Basic Concepts of Law

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This chapter deals with a number of basic concepts that play a role in law and legal science. ► Section 1 addresses the different fields of law, such as tort law and administrative law. Legal subjects such as natural and legal persons are the topic of ► Sect. 2. ► Section 3 deals with the operation of rules and discusses operative facts and legal consequences. Juridical acts, by means of which legal agents can intentionally change the legal positions of themselves and others, are the topic of ► Sect. 4. ► Section 5 addresses the relations between duties, prohibitions, and permissions, while ► Sect. 6 goes into some detail concerning competences and immunities. ► Sections 7, 8, 9, and 10, finally, discuss different kinds of rights.

1 Fields of law

Law is not a homogeneous body of rules; it consists of many «fields of law» that sometimes exhibit large differences. Most of what has to be said about law is therefore included in the chapters that deal with the different legal fields, such as property law, constitutional law, international law, and criminal law. This section deals with the fields of law in a more general way. It focuses upon two major divisions within law, namely, the divisions between public and private law and between substantive and procedural law.

1.1 Public Law and Private Law

The first major division is between public and private law. In this division, the role of the government is central. Simply stated:

- Public law is that part of the law in which the government as such plays a role.
- Private law is that part of the law in which the government as such does not play a role.

The above characterizations refer to the government «as such» because the government can at times act as a private party. An example is that the police force owns a number of police cars. This is not different from ownership by a private person.

Private Law

Private law deals with the mutual relations between citizens. *Property law* and *contract law* are major branches of private law, which regulate things such as sales, ownership, and mortgages. A third branch of private law is *tort law*, which deals with the compensation for damage that occurs when there is

no contract. Other branches of private law include the *family law* (marriage, adoption, right to a name) and the *law of commerce*, which regulates, among other things, the transport of goods. A special branch is *private international law*, which determines which laws are applicable if a case falls under more than one jurisdiction. For instance, it determines which family law governs the divorce of persons with different nationalities.

Public Law

Public law is characterized by the fact that the government, as such, plays a central role. There are four main branches of public law. The best known of these may be *criminal law*. This is a branch of public law because the tracing, prosecution, and punishment of criminals are handled by, or on behalf of, the government.

A second important branch of public law organizes the State and the government. This branch is called *constitutional law* and deals with topics such as the division of government powers (Trias Politica), the functioning of democracy, the creation of legislation, and the relationship between central and local government agents. Traditionally, it also deals with human rights, but that field now also falls under public international law.

The third branch, *administrative law*, covers the most expansive part of public law and deals with the many interactions between government agents and civilians or private organizations. Administrative law has many branches of its own, including social security law, environmental law, and tax law.

Public international law regulates relations between States and international organizations and is also a branch of public law.

European Union Law

European Union law illustrates that the division between private and public law is not always clear-cut. On the one hand, there are treaties between the member States of the European Union (EU) in which the main institutions of the EU are regulated. These rules very much resemble the constitutional law of the individual member States and would therefore be a kind of public law. As this law is created in the form of treaties between States, it is a kind of public international law. On the other hand, the institutions of the EU also make law themselves. This law deals with the organization of the EU, in a manner similar to constitutional law. However, it also deals with the relationship between citizens and companies within the EU. There are, for instance, EU rules about fair competition, and many of these rules focus on citizens and companies. Arguably, these rules belong to private law.

1.2 Substantive and Procedural Law

A second twofold division of law, which is perpendicular to the division between public and private law, is the division between substantive and procedural law. *Substantive law* consists of rules that give people rights and determine what people should do.

Not everyone always complies with all duty-imposing rules nor are all the rights of legal subjects always respected. Therefore, if law is to function well, it has to provide the means through which compliance with duties and respect for rights can be enforced. These means are given by *procedural law*. This field of law provides the rules for court procedures and for the organization of the judiciary. It also includes rules that specify how judicial orders can be enforced.

There are branches of procedural law for each of the major branches of substantive law. This means that there exist rules for *civil procedure*, which deal with the enforcement of private law. There are also rules for *criminal procedure*, which specify how criminal suspects can be traced, prosecuted, and—after conviction— punished. Further, there are rules of *administrative* procedure, indicating, for example, how environmental law or tax law can be enforced. The European Union has its own procedural rules, which govern, among others, the operation of the Court of Justice of the European Union.

