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Anglais Juridique I

Plaquette de Travaux Dirigés

Institut de Droit des Affaires Internationales (IDAI)

2021-2022

Section 4: Sources of rules of law in the different legal systems

Duration: 1 hour 30 minutes

Presentation:

During this chapter, the student must learn the differences between legal systems and the sources of rules of the main two legal systems: Civil law, common-law, and European rules.

The below documents are complementarians to the lectures added to the students in order to be able to prepare for the lecture, review his/her notes, deepen his/her knowledge, and might also help for the preparation for the exam, however, the latter shall be mainly based on the lectures.

Exercise: Exercise: Oral presentation related to the following question: Is the Civil Law system practically different from the Common-law system?

- The student shall conduct legal research with regards to the above proposed subject.
- The student shall prepare his thoughts, arguments, and questions in order to be part of a fruitful discussion during the lectures.

Mr. Abdelrahman MAHDY

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edition 10

Introduction to Law and the Legal System

Frank August Schubert

III

Institutional Sources of American Law

CHAPTER OBJECTIVES

1. *Identify the primary sources of American law.*
2. *Summarize each source's formal role in the making of American law.*
3. *Explain important aspects of our federal form of government such as federal supremacy, the police power of the states, full faith and credit, and conflict-of-laws rules.*
4. *Explain the judicial doctrine known as stare decisis.*
5. *Describe the fundamental differences between civil law and common law legal systems.*

It is important to understand that the rules constituting American law derive from several authoritative sources. The most important of these are the federal and state constitutions; legislation produced at the federal, state, and local levels of government; decisions of federal and state courts; and the regulations and adjudicatory rulings of federal, state, and local administrative agencies. In this chapter we preview each of these major sources of law and focus on the legislative and judicial branches of government.

COMMON LAW AND CIVIL LAW LEGAL SYSTEMS

From your reading of Chapter I, you have already seen how the English common law system developed over many centuries.[1] You know that as judges decided cases, rules slowly evolved and became recognized as judicial precedents, which began to be written down and followed. These practices made it possible for cases raising a particular issue to be decided in essentially the same way throughout England. With its emphasis on judge-made law, this approach differs markedly from the legal systems found in France, Germany, and Italy. Those countries follow a different approach, often referred to as the civil law system.[2]

Civil law systems are based upon detailed legislative codes rather than judicial precedents. Such a code is a comprehensive, authoritative collection of rules covering all the principal subjects of law. Civil law codes are often developed by academicians and then enacted by legislative bodies. They are based on philosophy, theory, and abstract principles. Civil law systems usually reject the use of precedent, dispense with juries in civil cases, and avoid complex rules of evidence. In civil law countries, judges are expected to base their decisions on the appropriate provisions of the relevant code, and they do not treat the decisions of other judges as authoritative sources.

The civil law tradition traces its roots to historically famous codes of law such as ancient Rome's **Corpus Juris Civilis** and the **Code Napoleon**. At present, Europe, Central and South America, the Province of Quebec, and the former French colonies of Africa have adopted the civil law system.

Although the common law system has had much more impact on American law, the civil law system has been of increasing influence. For example, early-nineteenth-century American legislatures wanted to replace the complex and ponderous system of common law pleading, and reformers campaigned in favor of replacing the traditional reliance on judge-made law with legislated codes. Today, codes of civil procedure regulate litigation in all federal and state courts. Many states have taken a similar approach with respect to probate law, criminal law, and commercial law. State legislatures in forty-nine states, for example, have adopted the Uniform Commercial Code to replace the common law with respect to the sale of goods. (Louisiana is the holdout.)

CONSTITUTIONS

The United States in its Constitution has adopted a federal form of government. Like the federal government, each of the fifty states is sovereign with a written constitution and legislative, executive, and judicial branches of government. The written constitution is the fundamental source of the rule of law within each jurisdiction. It creates a framework for the exercise of governmental power and allocates responsibility among the branches of government. It authorizes and restrains the exercise of governmental authority, protects fundamental rights, and provides an orderly vehicle for legal change. Laws and governmental actions that violate its terms are unconstitutional.

The U.S. Constitution grants certain powers to the federal government in Article I, such as the rights to regulate interstate commerce, operate post offices, declare war, and coin money. The states, however, retain many important powers and can implement significant change by enacting statutes and by amending their state constitutions. One strength of our federal form of government is that states can innovate and experiment without having to obtain permission from other states. Nebraska's constitution, for example, provides for a unicameral legislature (the only state to do so); Oregon's laws provide persons who are terminally ill with the option of physician-assisted suicide; Vermont was the first state to legalize civil unions; and Massachusetts was the first state to issue marriage licenses to same-sex couples. Because of federalism, it is not unusual for states to provide their residents with greater substantive and procedural protections as a matter of state law than are required by the U.S. Constitution.

LEGISLATION

To maintain social harmony, society needs uniformly operating rules of conduct. The responsibility for determining the rules lies primarily with legislative bodies. The legislative branch creates law by enacting statutes. An examination of legislation reveals the problems and moods of the nation. Legislatures write history through the legislative process. There have been legislative reactions to almost all political, social, and business problems that have faced society. Laws have been passed in response to wars, depressions, civil rights problems, crime, and concern for cities and the environment. Checks and balances have been built into the system in order to prevent overreaction by the legislature and to promote wise and timely legislation.

The process of enacting statutes is lengthy and complex. At the federal level, it is a procedure that involves 535 persons in the House and Senate who represent the interests of their constituents, themselves, and the country. A proposed bill may encounter numerous obstacles. Mere approval by the legislative bodies does not ensure passage, for at both federal and state levels the executive branch has the power to veto a bill. Another check on legislation can come once a bill becomes law. At that point, the constitutionality of the legislative act may be challenged in court.

With the exception of bills for raising revenue, which must originate in the House (Article I, Section 7 of the Constitution), it makes no difference in which body a bill is introduced, because a statute must be approved by both houses of the legislature. However, the legislative process varies slightly between the Senate and House. If differences exist between the House and Senate versions of a bill, a joint conference committee meets to reconcile the conflicts and draft a compromise bill.

After a bill has been approved by both houses and certain formalities have been completed, it must be approved and signed by the president of the United States to become effective. If the president vetoes a bill—which rarely occurs—it does not become law unless the veto is overridden by a two-thirds vote of both houses.

Defeat of a bill is far more common than passage. More than 95 percent of all legislation introduced is defeated at some point. Still, much legislation *is* signed into law each year. Legislative death can result at any stage of the process, and from many sources. For legislation to be successful in passing, assignment to the proper committee is crucial. However, committees can be cruel. They may refuse to hold hearings. They may alter a bill completely. Or they may kill it outright. If a proposed statute survives the committee stage, the House Rules Committee or the Senate majority leader determines the bill's destiny. Once a bill reaches the floor of the House or Senate, irrelevant proposals—known as riders—may be added to it. Or drastic amendments can so alter it that it is defeated. The possibilities are almost endless.

The need for certainty and uniformity in the laws among the states is reflected in federal legislation and uniform state laws. A great degree of uniformity has been accomplished among the states on a number of matters. An important example is the **Uniform Commercial Code** (UCC). With increased interstate business operations, business firms pressured for uniform laws dealing with commercial transactions among states. Judges, law professors, and leading members of the bar drafted the UCC for adoption by the individual states. The UCC was first adopted by the Pennsylvania legislature in 1953, and has now been adopted at least partially in all fifty states. The UCC covers sales, commercial paper, bank collection processes, letters of credit, bulk transfers, warehouse receipts, bills of lading, other documents of title, investment securities, and secured transactions.

