U.S. Business Organizations

Friday: 14:00 - 16:00
Location: Hörsaal XVIII [Mel]
About the Course

- The Lecturer
- The Course
What are Business Organizations?

❖ Business organization, an entity formed for the purpose of carrying on commercial enterprise.

❖ Business enterprises customarily take one of the following forms: individual proprietorships, partnerships, limited-liability companies or corporations
Define:

Business

Commercial activity.
Define:

**Commercial**

- Concerned with or engaged in commerce.
- Making or intended to make a profit.
Define:

**Commerce**

The activity of buying and selling, especially on a large scale.
Question:

Is this Commerce?
Tentative Course Schedule

- April 5, 2019: Introduction to the Common Law Tradition (90 minutes)
- April 12, 2019: NO CLASS
- April 19, 2019: NO CLASS (Good Friday)
- April 26, 2019: American Contract Law (135 Minutes)
- May 3, 2019: American Tort Law, American Regulatory and Administrative Law (135 Minutes)
- May 10, 2019: NO CLASS
- May 17, 2019: NO CLASS
- May 24, 2019: Sole Proprietorships, Agency Law, Partnership Law, Businesses and Liability (180 Minutes)
- May 31, 2019: Mid-Term Review and Self-Assessment (90 Minutes)
- June 7, 2019: NO CLASS
- June 14, 2019: Corporations I (180 Minutes)
- June 21, 2019: Corporations II (180 Minutes)
- June 28, 2019: Corporations III (180 Minutes)
What is the Common Law?
What is Common Law?

- "The body of law derived from judicial decisions, rather than from statutes or constitutions; [synonym] CASELAW, [contrast] STATUTORY LAW."

- “A body of law that is based on custom and general principles and embodied in case law and that serves as precedent or is applied to situations not covered by statute (the common law of torts)” (Barron’s Dictionary)
## Big Picture Differences

<table>
<thead>
<tr>
<th>Legal System</th>
<th>Civil</th>
<th>Common</th>
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<td>Core principles are codified into a referable system which serves as the stable foundation of law</td>
<td>Judges play a role in developing law through evolving or transforming the scope and application of the law through reasoned decisions on a case-by-case basis</td>
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| Judge | Investigative role where judges establish facts of the case and apply provisions to the facts | Scholarly or philosophical role, objective arbiter |

| Lawyers | Lawyers present arguments based on the information that lawyers find | Lawyers are investigators, and zealous advocates who play a role in presenting a case and the relevant law to a neutral judge |

| Worth of judgements | A decision in one case has no binding impact on a decision in another case — but may be used to guide a judges decision making process | Judicial decisions are binding – decisions of the highest court can generally only be overturned by that same court or through legislation; Binding on future courts but subject to change as required by changing societies and differences between different cases. |

| Precedent | Only valuable if a string of judges converge on a single interpretation over a long period of time | A single precedent with due authority has the force of law but its purport is interpreted by Opinions that follow |

| Evidence | Within the sovereign inquisitorial function of the court —not within the lawyer’s role | Supplied by the parties through their lawyers — generally no judicial interference is allowed |

| Contract Law | There are a number of provisions implied into a contract under the civil law system – less importance is generally placed on setting out ALL the terms governing the relationship between the parties to a contract in the contract itself as inadequacies or ambiguities can be remedied or resolved by operation of law. | Extensive freedom of contract - few provisions are implied into the contract by law (although provisions seeking to protect private consumers may be implied); Generally, everything is permitted that is not expressly prohibited by law. There are few provisions implied into a contract under the common law system – it is therefore important to set out ALL the terms governing the relationship between the parties to a contract in the contract itself. This will often result in a contract being longer than one in a civil law country. |

| Influence of Scholars | Influence of scholars given importance | Very little influence, if any. |

| Countries | Spain, China, Japan, Germany, most African nations, South American nations, France | USA, UK, Australia, Canada, India |
The American Common Law System
What is Common Law, in practice?

- Common Law, in essence, is a method of establishing law by interpreting language (as set out in cases, statutes and administrative rules) through the lens of reason.

- This method of interpretation has important consequences for the legal system as a whole.
The Encounters that Formed America
A New Understanding of Liberty
A New Vision for the Purpose of Commerce
A Secular Basis for Shared Normative Values
A New Understanding of “People”
“A host of positive psychological changes inevitably will result from widespread economic security. The dignity of the individual will flourish when the decisions concerning his life are in his own hands, when he has the means to seek self-improvement. Personal conflicts among husbands, wives and children will diminish when the unjust measurement of human worth on the scale of dollars is eliminated.”