1.3 «Functional» Fields of Law

European Union law is not the only field of law that does not sit well within the established divisions between public and private law and between substantive and procedural law. In fact, there are many fields of law that have traits of both private and public law and/or both substantive and procedural law. Those fields of law are sometimes called «functional» fields of law because they are characterized by the function they fulfill rather than by belonging to one of the main areas of law. The function then consists mainly of the topic that is regulated by the field, such as the European Union (EU law), the environment (environmental law), or information and communication technology (ICT law).

The relationship between the main areas of law and the functional fields can be depicted as in ◘ Fig. 3.1.

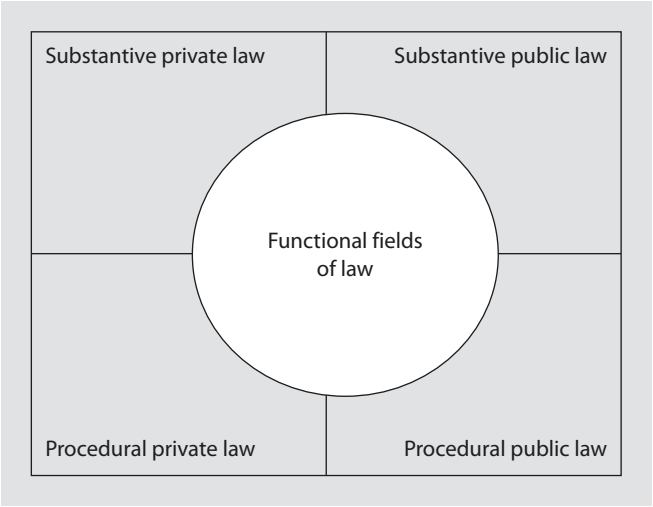

Fig. 3.1 Functional fields of law

2 Legal Subjects

Legal rules impose duties upon and attribute competences and rights to legal subjects. These legal subjects are typically human beings, but in theory law can give the status of a legal subject to anyone or anything it wants. For example, a foundation, a company with limited liability, a State, or a municipality, can—and in many countries do—be counted as legal subjects. Under the law, human beings are called «natural persons» (*personnes physiques*, *natürliche Personen*), while organizations that have received the status of legal subjects are called «legal persons» (*personnes morales*, *juristische Personen*).

The consequences of being a legal subject vary from one field of law to another. In criminal law, being a legal subject means to be addressed by rules of criminal law and to become punishable in case of violation. Natural persons are legal subjects in this sense, but it is not evident that legal persons are also addressed by criminal law rules. For instance, it is not immediately clear that one can speak about an «intention to act» in case of a municipality, even though an intention is an essential condition for many crimes.

Furthermore, natural persons are protected by the human rights that are assigned to them. They have a right to privacy, freedom of expression, freedom of religion, and a right to physical integrity. Not all of these rights make sense when

applied to legal persons. It is conceivable, for instance, that a legal person such as a newspaper company exercises its freedom of expression. Conversely, it is not immediately clear what the protection of physical integrity would mean in the case of legal persons.

In private law, legal subjects have rights, such as property or a claim to be paid money, and legal subjects can perform juridical acts. These consequences pertain to both natural and legal persons. For example, both a natural person and a foundation can own property and are able to contract.

3 Rules, Operative Facts, and Legal Consequences

Structure of Rules

A common understanding of law is that it consists of rules that prescribe behavior. However, there are also rules that give definitions, create rights and competences, define procedures, and fulfill still other functions. Although there are many different kinds of legal rules, most of them can be analyzed as having a conditional structure. They have a condition part, which states when the rule is applicable, and a conclusion part, which indicates what the consequences are when the rule is applied. This structure of rules is not always obvious from the literal wording of the rule. Take, for instance, Book 1, ► Sect. 7.1 of the German Civil Code, which reads (if translated into English):

> A person who settles permanently in a place establishes his residence in that place.

With some good will, the following conditional structure can be discovered in this statutory provision:

» If P settles permanently in a place
Then P has established his residence in that place

where «P» stands for an arbitrary person.