The Power to Legislate

Legislative bodies are organized in accordance with the provisions of the U.S. and state constitutions, and are entrusted with wide-ranging responsibilities and powers. These powers include enacting laws, raising taxes, conductinginvestigations, holding

Article I, Section 8 of the U.S. Constitution

The Congress shall have the power…

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes …

FIGURE 3.1 The Commerce Clause

hearings, and determining how public money will beappropriated. Legislatures play a major role in determining public policy. It is widely understood, however, that today's legislatures actually share policymaking duties with the executive and judicial branches and with administrative agencies.

Federal Government

The federal government cannot exercise any authority that is not granted to it by the Constitution, either expressly or by implication. The U.S. Constitution, in Article I, Section 8 and in authorizing sections contained in various constitutional amendments, enumerates the powers granted to the Congress. The powers that the Constitution delegates to the federal government are comprehensive and complete. They are limited only by the Constitution. The power to regulate interstate commerce is one of the most important of the expressly delegated powers.

From 1900 until 1937, the U.S. Supreme Court often followed a formalistic approach in its interpretations of the Commerce Clause. The justices severely limited the scope of this clause in a series of controversial cases. The Court, for example, rejected Congress's claim that Article I, Section 8, permitted the federal government to address problems resulting from indirect as well as direct impacts on interstate commerce,[3] and it defined interstate commerce very narrowly in cases in which Congress sought to regulate mining,[4] protect workers wishing to join labor unions,[5] and discourage the use of child labor in factories.[6]

The Supreme Court reversed its direction in 1937 and began to defer to Congress in cases where a rational connection existed between the legislation and commerce. The Court often used the Necessary and Proper Clause in conjunction with the Commerce Clause to justify extensions of federal authority.[7] In one case it upheld a federal act that was jurisdictionally based on indirect effects on interstate commerce and that authorized the use of injunctions against companies engaging in unfair labor practices,[8] and in a second case it upheld minimum wage legislation.[9] The continued viability of the "deferential" standard was called into question because of the Court's decision in *United States v. Lopez*, a case in which the U.S. Supreme Court ruled that Congress did not have authority under the Commerce Clause to enact the Gun-Free School Zones Act of 1990.

INTERNET TIP

You can read edited versions of *United States v. Lopez* and the U.S. Supreme Court's recent 2010 decision in *United States v. Comstock* with the Chapter III materials on the textbook's website. In *Comstock*, the justices considered whether Congress's reliance on the U.S. Constitution's Necessary and Proper Clause was sufficient authority to enact the Adam Walsh Child Protection Act of 2006. The federal district court and court of appeals had ruled that Congress had exceeded its legislative powers. The Adam Walsh law, also known as 18 U.S.C. Section 4248, provided a process by which federal prisoners with mental illnesses who had been previously classified as "dangerous sexual offenders " could continue to be detained indefinitely after the expiration of their prison sentences.

The U.S. Supreme Court in 2005 had to decide whether Congress had the right under the Commerce Clause to prohibit California and eight other states from statutorily permitting the cultivation and use of marijuana for medicinal purposes.

Angel Raich and Diane Monson, the plaintiffs in the trial court, were both experiencing excruciating pain because of serious illnesses. They unsuccessfully tried to alleviate this pain with conventional medications. But when these medications proved ineffective, they obtained prescriptions written by their board-certified physicians that allowed them to use marijuana to treat the pain. Monson, in addition to using marijuana for pain relief, also grew marijuana for her own medicinal use. Both the women, as well as their physicians, concluded that the marijuana had been effective in alleviating their pain.

Federal and state officers jointly investigated Monson's cultivation and use of marijuana, with the state officers concluding that she was acting lawfully under California law. The federal officers, however, took a different view and seized the plants, believing Monson's possession and use of this controlled substance to be a violation of the federal Controlled Substances Act (CSA). Raich and Monson then filed suit in the **U.S. District Court** (a federal trial court) seeking a **prohibitory injunction** (a court order prohibiting the enforcement of the CSA against Raich and Monson because of their cultivation and/or use of medicinal marijuana). Although the district court ruled against the women, the **U.S. Court of Appeals** (the primary appellate court in the federal system) for the Ninth Circuit reversed the district court and ruled in favor of Raich and Monson. The justice department then successfully petitioned the U.S. Supreme Court to agree to decide the case.

Alberto R. Gonzales v. Angel Raich
545 U.S. 1
U.S. Supreme Court
June 6, 2005

Justice Stevens delivered the opinion of the Court.
California is one of at least nine States that authorize the use of marijuana for medicinal purposes.…The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution "make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

I
California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana …and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996…The proposition was designed to ensure that "seriously ill" residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need.…The Act creates an exemption from criminal prosecution for physicians,…as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician…A "primary caregiver" is a person who has consistently assumed responsibility for the housing, health, or safety of the patient.…

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of

conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as "John Does," to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive…relief prohibiting the enforcement of the federal Controlled Substances Act (CSA)…to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. In their complaint and supporting affidavits, Raich and Monson described the severity of their afflictions, their repeatedly futile attempts to obtain relief with conventional medications, and the opinions of their doctors concerning their need to use marijuana. Respondents claimed that enforcing the CSA against them would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity.

The District Court denied respondents' motion for a preliminary injunction.…

A divided panel of the Court of Appeals for the Ninth Circuit reversed and ordered the District Court to enter a preliminaryinjunction.…

The obvious importance of the case prompted our grant of certiorari.…The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally.…

II

Shortly after taking office in 1969, President Nixon declared a national "war on drugs."…As the first campaign of that war, Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs.… That effort culminated in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.…

This was not, however, Congress' first attempt to regulate the national market in drugs.

Rather, as early as 1906 Congress enacted federal legislation imposing labeling regulations on medications and prohibiting the manufacture or shipment of any adulterated or misbranded drug traveling in interstate commerce.…Aside from these labeling restrictions, most domestic drug regulations prior to 1970 generally came in the guise of revenue laws, with the Department of the Treasury serving as the Federal Government's primary enforcer…For example, the primary drug control law, before being repealed by the passage of the CSA, was the Harrison Narcotics Act of 1914.…The Harrison Act sought to exert control over the possession and sale of narcotics, specifically cocaine and opiates, by requiring producers, distributors, and purchasers to register with the Federal Government, by assessing taxes against parties so registered, and by regulating the issuance of prescriptions.…

Marijuana itself was not significantly regulated by the Federal Government until 1937 when accounts of marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act.…Like the Harrison Act, the Marihuana Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana, and required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands.… Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with rather burdensome administrative requirements.…Noncompliance exposed traffickers to severe federal penalties,

whereas compliance would often subject them to prosecution under state law.... Thus, while the Marihuana Tax Act did not declare the drug illegal *per se*, the onerous administrative requirements, the prohibitively expensive taxes, and the risks attendant on compliance practically curtailed the marijuana trade.

Then in 1970, after declaration of the national "war on drugs," federal drug policy underwent a significant transformation...prompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act....

Title II of that Act, the CSA, repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances... Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels....

To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA....The CSA categorizes all controlled substances into five schedules. §812. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body....Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein....The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping....

In enacting the CSA, Congress classified marijuana as a Schedule I drug....This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway."...Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment....These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use....By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study....

The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules.... Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug....

III

Respondents in this case do not dispute that passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power....Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in *United States v. Lopez*, our understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time....The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation....For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible....Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress "ushered in a new era of federal regulation under the commerce power," beginning with the enactment of the Interstate Commerce Act in 1887,... and the Sherman Antitrust Act in 1890....

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce....As we stated in *Wickard* [*v.Filburn* (1942)], "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."...We have never required Congress to

legislate with scientific exactitude. When Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate.... In this vein, we have reiterated that when "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'"...

Wickard... establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that... activity would undercut the regulation of the interstate market in that commodity....

The similarities between this case and *Wickard* are striking. Like the [wheat] farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.... Just as the Agricultural Adjustment Act [of which Wickard was accused of violating] was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses"... and consequently control the market price,... a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets....

