

# 上 篇

## Part One



# Lesson 1

## Law and Its Classifications



*Law is a rule of conduct, a contract, an ideal of reason.*

—Aristotle

法是行为的准则，是契约，是理性的典范。

——亚里士多德（古希腊，公元前384—332）

### Text

## I. What Is Law

There have been and will continue to be different definitions of law. Aristotle saw law as a rule of conduct. Plato believed that law was a form of social control. Cicero contended that law was the agreement of reason and nature, the distinction between the just and the unjust. The British jurist Sir William Blackstone described law as “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong”. In America, the eminent jurist Oliver Wendell Holmes<sup>1</sup>, Jr., contended that law was a set of rules that allowed one to predict how a court would resolve a particular dispute: “the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.”

Although these definitions vary in their particulars, all are based on the following general observation: *law consists of enforceable rules governing relationships among individuals and between individuals and their society*. This very broad definition of law implies the following:

- To have law, there must be established rules<sup>2</sup>, such as constitutions, statutes,

<sup>1</sup> Oliver Wendell Holmes (1841—1935): 奥利弗·温德尔·霍姆斯, 1902年西奥多·罗斯福总统任命他为联邦最高法院法官, 任期直到1932年。其传世之作首推1881年《普通法》(The Common Law, 1881)。

<sup>2</sup> established rules: 固定下来的规则, 成文规则。

administrative agency<sup>1</sup> regulations, and judicial decisions<sup>2</sup>.

- These rules must be capable of enforcement; that is, law and order must prevail with resolution in a judicial system.
- The rules must establish approved conduct by which individuals deal with each other and participate in society.

National laws are made in Congress<sup>3</sup>, which is part of the legislative<sup>4</sup> branch and is made up of the House of Representatives<sup>5</sup> and the Senate<sup>6</sup>. Congress can make laws on all kinds of matters, such as setting speed limits on highways or regulating how much radon may be found in drinking water. During each Congress, senators and representatives introduce<sup>7</sup> numerous bills. Bills are passed by Congress and then signed into law<sup>8</sup> by the president.

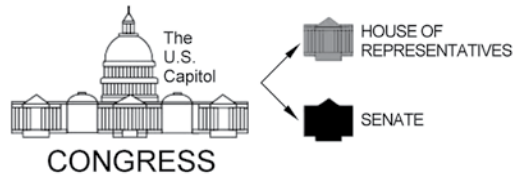


Figure 1-1

- 1 administrative agency: 行政机关。A governmental body with the authority to implement and administer particular legislation. 在英国，该词更多用于指19世纪末兴起的行政裁判机构。
- 2 judicial decisions: 司法判决。decision: 裁定，判决。A judicial determination after consideration of facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case.
- 3 Congress: 国会。The legislative body of the federal government, created under U.S. Constitution Article I, and consisting of the Senate and the House of Representatives.
- 4 legislative: 关于立法的，有立法权的，立法的。Of or relating to lawmaking or to the power to enact laws. legislative department: 立法部门。legislative power: 立法权。legislature: 立法机关。The branch of government responsible for making statutory laws. The U.S. federal government and most states have bicameral legislatures (两院制立法机关), usu. consisting of a house of representatives and a senate.
- 5 House of Representatives: 众议院。众议院的席位按照各州人口分配，每州至少要有一名议员。House of Representatives: the lower chamber of the U.S. Congress, composed of 435 members—apportioned among the states on the basis of population—who are elected to two-year term. 此外，House of Representatives也可以指美国各州的下院。House of Representatives可以缩写为H.R.
- 6 Senate: 参议院。Senate为美国国会的上院，参议院议员共有100名，每州2名，任期为6年，每两年更换全部议院的1/3。Senator: 参议员。The upper chamber of a bicameral legislature. In U.S.A., it is the upper house of the U.S. Congress, composed of 100 members—two from each state—who are elected to six-year term.
- 7 introduce: 提出议案等。To bring forward (a plan, a bill for example) for consideration.
- 8 sign into law: 签署成为法律。

## II. Classifications of Law

There are several different ways in which laws can be classified, depending on the criteria or characteristics which are applied for setting up the categories. One is to distinguish between public law and private law. Another important distinction is between criminal and civil law. Other classifications include civil law versus common law and substantive law versus procedural law. This section examines these legal classifications.

### a. Public Law v. Private Law

Law can be divided into two main branches: public law and private law<sup>1</sup>. Public law is the body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself; it includes constitutional law, criminal law, and administrative law. Private law is the body of law dealing with private persons and their property and relationships. Private law can be divided into six major branches according to the kinds of legal rights and obligations involved. These branches are contract and commercial law, tort law, property law, inheritance law, family law, and corporation law<sup>2</sup>.