Operative Facts and Legal Consequences

A legal rule is applicable to a case if the facts of the case satisfy the conditions of the rule. The facts of a case that match the conditions are called *operative facts*. A fact can only be an operative fact if a rule attaches *legal consequences* to it. For instance, if Claus Ziegler settled himself permanently in Bonn, this is an operative fact because the rule in ► Sect. 7.1 of the German Civil Code attaches to this fact the legal consequence that Claus Ziegler has established his residence in Bonn.

Other examples of operative facts are:

- Someone passes away. This has the legal consequence that the property of the deceased person is inherited by his heirs.
- Someone is the owner of a book. This has the legal consequence that this person will be competent to alienate the book (alienation is moving ownership to somebody else).
- A legislator creates a statute. This has the legal consequence that new rules come into existence.
- A court sentences a criminal suspect. This has the legal consequence that it becomes allowed to incarcerate this person.

4 Juridical Acts

Law is dynamic, both in the sense that the rules change over the course of time and in the sense that the legal positions of individual persons are subject to modifications. An example of the latter is that Jeanine Dabin was the owner of a Lamborghini sports car, and then because she sold it, she was no longer the owner. Some of these changes occur spontaneously; when a baby is born, it immediately has the right to privacy, or when a building collapses, the possessor of the building becomes liable for damages. However, not all operative facts just happen; some of them were brought about intentionally. If Jeanine Dabin sold her car, she intentionally brought about her loss of ownership of the car.

It is attractive if legal subjects, whether they be private citizens, organizations, or government agents, are able to change legal positions and legal rules as they deem fit. This adds to the autonomy of these agents. Of course, not everyone should be able to bring about any change he likes. Private persons should, for example, not be able to appropriate what belongs to others nor should they be able to marry two other persons who do not want to be married. A municipal legislator should not be able to create rules that apply to everyone in the world, and the EU should not be able to prohibit European citizens from expressing their opinions. However, within certain limits, legal subjects should have the power to intentionally change legal positions or even legal rules. This power is given to them through the possibility to perform juridical acts. Examples of juridical acts are contracts, last wills, legislative acts, judicial decisions, and administrative dispositions.

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The phenomenon of juridical acts exists in most, if not all, legal systems of the world. The concept of a juridical act, however, has mainly become popular in the legal systems that belong to the civil law tradition. In common law countries, one rather speaks of the exercise of a legal power. A consequence of this difference between legal cultures is that the English term «juridical act» has not reached the level of general usage.

Intention

Legal subjects perform juridical acts with the intention to bring about legal consequences. The very idea of a juridical act is that its performance leads precisely to these intended consequences. If one wants to know what the legal consequences of a juridical act are, the first place to look is at the intention of the agent.

For example, legislation is a juridical act. If a State agent legislates, the typical legal consequence is either that a new law is created in line with what the agent had intended or that rules the agent intended to repeal are repealed. If two parties enter into a contract—another juridical act—the legal consequences are in the first place those which the parties wanted to bring about.

Definition

A *juridical act* is an act performed with the intention to bring about legal consequences, specifically one where the law connects legal consequences to the act for the reason that they were intended. If Daniel contracts with Rebecca that he will paint her house, he does so with the intention to undertake a legal obligation. Because of this intention, Daniel is bound by the contract. However, if Johnnie commits a murder, it does not matter whether he had the intention to bring about the legal consequence that he is criminally liable, because the law attaches the legal consequence independently of his intention. This shows that murdering someone is not a juridical act, even though it has legal consequences.

Alternative expressions for «juridical act» in English are «legal act» and «legal transaction.» More common is the German term «Rechtsgeschäft» or the French term «acte juridique.» In Germany, the notion of a juridical act is confined to private law. This means that legislation, judicial decisions and administrative dispositions, which belong to public law, would not count as juridical acts in Germany.

Factual Acts

Sometimes it is useful to dispose of terminology to refer to acts that are not juridical acts. For instance, a municipality can pursue its parking policies both by creating prohibitions (which is a juridical act) and by making it physically impossible to park in certain places. We will use the expression «factual acts» to refer to acts, usually performed by the

administration, that are not aimed at creating legal consequences.