Regulation [of marijuana] is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.... In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding.... Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere,... and concerns about diversion into illicit channels,... we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity [wheat], Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce... among the several States." U.S. Const., Art. I, §8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

IV

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly. Those two cases, of course, are [*United States v.*] *Lopez*,... and [*United States v.*] *Morrison*.... As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."...

At issue in *Lopez*,... was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone.... The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. Distinguishing our earlier cases holding that comprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce, we held the statute invalid. We explained:

> "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce..."

The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA, enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act,... was a lengthy

and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Most of those substances—those listed in Schedules II through V—"have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." …The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project.

While the statute provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs.…Marijuana was listed as the 10th item in the third subcategory. That classification, unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many "essential part[s] of a larger regulation of economicactivity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." …Our opinion in *Lopez* casts no doubt on the validity of such a program.…

The Violence Against Women Act of 1994,…created a federal civil remedy for the victims of gender-motivated crimes of violence.…The remedy was enforceable in both state and federal courts, and generally depended on proof of the violation of a state law. Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held [in *U.S. v. Morrison*] the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*, and that our prior cases had identified a clear pattern of analysis: "'Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'"…

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." …The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.…Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.

The Court of Appeals was able to conclude otherwise only by isolating a "separate and distinct" class of activities that it held to be beyond the reach of federal power, defined as "the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." …The court characterized this class as "different in kind from drug trafficking." …The differences between the members of a class so defined and the principal traffickers in Schedule I substances might be sufficient to justify a policy decision exempting the narrower class from the coverage of the CSA. The question, however, is whether Congress' contrary policy judgment, *i.e.*, its decision to include this narrower "class of activities" within the larger regulatory scheme, was constitutionally deficient. We have no difficulty concluding that Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA; rather, the subdivided class of activities defined by the Court of Appeals was an essential part of the larger regulatory scheme.

First, the fact that marijuana is used "for personal medical purposes on the advice of a physician" cannot itself serve as a distinguishing factor.…The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses. Moreover, the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner. Indeed, most of the substances classified in the CSA "have a useful and legitimate medical purpose." …Thus, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug,…the CSA would still impose controls beyond what is required by California law. The CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply with statutory and regulatory provisions mandating registration with the DEA, compliance with specific production quotas, security controls to guard against diversion, recordkeeping and reporting obligations, and prescription requirements.…Furthermore, the dispensing of new drugs, even when doctors approve their use, must await federal approval.…Accordingly, the mere fact that marijuana—like virtually every

other controlled substance regulated by the CSA—is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.

Nor can it serve as an "objective marke[r]" or "objective facto[r]" to arbitrarily narrow the relevant class as the dissenters suggest…More fundamentally, if, as the principal dissent contends, the personal cultivation, possession, and use of marijuana for medicinal purposes is beyond the "'outer limits' of Congress' Commerce Clause authority,"'…it must also be true that such personal use of marijuana (or any other homegrown drug) for recreational purposes is also beyond those "'outer limits,'" whether or not a State elects to authorize or even regulate such use.…That is, the dissenters' rationale logically extends to place *any* federal regulation (including quality, prescription, or quantity controls) of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the "'outer limits'" of Congress' Commerce Clause authority. One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity. Indeed, that judgment is not only rational, but "visible to the naked eye,"…under any commonsense appraisal of the probable consequences of such an open-ended exemption.

Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,'" however legitimate or dire those necessities may be.…

Respondents acknowledge this proposition, but nonetheless contend that their activities were not "an essential part of a larger regulatory scheme" because they had been "isolated by the State of California, and [are] policed by the State of California," and thus remain "entirely separated from the market."…The dissenters fall prey to similar reasoning.…The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected.

Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just "plausible" as the principal dissent concedes,…it is readily apparent. The exemption for physicians provides them with an economic incentive to grant their patients permission to use the drug. In contrast to most prescriptions for legal drugs, which limit the dosage and duration of the usage, under California law the doctor's permission to recommend marijuana use is open-ended. The authority to grant permission whenever the doctor determines that a patient is afflicted with "any other illness for which marijuana provides relief,"…is broad enough to allow even the most scrupulous doctor to conclude that some recreational uses would be therapeutic.…And our cases have taught us that there are some unscrupulous physicians who overprescribe when it is sufficiently profitable to do so.…

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market.…The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious.…Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulouspeople will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so.…Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, a fact Justice O'Connor's dissent conveniently disregards in arguing that the demonstrated effect on commerce while admittedly "plausible" is ultimately "unsubstantiated."…Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

So, from the "separate and distinct" class of activities identified by the Court of Appeals (and adopted by the dissenters), we are left with "the intrastate, noncommercial cultivation, possession and use of marijuana."…Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed

magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim.

V

Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases. We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice O'Connor, with whom The Chief Justice and Justice Thomas join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government.... One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."...

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.... Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez*, *supra*, and *United States v. Morrison*.... Accordingly I dissent....

Case Questions

1. What exactly were Raich and Monson asking the Supreme Court to find?
2. What was the Supreme Court's decision?
3. What is your view of the decision in this case?

INTERNET TIP

You can read an edited version of the omitted portion of Justice O'Connor's dissent in the *Raich* case online at the textbook's website.

State Government

The authority that resides in every sovereignty to pass laws for its internal regulation and government is called **police power**. It is the power inherent in the state to pass reasonable laws necessary to preserve public health, welfare, safety, and morals. The states, as sovereigns, were exercising the police power prior to the adoption of the federal constitution, and they never delegated it to the federal government in the U.S. Constitution. In fact, the Constitution itself, in the Tenth Amendment, explicitly reserves to the states (or to the people) any power not delegated to the federal government. Although the police power exists without

any express limitations in the U.S. Constitution, the federal and state constitutions set limits on its exercise.

The basis of the police power is the state's obligation to protect its citizens and provide for the safety and order of society. This yields a broad, comprehensive authority. The definition of crimes and the regulating of trades and professions are examples of this vast scope of power. A mandatory precondition to the exercise of police power is the existence of an ascertainable public need for a particular statute, and the statute must bear a real and substantial relation to the end that is sought. The possession and enjoyment of all rights may be limited under the police power, provided that it is reasonably exercised.

Limitations on the police power have never been drawn with exactness or determined by a general formula. The power may not be exercised for private purposes or for the exclusive benefit of a few. Its scope has been declared to be greater in emergency situations. Otherwise its exercise must be in the public interest, must be reasonable, and may not be repugnant to the rights implied or secured in the Constitution.

Powers delegated by the federal government and individual state constitutions also serve as a basis for state legislation. Any activity solely attributable to the sovereignty of the state may not be restrained by Congress.

Federal Supremacy

The U.S. Constitution divides powers between the federal government and the states. Certain powers are delegated to the federal government alone. Others are reserved to the states. Still others are exercised concurrently by both. The Tenth Amendment to the Constitution specifies that the "powers not delegated to the United States by the Constitution . . . are reserved to the states . . . or to the people." Unlike the federal power, which is granted, the state already has its power, unless expressly or implicitly denied by the state or federal constitutions. Each state has the power to govern its own affairs, except where the Constitution has withdrawn that power.

The powers of both the federal and state governments are to be exercised so as not to interfere with each other's exercise of power. Whenever there is a conflict, state laws must yield to federal acts to the extent of the conflict. This requirement is expressed by the **Supremacy Clause** in Article VI of the Constitution.

Under the Supremacy Clause, Congress can enact legislation that may supersede state authority and preempt state regulations. The preemption doctrine is based on the Supremacy Clause. Hence state laws that frustrate or are contrary to congressional objectives in a specific area are invalid. In considering state law, one takes into account the nature of the subject matter, any vital national interests that may be involved, or perhaps the need for uniformity between state and federal laws, and the expressed or implied intent of Congress. It is necessary to determine whether Congress has sought to occupy a particular field to theexclusion of the states. All interests, both state and federal, must be examined.

