 1916 (Angu v. Attah). This pretty much reflects the idea of *usus*. Second, it means that if there is no established jurisprudence on the matter, evidence must be found from within the community that usually applies the custom. This means that chiefs or others who are knowledgeable about the customary laws may testify in court that the custom is indeed considered to be a part of the local legal system. This reflects the idea of *opinio iure sive necessitates*.

Customary law?
The principle that customary laws may not contradict with the British legal system that was established in Nigeria still applies. Article 18 (3) of the Nigerian Evidence Act stipulates: 'In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.' In fact, this rule does not necessarily aim at maintaining the heritage of the British law system, but rather prevent the application of rather barbarian customs (as ruled in Laoye v. Oyetunde, 1944). For instance, in some parts of eastern Nigeria, it was a custom to kill newly born twins. They were believed to bring bad luck to the community where they were born, for the birth of twins was considered to be an unnatural phenomenon. Igbo tribes in south-east Nigeria would bring newly born twins to an 'evil forest' and leave them there to die (Adewumi, 2014). While this custom seems to gradually disappear, the rejection of twins still composes a social problem in the south-east of Nigeria today (Asindi et al., 1993; Taiwo-Obalonye, 2013). Application of this custom would contradict with concepts as 'public policy' and 'natural justice' and would therefore not be legally applicable.

1.4.6 Legal principles

A legal principle is considered to be a founding principle in law that may not be violated.

Legal principle

I A legal principle is a general value that applies in law.

Such principles can be found in all fields of law. For instance, in penal law, the principle of legality may apply. This means that someone may not be condemned for something he could not be aware of, for instance due to the

fact that a law is applied in retro-perspective, or was formulated unclear. For example, the Constitution of South Africa stipulates that: 'Every accused person has a right to a fair trial, which includes the right (…) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.' Also in private law, legal principles may apply, such as the principles of reasonableness and fairness, or the principle of good faith as you can see in case study 1.3 on the website.
From this case study we can learn that the same legal principle may apply in more than one legal system. As a matter of fact, the principle of good faith in contract law is applied in a wide range of countries. One might even argue that such a principle has a universal scope. In law, we call this phenomenon *ius cogens*.

Ius Cogens

I Ius Cogens are universally binding legal principles.

In some cases, a principle is considered to have a universal scope. Although opinions on the exact meaning of *ius cogens* are very different, some legal principles seem to be widely accepted. For instance, the prohibition to genocide, slavery and torture are in most countries – at least in theory – accepted principles. Furthermore, concepts as equality, respect and freedom are universally proclaimed. Also in private law, the notion that trade should be fair, reasonable and with integrity is widely accepted, and could therefore be considered as universally applicable.
In this light, one needs to be cautious however. The legal principles that are said to have a universal scope are usually rather vague and understood differently around the world. It will at all times depend on the actual application of these principles in a given context to find out what their exact meaning is in that particular legal system.

Summary

The organization of just behaviour

- Law organizes just behaviour in a society using two types of legal rules: substantive and formal legal rules.
  - Substantive law is composed of legal rules that define the content of just behaviour;
  - Formal law is composed of legal rules that maintain substantive law.

- Substantive and formal legal rules are necessary to regulate two types of relations: public and private relations.
  - Public law is the law that regulates the relation between a government and its citizens.
  - Private law is the law that regulates the relation between citizen or those who act as citizens.

- For the purpose of this book we further subcategorize different legal branches.
  - At international level: economic cooperation;
  - At national public law level: constitutional and administrative law, and criminal law;
  - At national private law level we categorize law that deals with contracts, liability, labour contracts, the legal form of a company, privacy, and intellectual property.

- 'Just' implies a balance between the values 'justice', 'opportuness', and 'legal certainty'.
  - Justice is the moral conviction of a given society expressed in law;
  - Opportuness is the expression of effectiveness by a given society in law;
  - Legal certainty is the expression of legality in a given society.

The origin of law

- There are two opposing views regarding the origin of law: natural law and positivist law. They are two extremes, and are usually both apparent in legal systems.
  - In a Natural law approach it is assumed that law comes fort from nature;
  - In a positivist law approach, it is assumed that law comes forth from codification.

The sources of law

- The following sources are generally used: codified standards, the application of law, legal writings and teachings, religious writings and teachings, customary law and legal principles.