Formalities

Sometimes the performance of a juridical act requires that formalities are respected. Only if these formalities are taken into account will the act in question, for instance, signing a document in the presence of two witnesses, count as making a last will. This is also very clear in the case of legislation: a legislator must follow precisely specified steps in order to create a valid law. Other juridical acts have no formal requirements. Most contracts fall under this category; they come into existence merely through the exchange and the intention to create legal consequences.

Competence

We have already seen that not everyone can bring about a legal consequence by means of a juridical act. To begin with, juridical acts such as legislation that belong to the sphere of public law cannot be performed by ordinary citizens. Moreover, private persons cannot impose obligations on persons other than themselves. In general, there is a limitation on the kinds of juridical acts that can be performed by particular agents and on the kinds of legal consequences that can be brought about by means of juridical acts. This limitation is evidenced by the fact that one can only bring about particular legal consequences by means of a juridical act if one has the competence to do so.

Sometimes the act has legal consequences, despite the incompetence of the agent, because the act has created justified expectations that the laws want to honor. For instance, if a public servant has granted a building permit without having the relevant competence, legal certainty may nevertheless require that the permit remain valid, at least until it has been avoided.

The competence to create legal consequences by means of juridical acts is typically attached to a legal status by a legal rule. For instance, if an organization is the parliament of a country (a legal status), a legal rule may attach to this status the fact that this body has the competence to legislate. If somebody owns a house (another legal status), a legal rule attaches to this right of ownership the competence to sell the house to somebody else. Another rule attaches a competence to the bank which has a mortgage on the house, in case the owner does not repay his debt to the bank. If someone is the mayor of a city, a legal rule attaches to this fact the competence to make emergency regulations for her city.

Nullity, Validity, and Avoidance

If a person or an organization attempts to perform a juridical act for which they lack the relevant competence, the act in question will normally not have the intended legal consequences. The act is then said to be *null and void*.

If the intention of an agent to create a particular legal consequence was brought about in the wrong way, for instance, because the agent was cheated, the juridical act is typically still *valid*, meaning that it retains its legal consequences. However, the law often gives such an agent the competence to *avoid* the juridical act. If a juridical act is avoided, its legal consequences are taken away retrospectively. This means that the law treats the juridical act as if it never had been valid and never had any legal consequences. Sometimes the agent can avoid his juridical act himself, but it is also possible that a judicial decision is required for the avoidance. After avoidance, a juridical act is null and void.

Grounds for Avoidance

There are several possible reasons why a juridical act is avoidable. One of them is that the intention of the agent was brought about in a wrong way. An example would be that a crook puts a false signature under a painting and succeeds in selling the painting for far more than its actual value. The intention to buy this painting was therefore brought about in a wrong way.

Another reason would be that a public officer has made a legal mistake in refusing a license. The applicant for the license may ask a court to avoid this refusal.

Yet another example of why a juridical act may be avoidable is that its content is in some way undesirable. If a municipality makes a bylaw that violates one of the human rights enshrined in the constitution or a human rights treaty, this bylaw is avoidable. That would, for instance, be the case if the municipality prohibited the exercise of a particular religion.

In private law, undesirable content often leads to nullity, rather than avoidability, of a contract. If a hired killer contracts to murder an enemy of his contract partner, the contract will be null and void, both because the contract conflicts with existing law and because it is immoral. This difference between public and private law can be explained by the demands of legal certainty. In public law, administrative and legislative acts that are «wrong» are nevertheless often considered to be valid, because legal certainty demands this. However, in private law the demands of legal certainty are often less strict, which makes the sanction of nullity possible.

5 Duties, Prohibitions, and Permissions

Two of the most important notions in law are those of «duty» and «right». It is sometimes thought that the two are closely related in the sense that the duty of one person corresponds to the right of another and vice versa. As we will see, this is often not the case.

5.1 Duties and Prohibitions

If somebody has a duty to do something, this means that he is obligated to do it. Every duty has two elements:

1. The agent who has the duty
2. The kind of action which the agent is obligated to perform

Addressees

Duties are meant to guide persons in their behavior. This means that duties are always addressed to one or more specific agents. We use the general term «agent» because not only natural persons but also groups and organizations can have duties.

For instance, John Doe has the duty to stop when the traffic light is red; John and Jean Doe have the duty to clean away the snow from the pavement in front of their house; the Apple Company has a duty to treat its employees in a decent way.