Constitutionality of Statutes The power to declare legislative acts unconstitutional is the province and the duty of the judiciary, even though there is no express constitutional grant of the power. It is generally presumed that all statutes are constitutional and that a statute will not be invalidated unless the party challenging it clearly shows that it is offensive to either a state or federal constitution. When a court encounters legislation that it believes to be unconstitutional, it first tries to interpret the statute in a narrow way with what is called a limiting construction. An act of the legislature is declared invalid only as a last resort if it is clearly incompatible with a constitutional provision.

The right and power of the courts to declare whether the legislature has exceeded the constitutional limitations is one of the highest functions of the judiciary. The Supreme Court declared in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) that the judicial branch has the power to declare void an act of the legislature that conflicts with

the Constitution. The issue of the supremacy of the U.S. Constitution, and the right of individuals to claim protection thereunder whenever they were aggrieved by application of a contrary statute, was decided in *Marbury*. Chief Justice John Marshall wrote the opinion for the Court, stating in part:

> The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.
>
> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designated to be permanent.
>
> …It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The Constitution iseither a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.…
>
> 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.
>
> So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the Constitution, or conformable to the Constitution, disregarding the law; the court must determine which of the conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the Constitution—and the Constitution issuperior to any ordinary act of the legislature—the Constitution, and not suchordinary act, must govern the case to which they both apply.

Ex Post Facto Laws and Bills of Attainder

Article I, Section 9, of the federal Constitution prohibits Congress from enacting **ex post facto** laws or **bills of attainder**. The state legislatures are likewise prohibited by Article I, Section 10.

An ex post facto law is a law that makes acts criminal that were not criminal at the time they were committed. Statutes that classify a crime more severely than when committed, impose greater punishment, or make proof of guilt easier have also been held to be unconstitutional ex post facto laws. Such laws deprive an accused of a substantial right provided by the law that was in force at the time when the offense was committed.

The Ex Post Facto Clause restricts legislative power and does not apply to the judicial function. The doctrine applies exclusively to criminal or

penal statutes. A law's ex post facto impact may not be avoided by disguising criminal punishment in a civil form. When a law imposes punishment for certain activity in both the past and future, even though it is void for the punishment of past activity, it is valid insofar as the law acts prospectively. A law is not ex post facto if it "mitigates the rigor" of the law or simply reenacts the law in force when the crime was committed.

To determine if a legislative act unconstitutionally punishes past activity, courts examine the intent of the legislature. The court, after examining the text of the law and its legislative history, makes a determination as to whether an act that imposes a present disqualification is, in fact, merely the imposition of a punishment for a past event. The principle governing the inquiry is whether the aim of the legislature was to punish an individual for past activity, or whether a restriction on a person is merely incident to a valid regulation of a present situation, such as the appropriate qualifications for a profession.

A constitutionally prohibited bill of attainder involves the singling out of an individual or group for punishment. Bills of attainder are acts of a legislature that apply either to named individuals or to easily ascertainable members of a group in such a way as to impose punishments on them without a trial. For example, an act of Congress that made it a crime for a member of the Communist Party to serve as an officer of a labor union was held unconstitutional as a bill of attainder (*United States v. Brown,* 381 U.S. 437, 1965).

Statutory Construction

To declare what the law shall be is a legislative power; to declare what the law *is* is a judicial power. The courts are the appropriate body for construing acts of the legislature. Since courts decide only real controversies and not abstract or moot questions, a court does not construe statutory provisions unless doing so is required for the resolution of a case before it. A statute is open to construction only when the language used in the act is ambiguous and requires interpretation. Where the statutory language conveys a clear and definite meaning, there is no occasion to use rules of statutory interpretation.

Courts have developed rules of statutory construction to determine the meaning of legislative acts. For interpreting statutes, the legislative will is the all-important and controlling factor. In theory, the sole object of all rules for interpreting statutes is to discover the legislative intent; every other rule of construction is secondary.

It is the duty of the judiciary in construing criminal statutes to determine whether particular conduct falls within the intended prohibition of the statute. Criminal statutes are enforced by the court if worded so that they clearly convey the nature of the proscribed behavior. Legislation must be appropriately tailored to meet its objectives. Therefore it cannot be arbitrary, unreasonable, or capricious. A court will hold a statute void for vagueness if it does not give a person of ordinary intelligence fair notice that some contemplated conduct is forbidden by the act. The enforcement of a vague statute would encourage arbitrary and erratic arrests and convictions.

Penal statutes impose punishment for offenses committed against the state. They include all statutes that command or prohibit certain acts and establish penalties for their violation. Penal statutes are enacted for the benefit of the public. They should receive a fair and reasonable construction. The words used should be given the meaning commonly attributed to them. Criminal statutes are to be strictly construed, and doubts are to be resolved in favor of the accused. **Strict construction** means that the statute should not be enlarged by implication beyond the fair meaning of the language used. However, the statute should not be construed so as to defeat the obvious intention of the legislature.

A literal interpretation of statutory language can lead to unreasonable, unjust, or even absurd consequences. In such a case, a court is justified in adopting a construction that sustains the validity of the legislative act, rather than one that defeats it.

Courts do not have legislative authority and should avoid "judicial legislation." To depart from the meaning expressed by the words of the statute

so as to alter it is not construction—it is legislative alteration. A statute should not be construed more broadly or given greater effect than its terms require. Nothing should be read into a statute that was not intended by the legislature. Courts, however, don't always adhere to the principle.

Statutes are to be read in the light of conditions at the time of their enactment. A new meaning is sometimes given to the words of an old statute because of changed conditions. The scope of a statute may appear to include conduct that did not exist when the statute was enacted—for example, certain activity related to technological progress. Such a case does not preclude the application of the statute thereto.

ADMINISTRATIVE AGENCIES

As we will see in more detail in Chapter XIII, legislative bodies often delegate some of their authority to governmental entities called agencies, boards, authorities, and commissions. Legislatures do this when they lack expertise in an area requiring constant oversight and specialized knowledge. Agencies such as the Environmental Protection Agency; the Securities and Exchange Commission; the boards that license doctors, attorneys, and barbers; and public housing authorities are other examples.

Legislative bodies often permit the agencies to exercise investigative and rulemaking powers. Administrative rules, if promulgated according to law, have the same force as statutes. Some agencies also are delegated authority to conduct adjudicatory hearings before administrative law judges who will determine whether agency rules have been violated.

JUDICIAL DECISION MAKING

Legislators are not able to enact laws that address every societal problem. Sometimes a court encounters a case that presents a problem that has not been previously litigated within the jurisdiction. In such a case, the court will try to base its decision on a statute, ordinance, or administrative regulation. If none can be found, it will base its decision on general principles of the common law (principles that have been judicially recognized as precedent in previous cases). This judge-made law has an effect similar to a statute in such situations. Legislatures can modify or replace judge-made law either by passing legislation or through constitutional amendment.

In this portion of the chapter, we will learn about the use of common law precedents and how judges determine which body of substantive law to apply when the facts of a case involve the laws of more than one state.

One of the most fundamental principles of the common law is the doctrine of **stare decisis**. A doctrine is a policy, in this case a judicial policy that guides courts in making decisions. The doctrine normally requires lower-level courts to follow the legal precedents that have been established by higher-level courts. Following precedent helps to promote uniformity and predictability in judicial decision making. All judges within a jurisdiction are expected to apply a rule of law the same way until that rule is overturned by a higher court.

Following Precedent

Literally, stare decisis means that a court will "stand by its decisions" or those of a higher court. This doctrine originated in England and was used in the colonies as the basis of their judicial decisions.