### b. Criminal Law v. Civil Law

Criminal law defines breaches of duty to society at large. It is society, through government employees called prosecutors<sup>3</sup> (such as district attorneys), that brings court action against violators. If you are found guilty of a crime such as theft, you will be punished by imprisonment or a fine<sup>4</sup>. When a fine is paid, the money generally goes to the state, not the victim of the crime.

Private duties owed by one person (including corporations) to another are established by civil law. For example, we have a duty to carry out our contractual promises. Tort law defines a host of duties people owe to each other. One of the most common duties is a duty to exercise reasonable care<sup>5</sup> with regard to others. Failure to

1 private law: 私法。public law: 公法。罗马法学家乌尔比安 (Ulpianus) 将法律划分为公法与私法。

2 私法所包括的这六个部门依次是合同与商法、侵权行为法、财产法、继承法、家庭法以及公司法。

3 prosecutor: 检察官。A legal officer who represents the government in criminal proceedings.

4 fine: 罚金。A sum of money required to be paid as a criminal penalty.

5 a duty to exercise reasonable care: 尽合理注意义务。reasonable care也可以称作是“due care”或“ordinary care”。“Reasonable care” is the degree of care that a person of ordinary intelligence and prudence would exercise under the given circumstances. This is the standard of care expected of virtually everyone at all times; a failure to exercise reasonable care is negligence.

do so is the tort of negligence.

Suit for the breach of a civil duty must be brought by the person wronged<sup>1</sup>. Generally, the court does not seek to punish the wrongdoer but rather to make the wronged party whole through a money award called damages<sup>2</sup>. For example, if someone carelessly runs a car into yours, that person has committed the civil wrong (tort) of negligence. If you have suffered a broken leg, you will be able to recover damages from the driver (or his or her insurance company). The damages will be amount of money sufficient to repair your auto, to pay your medical bills, to pay for wages you have lost, and to give you something for any permanent disability such as a limp. Damages for “pain and suffering”<sup>3</sup> also may be awarded.

Although the civil law generally does not aim to punish, there is an exception. If the behavior of someone who commits a tort is outrageous, that person can be made to pay punitive damages<sup>4</sup> (also called “exemplary damages”). Unlike a fine paid in a criminal case, punitive damages go to the injured party.

Sometimes, the same behavior can violate both the civil law and the criminal law. For instance, a person whose drunken driving causes the death of another may face both a criminal prosecution by the state and a civil suit for damages by the survivors of the victim. If both suits are successful, the driver would pay back society for the harm done with a criminal fine and/or prison sentence, and compensate the survivors with the payment of money damages.

See Table 1-1 criminal law versus civil law, for a general comparison of criminal and civil cases.

1 wrong: 不法行为。The violation of or failure to perform a legal duty, or the infringement of another's legal rights. wrongdoer: 不法行为人。One who violates the law.

2 damages: 损害赔偿金。Money claimed or allowed as compensation for injury or loss. 例如, ① nominal damages 象征性损害赔偿金; ② liquidated damages 预定损害赔偿金。

3 pain and suffering: “痛苦与创伤” (精神损害赔偿金)。在美国《侵权行为法》中, 损害赔偿金通常指经济损失, 例如医疗开支、康复开支, 以及财产损失。但损害赔偿金有时还包括非经济损失, 基本上指被告的过失给身体受到伤害的原告所带来的“痛苦与创伤” (pain and suffering)。痛苦与创伤补偿通常会大大超过经济损失补偿。“拇指原则” (rule of thumb) 就是指, 假定原告完全康复, 痛苦与创伤补偿至少应该是经济损失的四倍。

4 punitive damages: 惩罚性损害赔偿金; exemplary damages: 惩戒性损害赔偿金。“Punitive damages or exemplary damages” refers to money damages awarded to punish the other's conduct, as well as to deter others from such conduct in the future.

Table 1-1

	Criminal Cases	Civil Cases
Elements	Intentional or negligent violation of a statute	Harm to another person or property (tort) or breach of a contract
Actors	Prosecutor v. Defendant (government) (accused)	Plaintiff v. Defendant (wronged party) (wrong party)
Punishment	Fines, imprisonment, execution etc.	Defendant may have to pay the plaintiff compensatory and punitive damages

### c. Civil Law v. Common Law

We have already seen that our system of law can be divided into two branches: Criminal law and non-criminal, or civil law. However, although “non-criminal” is indeed one meaning of the term “civil law”, it is not the one with which we are concerned here. Civil law is the name of a particular system of jurisprudence<sup>1</sup> that is followed in a great many countries of the world. Put in its simplest form, we can say that civil-law systems are those based on legal codes (or statutes) that spell out a society’s basic laws on a variety of subjects, such as acts that constitute crimes, tax obligations, and rules about owning and transferring property.