Duty-Imposing Rules

Duties are typically imposed on agents by a rule that attaches the duty to a particular status of the agent. For instance, only car drivers have the duty to turn on their car lights when it gets dark. The rule mentions car drivers in general, while the duty pertains to individual agents who happen to drive cars. Another example would be the rule that natural and legal persons with taxable incomes have the duty to make a yearly tax declaration. This rule imposes a duty on Alphabet (the company that owns Google) to make a yearly tax declaration. Some rules impose duties on everybody. An example is the rule not to torture. Rules that impose duties are also called «mandatory rules».

Content of Duty

Every duty has a *content*, which indicates what the addressee of the duty is obligated to do. The action that a duty prescribes can either be doing something or abstaining from doing something. An example of a duty to do something is the duty to pay one's income tax. An example of a duty to abstain from doing something is the duty not to commit theft. A *prohibition* is nothing other than a duty to refrain from doing something. The duty not to commit theft is therefore the prohibition of theft.

5.2 Permissions

If an agent is permitted (allowed) to perform some kind of action, this means that the agent is not forbidden to perform that kind of action. For instance, if Maria is allowed to walk

on the lawn, this means that Maria is not prohibited from walking on the lawn or that Maria does not have the duty not to walk on the lawn.

It is generally assumed that everybody is allowed to do anything that has not been explicitly forbidden. This means that if there is no rule that forbids the agent to do something, and if nobody forbade the agent to do it, the agent is allowed to do it. Permission is thus usually the mere absence of a prohibition; no permissive rule or explicit permission is required. For instance, if there is no applicable rule forbidding Maria to walk on the lawn, and no competent person forbade her to do so, Maria has permission to walk on the lawn.

Nevertheless, law has a function for permissive rules and explicit permissions. This function is to make an exception to what is generally forbidden. Police officers, for instance, are usually permitted to perform a body search on suspects of serious crimes. This permission is not merely the absence of a prohibition. In fact there *is* a prohibition against such an action: it is generally forbidden to search persons in this way. However, next to this general prohibition, there is an exception for the police. Police officers are permitted to do what no one else may do, namely, to search, interrogate, and apprehend suspects of serious crimes. While this permission applies only to police officers, it applies to police officers in general and is therefore based on a permissive rule.

Permissions are also often the result of a juridical act by which a permission is granted. If the lawn belongs to Dietmar, nobody else is permitted to walk on it, unless Dietmar gives permission. Giving permission is a juridical act through which an exception is created on a general prohibition. If Dietmar authorizes Maria to walk on the lawn, Maria has permission/is allowed to do so. This permission only applies to Maria; it is therefore not based on a permissive rule but on the explicit permission given by Dietmar.

Permission and Competence

Two concepts that are easily confused are those of permission and competence. Nevertheless, there are clear differences between the two. Competence is a precondition for the intentional creation of a legal consequence *by means of a juridical act*. If one tries to perform a juridical act for which one lacks the required competence, one will normally not succeed in bringing about any legal consequence. However, an attempt to do so is not necessarily illegal.

For instance, if an ordinary citizen tries to create a statute, this is not necessarily illegal, but an attempt to do so will not result in the intended consequence (the legislation will be consid-

ered non-existent or void) because ordinary citizens lack the required competence.

Permission has to do with what one is allowed to do. Any kind of action, whether juridical or ordinary, may be the object of permission. If an act is done without having the necessary permission to do so, this amounts to a norm violation or perhaps an unlawful act.

The difference between competence and permission becomes especially clear when it is approached from the perspective of a legislator who wants to prevent certain kinds of behavior. If the behavior in question is a juridical act, for instance, selling drugs, his task is quite easy. The only thing the legislator has to do is to make sure that no one has the competence to sell drugs. That can easily be done by means of legislation. Without competence, it is impossible to buy or sell, and as such the trade of drugs can be removed from the world by means of simple legislation.

Legally speaking, the argument above is correct: without competence it is not possible to buy or to sell, since sales contracts are juridical acts. However, it is still possible to give somebody drugs and to take money in exchange, because those are both purely factual acts. What is made impossible by legislation is the creation of an obligation to deliver the drugs and an obligation to pay money for them.