A decision on an issue of law by a court is followed in that jurisdiction by the same court or by a lower court in a future case presenting the same—or substantially the same—issue of law. A court is not bound by decisions of courts of other states, although such decisions may be considered in the decision-making process. A decision of the U.S. Supreme Court on a federal question is absolutely binding on state courts, as well as on lower federal courts. Similarly, a decision of a state court of final appeal on an issue of state law is followed by lower state courts and federal courts in the state dealing with that issue.

The doctrine of stare decisis promotes continuity, stability, justice, speed, economy, and adaptability within the law. It helps our legal system to provide guidelines so that people can anticipate legal consequences when they decide how to conduct their affairs. It promotes justice by establishing rules that enable many legal disputes to be concluded fairly. It eliminates the need for every proposition in every case to be subject to endless relitigation. Public faith in the judiciary is increased where legal rules are consistently applied and are the product of impersonal and reasoned judgment. In addition, the quality of the law decided on is improved, as more careful and thorough consideration is given to the legal questions than would be the case if the determinations affected only the case before the court.

Stare decisis is not a binding rule, and a court need not feel absolutely bound to follow previous cases. However, courts are not inclined to deviate from it, especially when the precedents have been treated as authoritative law for a long time. The number of decisions announced on a rule of law also has some bearing on the weight of the precedent. When a principle of law established by precedent is no longer appropriate because of changing economic, political, and social conditions, however, courts should recognize this decay and overrule the precedent to reflect what is best for society.

The Holding of the Case

Under the doctrine of stare decisis, only a point of law necessarily decided in a reported judicial opinion is binding on other courts as precedent. A question of fact determined by a court has no binding effect on a subsequent case involving similar questions of fact. The facts of each case are recognized as being unique.

Those points of law decided by a court to resolve a legal controversy constitute the **holding** of the case. In other words, the court holds (determines) that a certain rule of law applies to the particular factual situation present in the case being decided and renders its decision accordingly.

Sometimes, in their opinions, courts make comments that are not necessary to support the decision. These extraneous judicial expressions are referred to as **dictum**. They have no value as precedent because they do not fit the facts of the case. The reason for drawing a distinction between holding and dictum is that only the issues before the court have been argued and fully considered. Even though dictum is not binding under the doctrine of stare decisis, it is often considered persuasive. Other judges and lawyers can determine what the decision makers are thinking and gain an indication of how the problem may be handled in the future.

It is the task of the lawyer and judge to find the decision or decisions that set the precedent for a particular factual situation. In court, lawyers argue about whether a prior case should or should not be recognized as controlling in a subsequent case.

The Ohio Supreme Court had to make such a decision in the following 1969 case. Did the prosecution violate Butler's federal due process rights when it used his voluntary, in-custody statement (that was obtained without prior *Miranda* warnings) to **impeach** his trial testimony? The U.S. Supreme Court had ruled in a 1954 case (*Walder v. United States*) that prosecutors could impeach a testifying defendant with illegally obtained evidence once the defendant had "opened the door" with false testimony. The U.S. Supreme Court's *Miranda v. Arizona* (1966) opinion seemed to suggest that constitutional due process prevented the government from using such statements for any purpose. In *Miranda*, however, the prosecution had used the defendant's statement to prove guilt, not to impeach the defendant's testimony. Butler's lawyer argued to the Ohio Supreme Court that (1) the language contained in *Miranda* applied to impeachment uses, (2) *Miranda* should be recognized as controlling, and (3) Butler's statement was inadmissible. The lawyers for the State of Ohio disagreed. They argued (1) *Miranda* was not controlling, because

Butler's facts were distinguishable from the facts in *Miranda*;, (2) the *Walder* case was controlling;, and (3) Butler's statement was admissible for purposes of impeachment.

State v. Butler
19 Ohio St. 2d 55, 249 N.E.2d 818
Supreme Court of Ohio
July 9, 1969

Schneider, Justice

…The offense for which appellant was indicted, tried, and convicted occurred on August 30, 1964. He struck Annie Ruth Sullivan with a jack handle, causing an injury which resulted in loss of sight [in] her left eye. Appellant was apprehended and arrested by the Cincinnati police, and while in custody he was interrogated by police officers. Prior to the questioning, the police gave no explanation to appellant as to his rights to remain silent and have an attorney present. The interrogation was recorded and reduced to writing. Over objection by appellant's counsel, these questions and answers were repeated by the prosecutor at trial to impeach statements made by appellant during cross-examination.

Appellant appeared before the municipal court of Hamilton County on November 22, 1965. Probable cause was found and appellant was bound over to the Hamilton County grand jury. Bond was set at $500, which appellant posted. The grand jury returned an indictment for the offense of "maiming." Appellant was arraigned and pleaded not guilty, after which the court appointed counsel. Trial was set. A jury was waived and appellant was found guilty by the court of the lesser included offense of aggravated assault. The court of appeals affirmed the judgment of conviction.

Appellant raises [the question in this appeal as to] whether, in cross-examination of a defendant the prosecutor may use prior inconsistent statements of the defendant, made to police without *Miranda* warnings, in order to impeach his credibility.…

Appellant's…contention is that the prosecution violated his Fifth Amendment right against self-incrimination by using statements of his which were made to police during in-custody interrogation with no warning of his right to silence or to counsel.…The United States Supreme Court…in *Miranda v. Arizona* [1966]…held there that the prosecution's use of statements of an accused, made to police without prior warnings of his rights to remain silent, to counsel and appointed counsel if indigent, was a violation of the accused's Fourteenth and Fifth Amendment right against self-incrimination.…

The appellant took the stand and, on cross-examination by the prosecution, he made assertions as to the facts surrounding the crime. A recorded statement appellant made to a detective after arrest was then read to him to show a prior inconsistent statement. Counsel objected, but the court allowed the statement to be used as evidence to impeach the witness's credibility. Appellant contends that this use of the statements, made without cautionary warnings, violated his Fifth Amendment rights as defined by *Miranda v. Arizona, supra*.…

We cannot agree. First, the statements used by the prosecution were not offered by the state as part of its direct case against appellant, but were offered on the issue of his credibility after he had been sworn and testified in his own defense. Second, the statements used by the prosecution were voluntary, no claim to the contrary having been made.

The distinction between admissibility of wrongfully obtained evidence to prove the state's case in chief and its use to impeach the credibility of a defendant who takes the stand was expressed in *Walder v. United States* [1954]…."It is one thing to say that the government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths…"

Those words of Justice Frankfurter were uttered in regard to evidence inadmissible under the Fourth Amendment exclusionary rule. In the case of the Fifth Amendment, even greater reason exists to distinguish between statements of an accused used in the prosecution's direct case and used for impeachment in cross-examining the accused when he takes the stand. We must not lose sight of the words of the Fifth Amendment: "…nor shall be compelled to be a witness against himself…" This is a privilege accorded an accused not to be compelled to testify, nor to have any prior statements used by the prosecution to prove his guilt. We cannot translate those words into a privilege to lie with impunity once he elects to take the stand to testify…

We do not believe that…*Miranda*…dictates a conclusion contrary to ours. In *Miranda*, the court indicated that statements of a defendant used to impeach his testimony at trial may not be used unless they were taken with full warnings and effective waiver. However, we note that in all four of the convictions reversed by the decision, statements of the accused, taken without cautionary warnings, were used by the prosecution as direct evidence of guilt in the case in chief.

We believe that the words of Chief Justice Marshall regarding the difference between holding and *dictum* are applicable here. "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."…

The court, in *Miranda*, was not faced with the facts of this case. Thus, we do not consider ourselves bound by the *dictum* of *Miranda*.