The term “civil law” and the basis of the law itself are derived originally from the law of ancient Rome, the *jus civile*<sup>2</sup>. As time passed, ancient Roman law was reworked into comprehensive legal codes. The code of the emperor Justinian (483—565 A.D.)<sup>3</sup> was revived after the Dark Ages<sup>4</sup>, and it became the basis of modern law in Italy, the German Empire, the Netherlands, France, and Spain, as well as in their colonial offshoots. State of Louisiana historically also shares the civil-law tradition. Today, most Western European countries have civil-law systems, as do the countries of Latin America, most African countries, Japan, Thailand, and Turkey.

1 jurisprudence (法律体系): a system, body, or division of law. jurisprudence, 这是个意义多变的词, 除“法律体系”这个意思之外, jurisprudence还有“法理学”“法哲学”之意, 在德国法中, 它指the whole of legal knowledge; 在英美法中, 它还有“判例法”(case law)之意。

2 jus civile: 市民法。与之相对应的是“万民法”(jus gentium)。

3 罗马皇帝查士丁尼一世(Justinian I, 公元483—565年)。

4 Dark Ages: 黑暗世纪。指黑暗的中世纪年代, 大约从西罗马帝国灭亡(A.D. 476)到中世纪文明的复兴(A.D. 1000)这一段时间。宽泛的讲, 它等同于Middle Ages, 即大约从公元476年到1450年。

Besides the United States and England, a system known as common law prevails in Australia, Burma, Canada, India, Iraq, Liberia, Malaya, New Zealand, Singapore, and in Britain's former colonies in Africa, such as Ghana and Nigeria. The basis of common law is not a comprehensive code: Rather, the basic building block<sup>1</sup> of common-law system is case law, which is composed of decisions handed down by judges who rule on individual cases. Because each judicial opinion serves as a precedent<sup>2</sup> for later decisions, as a result, common law is sometimes called judge-made law. Common-law judges have very wide powers of interpretation to apply previous judicial rulings and to interpret statutes.

The most obvious distinction between civil law and common law systems is that civil law system is a codified system, whereas the common law is not created by means of legislation but is based mainly on case law. The principle is that earlier judicial decisions, usually of the higher courts, made in a similar case, should be followed in the subsequent cases, i.e. that precedents should be respected. This principle is known as stare decisis. The claim that common law is created by the case law is only partly true, as the common law is based in large part on statutes, which the judges are supposed to apply and interpret in much the same way as the judges in civil law (eg the Sale of Goods Act 1979, the Uniform Commercial Code).

#### **d. Substantive Law v. Procedural Law**

The branches of our legal system can be divided into substantive law and procedural law.

Procedural law establishes the rules or the guidelines—that is, the procedures—under which our legal system operates. In our legal system, for example, procedural law specifies the length of a statute of limitations<sup>3</sup> for instituting a lawsuit<sup>4</sup>. Procedural law can be divided into criminal procedures, such as the list of rights that

1 building block: (本义) 积木; 这里指组成部分。

2 precedent: 先例。A decided case that furnishes a basis for determining later cases involving similar facts or issues.

3 statute of limitations: 时效; 诉讼时效。A statute establishing a time for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered); a statute establishing a time limit for prosecuting a crime, based on the date when the offense occurred. 与“诉讼时效”相混淆的另一个概念“除斥期间”可以表述为“statue of repose”。

4 a lawsuit: 提起法律诉讼。

must be read to a suspect before being questioned by the police<sup>1</sup>, and civil procedures such as pleadings<sup>2</sup>, the written statements of the positions to be advanced at trial by the parties in lawsuit. Some procedures are common to both civil and criminal law.

Substantive law embraces rights, obligations, or limitations applicable to people and businesses in a variety of situations. Substantive law may be based in the Constitution of the United States, in legislative enactments such as statutes, or in case law developed by judges. In criminal law, for example, the actual definitions of the acts that constitute crimes are substantive law. In the law of contracts, substantive law includes the rights and remedies<sup>3</sup> that are available when one party to a contract violates the terms of the agreement.

### III. Goddess of Law

A common representation of Justice is a blind-folded woman holding a set of scales<sup>4</sup>. The origin of the Goddess of Justice goes back to antiquity. She was referred to as Maat by the ancient Egyptians and was often depicted carrying a sword with an ostrich feather in her hair (but no scales) to symbolize truth and justice. The term magistrate is derived from Maat because she assisted Osiris<sup>5</sup> in the judgment of the dead by weighing their hearts.