If the legislator wants to prevent something that is not a juridical act, the task is more difficult. Often the best that can be done is to prohibit the undesired behavior and use the threat of sanctions in case the prohibition is violated. This may work, but there is no guarantee. For example, a prohibition against speeding on the road is easily violated.

As an alternative, the administration can make some kinds of behavior physically impossible, for instance by making a road so rough that it is impossible to drive faster than 30 miles an hour.

6 Competences and Immunities

An agent exercises a competence by performing the juridical act for which this competence is required. Parliament exercises its competence to make legal rules by legislating; the owner of a book exercises his competence to alienate the book by selling it. Sometimes the performance of a juridical act has as an immediate legal consequence, changing the legal position of the agent or of someone else related to the act. For

example, if two parties enter into a contract, they not only change their own legal positions by undertaking obligations but those of their counterparts as well, by giving them rights.

The possibility that an agent changes the legal position of someone else seems problematic, especially if the change involves the imposition of a burden and if the agent is not a public authority. If Jan and Catalina are private persons, Jan should not be able to alienate Catalina's book, and Catalina should not be able to impose duties on Jan. Jan and Catalina are not able to do so because the acts in question are juridical acts, and Jan and Catalina lack the required competences.

The flip side of an agent lacking the competence to modify someone else's legal position is that this other person is *immune* to having his or her legal position modified by the agent. Catalina is immune to Jan alienating her book, while Jan is immune to Catalina imposing duties on him.

In private law, legal subjects are generally immune to having their legal positions modified by other legal subjects. However, they have the required competence for, and are therefore not immune to, the modification of their own legal positions. In public law, this is different: public officers often do have the competence to modify the legal positions of private citizens. A tax inspector can impose a duty to pay income tax on a citizen, a parking officer can fine the driver of a wrongly parked car, a public servant can grant a building permit, and a court can sentence a defendant to pay damages. Citizens are generally not immune to having their legal positions modified by public officers.

7 Rights as Pincushions

There are many different kinds of rights which differ considerably from each other. If one seeks a common denominator for the different kinds of rights, there are two characteristics that most (but not all) rights share. One is that rights represent interests that are protected by law. The other characteristic is that rights are like pincushions. They are points in legal space where other legal positions are grouped together, analogous to how a pincushion group pins together. These «other legal positions» include permissions, duties, prohibitions, powers, and immunities, in different combinations and with different contents for different rights (◘ Fig. 3.2).

The different kinds of rights can, with some good will, be grouped under three headings, that is, rights against a person (*rights in personam* or claims), rights on an «object» (*rights in*

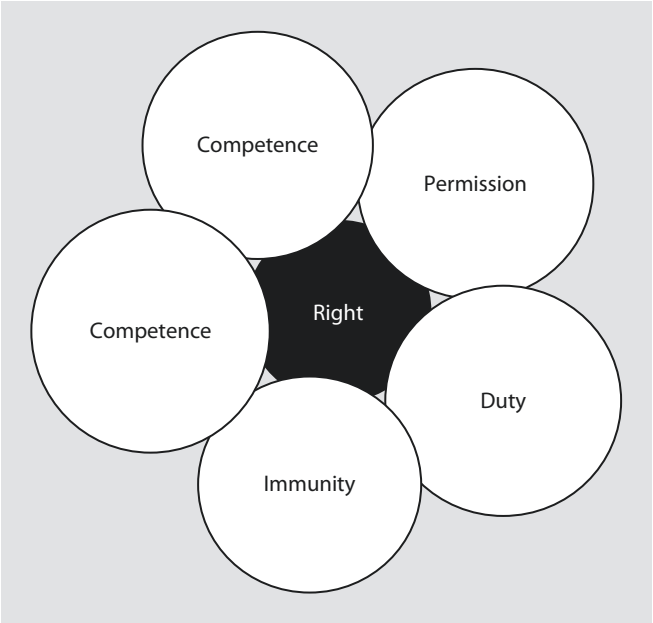

Fig. 3.2 Rights as pincushions

rem or *property rights*), and human or fundamental rights. ► Section 8 discusses claims and their counterparts and obligations. ► Section 9 will deal with property rights, and ► Sect. 10 covers a few fundamental rights.