The "linchpin" (as Mr. Justice Harlan put it…) of *Miranda* is that police interrogation is destructive of human dignity and disrespectful of the inviolability of the human personality. In the instant case, the use of the interrogation to impeach the voluntary testimony of the accused is neither an assault on his dignity nor disrespectful of his personality. He elected to testify, and cannot complain that the state seeks to demonstrate the lack of truth in his testimony.

Finally, we emphasize that the statements used by the prosecution were voluntarily made. The decision in *Miranda* did not discard the distinction between voluntary and involuntary statements made by an accused and used by the prosecution…Lack of cautionary warnings is one of the factors to consider in determining whether statements are voluntary or not. However, appellant here has never claimed that the statements used to impeach were involuntary. Thus, we assume they were voluntary, and hold that voluntary statements of an accused made to police without cautionary warnings are admissible on the issue of credibility after defendant has been sworn and testifies in his own defense.…

Judgment affirmed.

Duncan, Justice, dissenting

…The use of statements made by the defendant for impeachment without the warnings set forth in *Miranda v. Arizona*…having been given, is reversible error.

In *Miranda*, Chief Justice Warren stated…

> "The warnings required and the waivernecessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of *any statement made by a defendant*. No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, *no distinction may be drawn between inculpatory statements and statementsalleged to be merely 'exculpatory.'* If a statement made were in fact truly exculpatory, it would, of course, never be used by the prosecution. *In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication.* These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement."… [Emphasis supplied.]

This *specific* reference to impeachment, I believe, forecloses the use of defendant's in-custody statement in the instant case.

The United States Court of Appeals for the Second Circuit…arrived at a decision contrary to that arrived at by the majority in this case. Judge Bryan…stated:

> "These pronouncements by the Supreme Court may be technically *dictum*. But it is abundantly plain that the court intended to lay down a firm general rule with respect to the use of statements unconstitutionally obtained from a defendant in violation of *Miranda* standards. The rule prohibits the use of such statements whether inculpatory or exculpatory, whether bearing directly on guilt or on collateral matters only, and whether used on direct examination or for impeachment."…

I would reverse.

Case Questions

1. Explain the difference between holding and dictum.
2. Can the holding of a case be broader than the precedent relied on?
3. Why should dictum not be considered binding under the doctrine of stare decisis?
4. Was *Miranda* properly relied on by the majority in the *Butler* case?
5. If this same case had been decided by the United States Court of Appeals for the Second Circuit, would the decision have been different or the same? Why?

Requirements for a Precedent

Only a judicial opinion of the majority of a court on a point of law can have stare decisis effect. A dissent has no precedential value, nor does the fact that an appellate court is split make the majority's decision less of a precedent. When judges are equally divided as to the outcome of a particular case, no precedent is created by that court. This is true even though the decision affirms the decision of the next-lower court.

In addition, in order to create precedent, the opinion must be reported. A decision by a court without a reported opinion does not have stare decisis effect. In the great majority of cases, no opinion is written. Appellate courts are responsible for practically all the reported opinions, although occasionally a trial judge will issue a written opinion relating to a case tried to the court. Trial judges do not write opinions in jury cases.

Once a reported judicial precedent-setting opinion is found, the effective date of that decision has to be determined. For this purpose, the date of the court decision, not the date of the events that gave rise to the suit, is crucial.

The Retroactive-Versus-Prospective Application Question

A court has the power to declare in its opinion whether a precedent-setting decision should have retroactive or prospective application. **Retroactive effect** means that the decision controls the legal consequences of some causes of action arising prior to the announcement of the decision. **Prospective effect** means that the new rule will only apply to cases subsequently coming before that court and the lower courts of the jurisdiction. Prior to the U.S. Supreme Court's 1993 decision in *Harper v. Virginia Dep't of Taxation*, the general rule in civil cases was that unless a precedent-setting court had expressly indicated otherwise, or unless special circumstances warranted the denial of retroactive application, an appellate court decision was entitled to retroactive as well as prospective effect in all actions that were neither ***res judicata*** (not previously decided) nor barred by a **statute of limitations**, (meaning the plaintiff's lawsuit cannot go forward because of the plaintiff's failure to start the action within the period of time allowed

for that purpose by state statute. This topic is more thoroughly discussed in Chapter IV). This pre-*Harper* approach was based on the U.S. Supreme Court's decision in a 1971 case, *Chevron Oil Co. v. Huson*. The U.S. Supreme Court's decision in *Harper* prohibited federal courts from applying a decision prospectively. Each state then had to decide whether or not to continue following the *Chevron* approach. This was the question before the Montana Supreme Court in the 2004 case of *Dempsey v. Allstate Insurance Company*.

The following excerpt from the majority opinion in *Dempsey* provides an excellent summary of the evolution of the law as it relates to retroactivity. Readers may recall from Chapter I references to Sir William Blackstone as an important figure in the development of the common law and to the philosophical school known as legal realism. Notice how Justice Leaphart in the *Dempsey* opinion contrasts Blackstone's belief that judges "discover law" with the view of the legendary legal realist, Justice Oliver Wendell Holmes, that judges make law.

Dempsey v. Allstate Insurance Company
104 P.3d. 483
Supreme Court of Montana
December 30, 2004

Justice W. William Leaphart delivered the Opinion of the Court

[The "Factual and Procedural Background" segment of this opinion has been omitted in order to focus on the court's discussion about whether decisions should apply prospectively.]

Discussion

In 1971 the United States Supreme Court announced *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97.... *Chevron* laid out a flexible three-factored test for whether a decision applies prospectively only. We adopted the *Chevron* test for questions of Montana law... and subsequently applied it several times... In the meantime, the United States Supreme Court revisited the question of prospective application several times and eventually overruled *Chevron* in *Harper v. Virginia Dep't of Taxation* (1993)....

...[I]t appeared that we would follow the rule of the United States Supreme Court's *Harper* decision. However, subsequent decisions did not bear that out ... [as] we applied the *Chevron* test to determine whether prospective application was appropriate....Given our long history of applying decisions prospectively we cannot ignore these recent decisions applying the *Chevron* test.... As we explain later in this opinion, the two lines of cases may be comfortably merged into a rule of retroactivity in keeping with the last seventy years of this Court's jurisprudence....

A. A Brief History of Retroactivity

The retroactive/prospective distinction is relatively new to our common law tradition. In the days of Blackstone the law was understood as something that the courts applied, not something that they made. Accordingly, it made no sense for a court to comment on whether its ruling applied retroactively or not. Its ruling was simply the law as it is and always was... ("[T]he Blackstonian model takes law as a timeless constant, always (optimistically) assuming the correctness of the current decision. Prior inconsistent decisions are and always were incorrect.")

This view, of course, is no longer even remotely fashionable in today's climate of legal realism and aversion to castles in the clouds. Justice Holmes, the great realist of his time, was one of the first to see past Blackstone and spy the retroactive/prospective distinction. In endorsing what we now call "retroactivity" he characterized common law adjudication not as a search for an entity separate from the courts, but as an act of creation, stating "[t]he law of a State does not become something outside of the state court and independent of it by being called the common law. Whatever it is called it is the law as declared by the state judges and nothing else." *Kuhn v. Fairmont Coal Co.* (1910)... (Holmes, J., dissenting).

After flirting with the issue of prospective decisions in a handful of now defunct....common law cases, the Court ruled in 1932 that a state supreme court does not violate the United States Constitution by giving a decision mere prospective effect. *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.* (1932),... ("A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operations and that of relation backward.")....

After receiving the United States Supreme Court's blessing in *Great Northern* this Court used its power to prospectively apply its decisions when it saw fit.... The United States Supreme Court fully endorsed and justified its own use of prospective application in 1965 with *Linkletter v. Walker*.... In *Linkletter* the Warren Court was faced with an extraordinarily explosive issue. Four years before, [in] *Mapp v. Ohio* (1961)...the Court had ruled that the exclusionary rule applies against the states. Linkletter argued that his conviction was obtained through evidence that should have been inadmissible under the exclusionary rule. Even though he was convicted and his case became final before the *Mapp* ruling, he reasoned that because the decisions of the United States Supreme Court apply retroactively he must be granted habeas corpus relief....