To the ancient Greeks she was known as Themis, originally the organizer of the “communal affairs of humans, particularly assemblies.” Her ability to foresee the future enabled her to become one of the oracles at Delphi (Temple of Apollo),

1 事实上，这里所讲的主要是“米兰达警示原则”。Miranda Warnings: “1. You have the right to remain silent. 2. Anything you say can and will be used against you in a court of law. 3. You have the right to have an attorney present before any questioning. 4. If you cannot afford an attorney, one will be appointed to represent you before any questioning.”（“你有权保持沉默，否则你说的一切，都可能作为指控你的不利证据。你有权请律师在你受审时到场。如果你请不起律师，法庭将为你指派一位。”）本书在“沉默权制度”一文中对此有专门论述。

2 pleadings: 诉讼文件，民事诉状；答辩状。A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses.

3 remedy: 救济。Redress sought from or awarded by a court.

4 a set of scales: 天平。法律女神，又称作正义女神。正义女神的样子一般被描述为：“眼睛上蒙着布，一手执衡器（以权正义），一手执宝剑（以实现正义——法律）”。宝剑而无衡器，不过是暴力；衡器而无宝剑，只是有名无实的正义，二者相依相辅，运用宝剑的威力与运用衡器的技巧协调，而后法律才能见诸实行。

5 奥西里斯神，尼罗河之神，也是幽冥界之王。在古希腊神话中，心脏被认为是人的意识栖身之所，于是将死者的心放到天平的一边，在天平的另一边放上象征正义的羽毛，如果心脏重于羽毛，则通不过审判，被交给长着鳄鱼头的魔鬼；如果羽毛重于心脏，则通过审判，获得永生。



which in turn led to her establishment as “the goddess of divine justice.” Classical representations of Themis did not show her blindfolded (because of her talent for prophecy, she had no need to be blinded) nor was she holding a sword (because she represents common consent, not coercion).

The Roman goddess of justice was called Justitia and was often portrayed as evenly balancing both scales and a sword and wearing a blindfold. She was sometimes portrayed holding the fasces (a bundle of rods around an ax symbolizing judicial authority) in one hand and a flame in the other (symbolizing truth).

## Glossary

**administrative agency** 行政机关

**administrative law** 行政法

**antiquity** 古代

**assembly** 大会；公民大会

**building block** (本义) 积木；这里指组成部分

**Congress** 国会

**constitutional law** 宪法

**criminal law** 刑法

**damages** 损害赔偿金

**Dark Ages** 黑暗世纪

**exemplary damages** 惩戒性损害赔偿金

**fine** 罚金

**House of Representatives** 众议院

**introduce** 提出议案等

**judicial decisions** 司法判决

**Jurisprudence** 法律体系；法理学；法哲学

**jus civile** 市民法

**legislative** 关于立法的；有立法权的；立法的

**pain and suffering** 痛苦与创伤

**pleadings** 诉讼文件；民事诉状；答辩状

**precedent** 先例

**private law** 私法

**prosecutor** 检察官

**public law** 公法

**punitive damages** 惩罚性损害赔偿金

**radon** [化] 氡

**remedy** 救济

**scales** 天平

**Senate** 参议院

**spell out** 详细规定；详细说明

**statute of limitations** 时效；诉讼时效

**survivor** 尚存者

**violator** 违法者；违反者

**EXERCISES****I. Answer the following questions.**

1. Name the appropriate category of law to fit each of the following descriptions:
  - a) law that regulates relationships between two or more different countries.
  - b) law that operates within a single country.
  - c) a codified legal system deriving largely from Napoleon's law code, and mostly operating within a European country.
  - d) law deriving from the English legal system and operating in a Commonwealth country and the U.S.
2. Under which category (or categories) of law would each of the following be dealt with?
  - a) Who will care for the young children when a man and woman divorce?
  - b) Can I sue the builder who undertook to build my house but did not finish the job?
  - c) Can I seek any compensation if my neighbor's fierce dog attacked and savagely bit me as I was walking along the footpath?
  - d) How does the country get a new Prime Minister?
3. Explain briefly what matters are dealt with by each of the following categories of law:
  - a) Administrative law
  - b) Constitutional law
  - c) Property law
  - d) Tort law
  - e) Criminal law
4. What is "common law"? Why is the United States a "common law country"?
5. What is the primary distinction between common law and civil law legal systems?
6. What is public law? Give three examples of public law.
7. Explain private law. Give three examples.
8. What is the difference between civil law and criminal law?
9. Explain the two ways that the words civil law are used in this chapter.
10. Define substantive law and procedural law.
11. Is contract law substantive law or procedural law? What about a rule specifying that a defendant has 30 days to respond to a complaint?