8 Claims and Obligations

Personal rights, which are also called «claims» or «relative rights», mainly belong to the field of private law and are the counterparts of obligations in a narrow sense. Legal obligations are the results of events to which private law attaches an obligation as its legal consequence. Typical examples of such events are contracts and the unlawful actions that are grouped together under the denominator «torts». Take, for instance, a sales contract. When two parties enter into a sales contract, the seller has the obligation to deliver what he has sold, and the buyer has a corresponding right to its delivery. This right is only directed to the seller and is therefore a personal right or a claim. The word «obligation» is used both to describe the obligation that is the counterpart of the claim («obligation» in the narrow sense) and to describe the combination of the obligation in the narrow sense and the claim that resulted

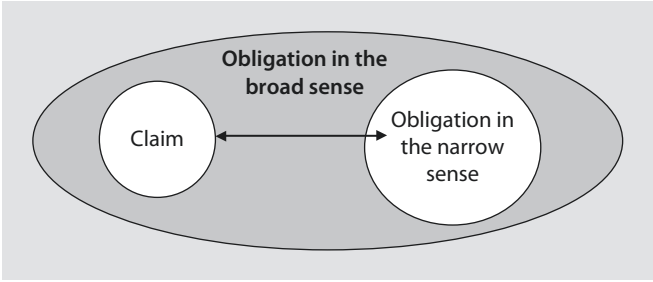

Fig. 3.3 Obligations in the wide and narrow sense

from the contract or the tort («obligation» in the broad sense). From now on, we will use the word «obligation» to refer to obligations in the narrow sense only (Fig. 3.3).

Obligations and Duties

Obligations and duties are quite similar. In fact, in English legal literature, the words are used interchangeably. In the civil law tradition, however, for every obligation there is a creditor, while in the case of duties there is not. Therefore, the word «obligation» refers to what a person, the debtor, is obligated to do in favor of another person, the creditor. For example, if Antonia borrows €5.000 from William, she has an obligation *toward William* to repay the money. If Gerald approaches a red traffic light, he has the duty to stop, but this is not a duty toward someone in particular. This difference in directedness—obligations being directed to someone while duties are not—is reflected in the counterpart of an obligation, the claim, or personal right. If Antonia has an obligation toward William, William has a claim against Antonia. There are no claims corresponding to duties.

However, if somebody violates a duty, and damage results, the law may attach an obligation to compensate the damage to this violation. This obligation has a corresponding claim.

What a Claim Involves

A claim is more than merely the flip side of an obligation. Like other rights, it is best seen as a point in legal space where several legal positions are joined together, attached to the claim.

One of these positions is the competence to transfer a claim. If William transfers his claim against Antonia to Mark, Mark will be the new claim holder. This means that the content of Antonia's obligation has changed: after the transfer, she is obligated to pay €5.000 to Mark and not to William. Moreover, if William transfers his claim to Mark, all the competences that are attached to the claim also move from William to Mark.

Another possible legal position attached to a claim is the competence to enforce that claim. If Antonia does not repay the €5.000 to William, William can start a court procedure which may end with a bailiff enforcing the claim against Antonia.

Finally a claim holder has the competence to waive his right. If William informs Antonia in the proper way that she no longer has to repay the money, this will end both Antonia's obligation and William's claim.

As we can see, a claim held by a creditor does not only involve an obligation on the side of the debtor but also a number of competences for the claim holder. Neither the obligation nor the competences are identical to the claim, but having a claim involves the presence of the obligation and the competences. If a claim is transferred, the content of the corresponding obligation is adapted, and the associated competences move with the claim to the new holder.

9 Property Rights

Where claims correspond to obligations and are therefore rights that correspond with doing or not doing something, property rights are the relations between the right holder and the object of the right (the property). The most familiar example of such a right regarding an object is the right of ownership, which the owner has with regard to the owned object. Other examples of property rights are copyright and mortgage.

The term «property right» is somewhat misleading, because it suggests that there is always property in the sense of ownership. Perhaps the expression of a «right regarding an object» describes more precisely the definition of property rights. However, since the name «property right» is well established, we will use it here too.

What distinguishes property rights from claims is that the latter can only be invoked against the specific person who is bound by the corresponding obligation, while the former can potentially be invoked against everyone. In Latin, the property right is therefore a right *erga omnes*. The owner of a car, for instance, can in principle invoke his ownership against everyone who happens to have the car in his possession.