If the Court had granted Linkletter's request, thousands of otherwise properly obtained convictions would have immediately become suspect. The Court found such retroactive application too great a disruption of the criminal justice system....Also, applying *Mapp* to cases closed before its issuance would do nothing to further the policy behind the exclusionary rule—deterrence of unconstitutional police actions..... Therefore, after weighing these factors and others, the Court concluded it was prudent to rule that cases final before the *Mapp* decision were unaffected by it.

In 1971 the Court extended this flexible approach to civil cases in *Chevron Oil Co. v. Huson* (1971).... In applying a prior decision that had greatly changed the operation of statutes of limitations under the Outer Continental Shelf Lands Act, the Court adopted a version of the nonretroactivity test used in its criminal cases. In the context of criminal appeals, the three factors of the test were as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity."

...With this test in place the federal courts had flexibility to grant nonretroactive relief to litigants who had justifiably relied on old rules of law when there was no indication that the rule would change. Gone was any pretense that the law that the courts announce is the law as it has always been.

B. The Decline and Fall of Chevron.

The United States Supreme Court's tolerance of prospective decisions did not last long. After indicating several times that it was not satisfied with current doctrine, the Court finally overruled itself in 1987, jettisoning the *Linkletter* approach. *Griffith v. Kentucky* (1987),...The Court announced a new rule requiring that all criminal decisions apply retroactively to all cases "pending on direct review or not yet final."... It reasoned that it was unfair to announce a new rule that would affect some defendants and not others merely because of the timing of their prosecutions...

It was only a matter of time before this approach to retroactivity in criminal cases found its way into the Court's civil jurisprudence.... [T]he Court announced [in *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86 (1993) that due to the inequities inherent in a flexible *Chevron* approach, federal rules of law may not be selectively applied prospectively....

After *Harper,* the *Chevron* test no longer had any applicability to interpretations of federal law, whether in federal or state court. The *Harper* decision is grounded in fairness and the arbitrariness of "temporal barriers," rather than a renewed embrace of Blackstone's theory of law "existing" independently of a court's decisions.

C. Revolt in the Provinces: Chevron *is Alive and Well in the State Courts*

Chevron concerned a federal question, and thus only governed issues of federal law. Therefore, although the United States Supreme Court has rejected *Chevron,* the states are free to continue employing the *Chevron* criteria in deciding questions of retroactivity of state law. Prior to *Harper,* the *Chevron* approach proved popular in state courts....

The state courts' reactions to *Harper* have been decidedly mixed, with many expressing disagreement, if not open hostility. For example, the Supreme Court of New Hampshire voiced support for the rejection of *Chevron....* However, inspired by Justice O'Connor's dissent in *Harper,* the court reserved for itself the authority to give new rules prospective effect, but that if a rule is applied retroactively to the parties before the court, it must be given uniform retroactive effect....In contrast, the New Mexico Supreme Court took great issue with much of *Harper,*.... [constructing] a *presumption* in favor of retroactivity "in lieu of the hard-and-fast rule prescribed for federal cases in

Harper.".... Many states are uncomfortable with the harsh results that might follow if they abandon *Chevron* and completely disallow prospective decisions.

D. Reserving Chevron *as an Exception*

Our precedent allows for a compromise between the powerful arguments of the *Harper* court and the compelling need for prospective application in limited circumstances....

We agree with the *Harper* court that limiting a rule of law to its prospective application creates an arbitrary distinction between litigants based merely on the timing of their claims. Interests of fairness are not served by drawing such a line, nor are interests of finality. In the interests of finality, the line should be drawn between claims that are final and those that are not (the line drawn in *Harper*).... We have already recognized the arbitrary nature of prospective decisions in the criminal context...[and] ...in keeping with the United States Supreme Court's opinion in *Griffith,* we overruled all of our prior decisions which limited a new judicial rule of criminal procedure to prospective application....

We also understand, however, that what follows from civil litigation is different in kind from the consequences inherent in a criminal prosecution and conviction. On many occasions we have noted the disruption that a new rule of law can bring to existing contracts and to other legal relationships. Therefore today we reaffirm our general rule that "[w]e give retroactive effect to judicial decisions,"...We will, however, allow for an exception to that rule when faced with a truly compelling case for applying a new rule of law prospectively only.

The *Chevron* test is still viable as an exception to the rule of retroactivity. However, given that we wish prospective applications to be the exception, we will only invoke the *Chevron* exception when a party has satisfied *all three* of the *Chevron* factors....

Therefore, we conclude that, in keeping with our prior cases, all civil decisions of this court apply retroactively to cases pending on direct review or not yet final, unless all three of the *Chevron* factors are satisfied. For reasons of finality we also conclude that the retroactive effect of a decision does not apply ....to cases that became final or were settled prior to a decision's issuance....

Case Questions

1. Based what you have read about the history of the rule of retroactivity, do you see any fundamental problems with the *Harper v. Virginia Department of Taxation* decision that could in the future threaten its survival as a precedent?
2. Think about the positions advocated by Sir William Blackstone and Justice Oliver Wendell Holmes with respect to whether judges "discover law" or "make law." How would you characterize the decision-making process followed by the Montana Supreme Court in reaching its conclusions in *Dempsey*?

Do you believe that ethical considerations played any role in the Montana Supreme Court's decision not to exclusively follow the rule promulgated by the U.S. Supreme Court in *Harper v. Virginia Department of Taxation*?

Absence of Precedent

When judges are confronted by a novel fact situation, they must rely on their own sense of justice and philosophy of law. The public interest, tradition, prevailing customs, business usage, and moral standards are important considerations in the decision-making process. Judges encountering a case of first impression first look for guidance within

the forum state. When precedent is lacking in the forum state, decisions of other state and federal courts, as well as English decisions, may be considered persuasive on the legal point at issue.

The trial court in the following case encountered a problem that was unique. The trial and appellate courts were required to make decisions without being able to benefit from the experience of others as reflected in statutory law and common law opinions. They had to create new law when life and death were at stake. Note that three of the seven members of the appellate court dissented.

Strunk v. Strunk
445 S.W.2d 145
Court of Appeals of Kentucky
September 26, 1969

Osborne, Judge

The specific question involved upon this appeal is: Does a court of equity have power to permit a kidney to be removed from an incompetent ward of the state upon petition of his committee, who is also his mother, for the purpose of being transplanted into the body of his brother, who is dying of a fatal kidney disease? We are of the opinion it does.

The facts of the case are as follows: Arthur L. Strunk, 54 years of age, and Ava Strunk, 52 years of age, of Williamstown, Kentucky, are the parents of two sons. Tommy Strunk is 28 years of age, married, an employee of the Penn State Railroad and a part-time student at the University of Cincinnati. Tommy is now suffering from chronic glomerus nephritis, a fatal kidney disease. He is now being kept alive by frequent treatment on an artificial kidney, a procedure that cannot be continued much longer.

Jerry Strunk is 27 years of age, incompetent, and through proper legal proceedings has been committed to the Frankfort State Hospital and School, which is a state institution maintained for the feeble-minded. He has an IQ of approximately 35, which corresponds with the mental age of approximately six years. He is further handicapped by a speech defect, which makes it difficult for him to communicate with persons who are not well acquainted with him. When it was determined that Tommy, in order to survive, would have to have a kidney, the doctors considered the possibility of using a kidney from a cadaver if and when one became available, or one from a live donor if this could be made available. The entire family, his mother, father, and a number of collateral relatives, were tested. Because of incompatibility of blood type or tissue, none was medically acceptable as a live donor. As a last resort, Jerry was tested and found to be highly acceptable. This immediately presented the legal problem as to what, if anything, could be done by the family, especially the mother and the father, to procure a transplant from Jerry to Tommy. The mother as a committee petitioned the county court for authority to proceed with the operation. The court found that the operation was necessary, that under the peculiar circumstances of this case, it would not only be beneficial to Tommy but also beneficial to Jerry because Jerry was greatly dependent on Tommy, emotionally and psychologically, and that his well-being would be jeopardized more severely by the loss of his brother than by the removal of a kidney.