- Codified standards are written rules produced by a legislator;
  - At international level, written standards are usually created in the form of a contract between states: a treaty.
    - A bilateral treaty is a treaty to which two states are party.
    - A multilateral treaty is a treaty to which more than two states are party.
  - A state expresses the will to be bound by a treaty by signing and ratifying the treaty.
    - The signature of a treaty implies the consent of the responsible negotiator on behalf of the state to the treaty.
    - The ratification of a treaty implies the consent of the responsible Legislator on behalf of the state to the treaty.
  - There are two approaches in how international written standards have effect in the domestic legal order of state parties to a treaty: monism and dualism.
    - Monism is an approach in law in which it is assumed that the content of a signed and ratified treaty is automatically part of the domestic legal order.
    - Dualism is an approach in law in which it is assumed that a signed and ratified treaty needs to be transformed into domestic law first before it forms part of the domestic legal order.

- Law application is performed by courts and tribunals, the administration, and the military.
  - Case law is a chain of authoritative legal rulings in which the same reasoning pattern of the court is applied in similar cases. In some countries, the principle of *stare decisis* applies.
    - *Stare decisis* is a legal principle in which courts have to follow the legal reasoning as applied in previous cases.
  - The administration is the branch in the public sector that executes the law within the boundaries of its competences.
    - The margin of discretion is the room allowed to the administration to execute the law at their own discretion.
  - In some countries, the military is authorized to apply the law, or parts of the law.

- Legal writings and teachings can be a legal source in its own right.

- In some countries, religious writings and teachings are accepted as a source of law.
  - A non-secular state is a state in which governance and religion are mixed;
  - A secular state is a state in which governance and religion are separated.

- A custom is an established and accepted legal practice.

- A legal principle is a general value that applies in law.
  - *Ius Cogens* are universally binding legal principles.

Practice questions

Open questions

1.1 Please read the following consideration of the Supreme Court of Appeal of South Africa (Renasa Insurance Company Limited v. Watson (32/2014) [2016] ZASCA 13 (11 March 2016).

> *In casu,* a certain payment from an insurer in a case of fire was disputed: the insurer refused to pay since the claimant was believed to have caused the fire by negligent acting. The reference made to clause 5 is an Article derived from the general terms, used by the insurance company.
> 'In view of the conclusion that I have reached on the alternative defence, it is not necessary to consider whether or not the full court in Santam Limited v. CC Designing CC, and accordingly the court a quo too, correctly interpreted clause 5. Having regard to the wording of clause 5, it is at the very least clear that to require an insured to take steps to prevent a loss, proof of foreseeability of loss eventuating is required. This would require proof that the reasonable person in the position of the insured would have foreseen the reasonable possibility of the loss eventuating and would therefore have taken reasonable steps to prevent same.'

What kind of legal sources is the Court referring to (one could distinguish at least two)? Please explain thoroughly.

1.2 Please, read Article 8 of the Vietnamese Civil Code:

> 'The establishment and implementation of civil rights and obligations must ensure preservation of ethnic identity and shall respect and promote the good customs, practices and traditions, solidarity, mutual support, [the tradition of] 1 each person2 for the community and the community for each person, and the high moral values of the various ethnic groups living in Vietnam. Ethnic minorities shall enjoy favourable conditions in their civil relations in order to improve steadily their physical and spiritual life. Assistance to elderly persons, young children and disabled persons in the implementation of civil rights and obligations shall be encouraged.'

As we have seen, there are three purposes of law: justice, opportuness and legal certainty. Which of these three are served best by this Article, and which is not so much guaranteed here? Please explain thoroughly.

1.3 Gerry bribes a government official. He claims that he has the right to do so, because this has been going on for ages, and is simply the way things work. He claims that this matter of affairs can be justified under customary law. However, the victims of the bribery who bear the consequences are not so happy with this.

What element of customary law is Gerry overlooking here, which would make this course of affairs invalid?

1.4 The King of Norway orders a Pizza at a Restaurant. He leaves without paying, claiming that since he is the King, and therefore a public legal institution, private legal rules are not applicable to him or his actions.

Could you kindly tell the King why he is mistaken?

Essay question

Please, reflect on the pros and cons of natural law and positivist law. Conclude with your own opinion on the matter: which approach do you prefer and why?

Multiple choice questions

1.1 *Opinio iure sive necessitas* is a prerequisite for
a a legal principle
b a legal custom
c law application

1.2 In the UK, an international treaty is only internally binding when the national Parliament adopts a national law with the same content.
The UK has a
a monistic system
b dualistic system
c tripartite system

1.3 Article 81 of the Argentine Constitution reads: 'No bill wholly rejected by either House shall be reintroduced in the legislative session of the same year. No House shall totally reject a bill originated in it and later added or amended by the revising House. If the bill were subject to additions and amendments by the revising House, the result of the voting shall be made known in order to state if such additions or amendments were made by the absolute majority or by two-thirds of the members present…'

This is predominantly an example of
a public substantive law
b private formal law
c public formal law

1.4 The International Covenant on Economic Social and Cultural Rights (164 ratifications) is an example of
a a bilateral treaty
b a universal treaty
c a multilateral treaty