The French speak of this as a «droit de suite»; a right to follow the object of the right wherever this object may find itself.

A property right on a physical object normally involves a general prohibition against everyone except the right holder to use, damage, or destroy the object of the right. The property right then typically involves a permission for the right holder to use, damage, or destroy this object.

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For example, if Johannes owns a car, no one is allowed to use the car, except for Johannes.

The holder of a property right typically has the competence to transfer his property right to somebody else. Moreover, he also has the competence to give other persons permission to do things with the property which would normally count as infringements of the right.

Johannes is competent to transfer the ownership of his car to Dorothée. Moreover, he can give André permission to use his car.

10 Fundamental Rights

Fundamental rights, such as the freedom of religion, freedom of expression, freedom of association, the right to bodily integrity, but also the right to privacy, the right to health care, the right to schooling, and the right to employment, are traditionally seen as the rights which human beings hold against their governments. These rights are also known as «human rights», and as they are seen as rights against governments, they can often be found in constitutions. This heading should not bother us here; the issue that needs to be discussed at this point is what these fundamental rights involve. Thus, the main message is that although the common denominator of «fundamental rights» may suggest the contrary, there is little that all the respective fundamental rights actually have in common. To show that this is the case, we will take a closer look at three of these rights.

The Right to Bodily Integrity

Let us start from the assumption that fundamental rights are first and foremost rights against the government, which bears a duty corresponding to the right. In this respect, they are like relative rights, which are also rights against a specific legal subject. However, unlike relative rights, the right to bodily integrity does not belong to an obligation in the broad sense, and the right does not originate from a specific event as relative rights do.

The holder of the right to bodily integrity has the competence to enforce this right through a judicial procedure. Moreover, he has the competence to waive his right by giving

permission to affect his body, for instance, for a medical operation. However, such a waiver does not end the right to bodily integrity as it would for a personal right. A permission for a single operation does not mean that from that moment on, the government has permission to affect the body of the right holder.

The right holder does not have the competence to transfer his right of bodily integrity to someone else. It is not even clear what such a transfer would mean. Moreover, he is immune to someone else taking his right away.

Freedom of Expression

The freedom of expression involves not only a prohibition for the State to withhold legal subjects from expressing themselves but also an immunity. However, it is not a permission. The holder of this right is permitted to express his or her opinions, but since there is no general prohibition to do so, the right does not add anything to the permission that consists in the absence of a prohibition. The very point of the freedom of expression is that the government lacks the competence to prohibit the expression of opinions. Because the government lacks this competence, the right holder enjoys an immunity against having her permission to express herself taken away by the government, for instance, through legislation that curbs free expression.

The right holder also has the competence to enforce her freedom of expression through a judicial procedure against the government. For instance, the right empowers courts not to apply legislation that would infringe upon the freedom of expression.

The right holder does not have the competence to waive her right against the government; however, she can waive her right to the extent that it is also a right against private legal subjects. For instance, a labor contract may include the clause that the employee is not permitted to talk about secret company information. Such a clause would not be null and void because it violates the freedom of expression.

The Right to Health Care

The right to health care is partnered with the duty of the State to provide adequate health care. However, the right does not involve the competence of a private person to enforce this State duty. This is perhaps because it is not sufficiently specified what the duty of the State actually involves in fulfilling this right. In this respect, the right to health care differs from the right to bodily integrity.

It is unlikely that the holder of a right to health care can transfer his right to somebody else or is competent to waive his right. Moreover, he is immune against having his right taken away through actions of the State.

Conclusion

The rights to bodily integrity, free expression, and health care turn out to involve rather different combinations of duties, permissions, competences, and immunities. This goes to show that there is no common measure for what a fundamental right is. Moreover, personal rights and property rights do not only differ from each other but also from all kinds of other fundamental rights. The only thing that rights seem to have in common is that they protect an interest of the right holder and that they function as points in legal space in which duties, obligations, permissions, competences, and immunities are tied together in various combinations.

Recommended Literature

Hohfeld WL (1920) Fundamental legal conceptions as applied in judicial reasoning, and other legal essays. Yale University Press, New Haven