—Martin Luther King, Jr.
Lex est ratio summa
Common Law Expresses Reason

❖ *Lex est ratio summa, quad jute quad sunt utsila et necessaria, et contraria prohibit*

❖ “Law is the perfection of reason, which commands what is useful and necessary and prohibits the contrary.”
Define:

**Reason**

- An underlying ground, justification, purpose, motive, or inducement
- The faculty of comprehending, inferring, or distinguishing esp. in a fair orderly way
- The proper sane exercise of the mind
Pure Reason

As a philosophical concept:

The faculty that embraces the *a priori* forms of knowledge and *is the* source of transcendental ideas.
Why are we sure that the sun does not orbit the earth, despite all appearances?

To answer such questions, we need to consider reason’s role in scientific knowledge.

Kant claims that reason is “the origin of certain concepts and principles” (A299/B355) independent from those of sensibility and understanding.
Define:

**Reasonableness**

- Being in accordance with reason, fairness, duty, or prudence
- Of an appropriate degree or kind
- Supported or justified by fact or circumstance
Who’s Reason?

- Who’s Reason? *Lex non scripta* (unwritten law)
- The “Reasonable Person” Standard
Which Method?

❖ Reason is not immediately apparent or obvious.
❖ It is deduced through legitimate methods
   ❖ Classic examples:
     ❖ Kant, *Critique of Pure Reason*
     ❖ Descartes, *Meditations on First Philosophy*
Before 1873, England had two complementary court systems: courts of "law" which could only award money damages and recognized only the legal owner of property, and courts of "equity" (courts of chancery) that could issue injunctive relief (that is, a court order to a party to do something, give something to someone, or stop doing something) and recognized trusts of property.

This split propagated to many of the colonies, including the United States: The states of Delaware, Illinois, Mississippi, South Carolina, and Tennessee continue to have divided Courts of Law and Courts of Chancery. In New Jersey, the appellate courts are unified, but the trial courts are organized into a Chancery Division and a Law Division.
The Role of Procedure: Form of Pleading

❖ Writ system: The way you sued someone under English common law of the Middle Ages was to go to the chancellor and request a writ that would enable you to invoke the assistance of a court for a particular purpose. The writs had different names—trespass, trespass one the case, trover, assumpsit, debt, ejectment—each writ covered a body of private law that we now associate with tort, contract, or property.

❖ Now no longer in use — but found in the document called the Complaint

❖ It is the responsibility of the Plaintiff to ensure the proper construction of the claim and request the proper remedy

❖ These selections determines the outcome of the case
Define:

Due Process

Before depriving a citizen of life, liberty or property, government must follow fair procedures. Thus, it is not always enough for the government just to act in accordance with whatever law there may happen to be. Citizens may also be entitled to have the government observe or offer fair procedures, whether or not those procedures have been provided for in the law on the basis of which it is acting.
How is Common Law Established?

- Common law acquires force of law because it is pronounced by a court (or similar tribunal) in an Opinion.
- Common law draws from institutionalized opinions and interpretations from judicial authorities and public juries.
- Common laws sometimes prove the inspiration for new legislation to be enacted.
Common Law & Judicial Decisions

- Common law, also known as case law, relies on detailed records of similar situations and statutes because there is no requirement for an official legal code which can apply to a case at hand.
- The judge presiding over a case determines which precedents apply to that particular case.
- The example set by higher courts is binding on cases tried in lower courts.
- This system promotes stability and consistency in the U.S. legal justice system.
- However, lower courts can choose to modify or deviate from precedents if they are outdated or if the current case is substantially different from the precedent case. Lower courts can also choose to overturn the precedent, but this rarely occurs.
Define:

Discretion

Power of free decision or latitude of choice within certain bounds imposed by the law
The power of a judge to use his or her own judgment in making decisions guided by what is fair and equitable and by principles of law

ABUSE OF DISCRETION: An error of judgment by a trial court in making a ruling that is clearly unreasonable, erroneous or arbitrary, and not justified by the facts or the law applicable in the case.
Define:

Deference

Submission or courteous respect given to another, often in recognition of authority. See Synonyms at honor.

(American Heritage Dictionary)
State Court System

Supreme Court

Federal Court System
The Jury:
Decides issues of fact (not law)

Judge:
A broadly defined role guided by the judge’s discretion to unearth and protect the principles of law underlying fact patterns and limited by a culture of deference that judges owe lawyers, jury members, fellow judges and other branches.

Attorneys:
Responsible for zealous representation of their clients within the legitimate scope of the law. Attorneys may advance (non-frivolous) creative arguments interpreting the law to advance the law and the best interests of their clients but they may not break the law.
Ratio Decidendi:
the rule of law on which a judicial decision is based.

Stare Decisis:
the legal principle of determining points in litigation according to precedent.

Obiter Dictum:
a judge’s expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.
Judiciary:
The branch that wields the judicial authority of a country; the power of judges collectively.

Legislative:
The branch with the power to make laws.

Executive:
The branch with the power of putting plans or actions into effect, the branch under Presidential Power.
Define:

**Federalism**

Distribution of power in a federation between the central authorities and constitutive units involving especially the allocation of significant lawmaking powers to those constituent units.
The American Legal System is Deliberately Decentralized
Sources of Law Used in this Class

- Case Law
- Statutes
- Administrative and Legislative Codes
- Model Codes
Constitutional Law

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”
Case Law

Law established by judicial decisions in cases as distinguished from law created by legislation (also called decisional law) (Barron’s)
Define

Legislation

Legislation is a directive proposed by a legislative body while a regulation is a specific requirement within legislation.

Legislation (or "statutory law") is law which has been promulgated (or "enacted") by a legislature or other governing body or process.

Before an item of legislation becomes law it may be known as a bill, and may be broadly referred to as "legislation".

Legislation can have many purposes: to regulate, to authorize, to outlaw, to provide (funds), to sanction, to grant, to declare or to restrict.
Define

Administrative Law

❖ The branch of law dealing with government agencies
❖ Made up of non-legislative acts which are adopted by an executive or administrative body under the authority of a legislative act or for implementing a legislative act.
Define

Judicial Review

Review by the Supreme Court of the constitutional validity of a legislative or administrative act.
Reading a Case: Marbury v. Madison

- The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish.

- **It is emphatically the province and duty of the judicial department to say what the law is.** Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

- Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.
Justice Cardozo noted the "common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively" but "[i]ts method is inductive, and it draws its generalizations from particulars."
Putting it all together: How Case Law is Made

❖ First, one must ascertain the facts.
❖ Then, one must locate any relevant statutes and cases, extract the principles, analogies and statements by various courts of what they consider important to determine how the next court is likely to rule on the facts of the present case.
❖ Decisions, and decisions of higher courts or legislatures carry more weight than earlier cases and those of lower courts.
❖ Finally, one integrates all the lines drawn and reasons given, and determines "what the law is".
❖ Then, one applies that law to the facts.
Define:

**Legal Reasoning**

Methods used to apply laws to facts in order to answer legal questions.
Define:

Deduce

1. To reach (a conclusion) by reasoning
2. To infer from a general principle; reason deductively: deduced from the laws of physics that the new airplane would fly
3. To trace the origin or derivation of
Define:

Analogize

To reason by or use analogy:

a·nal·o·gies
1.
   a. A similarity in some respects between things that are otherwise dissimilar: sees an analogy between viral infection and the spread of ideas.
   b. A comparison based on such similarity: made an analogy between love and a fever.
What is Common Law?

- Common Law, in essence, is a method of establishing law by interpreting language through the lens of reason.
- This method has important consequences for the legal system as a whole.
Features of an Opinion

❖ **Ratio Decidendi**: The rule of law on which a judicial decision is based.

❖ **Obiter Dictum**: A judge’s expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.

❖ **Stare Decisis**: The legal principle of determining points in litigation according to precedent.

❖ **Deference**: Submission or courteous respect given to another, often in recognition of authority. See Synonyms at honor.

❖ **Discretion**: Power of free decision or latitude of choice within certain bounds imposed by the law. The power of a judge to use his or her own judgment in making decisions guided by what is fair and equitable and by principles of law.

❖ **Case Law Fragments**: Excerpts from prior case law

❖ **Statutory Fragments**: Excerpts from statutes
Why do I emphasize this definition of Common Law?

- Common Law, in essence, is a method of establishing law by interpreting language through the lens of reason.
- As we will see, this method has important consequences for the legal system as a whole.
Is this Commerce?

https://youtu.be/H4j4rv34VyQ