Appeal was taken to the Franklin Circuit Court where the chancellor reviewed the record, examined the testimony of the witnesses, and adopted the findings of the county court.

A psychiatrist, in attendance to Jerry, who testified in the case, stated in his opinion the death of Tommy under these circumstances would have "an extremely traumatic effect upon him [Jerry]."

The Department of Mental Health of this commonwealth has entered the case as *amicus curiae* and on the basis of its evaluation of the seriousness of the operation as opposed to the traumatic effect on Jerry as a result of the loss of Tommy, recommended to the court that Jerry be permitted to undergo the surgery. Its recommendations are as follows: "It is difficult for the mental defective to establish a firm sense of identity with another person. The acquisition of this necessary identity is dependent on a person whom one can conveniently accept as a model and who at the same time is sufficiently flexible to allow the defective to detach himself with reassurances of continuity. His need to be social is not so much the necessity of a formal and mechanical contact with other human beings as it is the necessity of a close intimacy with other men, the desirability of a real community of feeling, an

urgent need for a unity of understanding. Purely mechanical and formal contact with other men does not offer any treatment for the behavior of a mental defective; only those who are able to communicate intimately are of value to hospital treatment in these cases. And this generally is a member of the family.

"In view of this knowledge, we now have particular interest in this case. Jerry Strunk, a mental defective, has emotions and reactions on a scale comparable to that of a normal person. He identifies with his brother Tom. Tom is his model, his tie with his family. Tom's life is vital to the continuity of Jerry's improvement at Frankfort State Hospital and School. The testimony of the hospital representative reflected the importance to Jerry of his visits with his family and the constant inquiries Jerry made about Tom's coming to see him. Jerry is aware he plays a role in the relief of this tension. We the Department of Mental Health must take all possible steps to prevent the occurrence of any guilt feelings Jerry would have if Tom were to die.

"The necessity of Tom's life to Jerry's treatment and eventual rehabilitation is clearer in view of the fact that Tom is his only living sibling and at the death of their parents, now in their fifties, Jerry will have no concerned, intimate communication so necessary to his stability and optimal functioning.

"The evidence shows that at the present level of medical knowledge, it is quite remote that Tom would be able to survive several cadaver transplants. Tom has a much better chance of survival if the kidney transplant from Jerry takes place."

Upon this appeal, we are faced with the fact that all members of the immediate family have recommended the transplant. The Department of Mental Health has likewise made its recommendation. The county court has given its approval. The circuit court has found that it would be to the best interest of the ward of the state that the procedure be carried out. Throughout the legal proceedings, Jerry has been represented by a guardian *ad litem*, who has continually questioned the power of the state to authorize the removal of an organ from the body of an incompetent who is a ward of the state. We are fully cognizant of the fact that the question before us is unique. Insofar as we have been able to learn, no similar set of facts has come before the highest court of any of the states of this nation or the federal courts. The English courts have apparently taken a broad view of the inherent power of the equity courts with regard to incompetents. *Ex parte Whitebread* (1816)…holds that courts of equity have the inherent power to make provisions for a needy brother out of the estate of an incompetent.…The inherent rule in these cases is that the chancellor has the power to deal with the estate of the incompetent in the same manner as the incompetent would if he had his faculties. This rule has been extended to cover not only matters of property but also to cover the personal affairs of the incompetent.…

The right to act for the incompetent in all cases has become recognized in this country as the doctrine of substituted judgment and is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward.…

The medical practice of transferring tissue from one part of the human body to another (autografting) and from one human being to another (homografting) is rapidly becoming a common clinical practice. In many cases, the transplants take as well when the tissue is dead as when it is alive. This has made practicable the establishment of tissue banks where such material can be stored for future use. Vascularized grafts of lungs, kidneys, and hearts are becoming increasingly common. These grafts must be of functioning, living cells with blood vessels remaining anatomically intact. The chance of success in the transfer of these organs is greatly increased when the donor and the donee are genetically related. It is recognized by all legal and medical authorities that several legal problems can arise as a result of the operative techniques of the transplant procedure.…

The renal transplant is becoming the most common of the organ transplants. This is because the normal body has two functioning kidneys, one of which it can reasonably do without, thereby making it possible for one person to donate a kidney to another. Testimony in this record shows that there have been over 2500 kidney transplants performed in the United States up to this date. The process can be effected under present techniques with minimal danger to both the donor and the donee.…

Review of our case law leads us to believe that the power given to a committee under KRS 387.230 would not extend so far as to allow a committee to subject his ward to the serious surgical techniques here under consideration unless the life of his ward be in jeopardy. Nor do we believe the powers delegated to the county court by virtue of the above statutes would reach so far as to permit the procedure which we [are] dealing with here.

We are of the opinion that a chancery court does have sufficient inherent power to authorize the

operation. The circuit court having found that the operative procedures are to the best interest of Jerry Strunk and this finding having been based on substantial evidence, we are of the opinion the judgment should be affirmed. We do not deem it significant that this case reached the circuit court by way of an appeal as opposed to a direct proceeding in that court.

Judgment affirmed.

Hill, C.J., Milliken, and Reed, JJ., concur.

Neikirk, Palmore, and Steinfeld, JJ., dissent.

Steinfeld, Judge, dissenting

Apparently because of my indelible recollection of a government which, to the everlasting shame of its citizens, embarked on a program of genocide and experimentation with human bodies, I have been more troubled in reaching a decision in this case than in any other. My sympathies and emotions are torn between a compassion to aid an ailing young man and a duty to fully protect unfortunate members of society.

The opinion of the majority is predicated on the authority of an equity court to speak for one who cannot speak for himself. However, it is my opinion that in considering such right in this instance, we must first look to the power and authority vested in the committee, the appellee herein. KRS 387.060 and KRS 387.230 do nothing more than give the committee the power to take custody of the incompetent and the possession, care, and management of his property. Courts have restricted the activities of the committee to that which is for the best interest of the incompetent.... The authority and duty have been to protect and maintain the ward, to secure that to which he is entitled and preserve that which he has....

The wishes of the members of the family or the desires of the guardian to be helpful to the apparent objects of the ward's bounty have not been a criterion. "A curator or guardian cannot dispose of his ward's property by donation, even though authorized to do so by the court on advice of a family meeting, unless a gift by the guardian is authorized by statute."...Two Kentucky cases decided many years ago reveal judicial policy. In *W. T. Sistrunk & Co. v. Navarra's Committee*, ...105 S.W.2d 1039 (1937), this court held that a committee was without right to continue a business which the incompetent had operated prior to his having been declared a person of unsound mind. More analogous is *Baker v. Thomas*,...114 S.W.2d 1113 (1938), in which a man and woman had lived together out of wedlock. Two children were born to them. After the man was judged incompetent, his committee, acting for him, together with his paramour, instituted proceedings to adopt the two children. In rejecting the application and refusing to speak for the incompetent, the opinion stated: "The statute does not contemplate that the committee of a lunatic may exercise any other power than to have the possession, care, and management of the lunatic's or incompetent's estate."...The majority opinion is predicated on the finding of the circuit court that there will be psychological benefits to the ward but points out that the incompetent has the mentality of a six-year-old child. It is common knowledge beyond dispute that the loss of a close relative or a friend to a six-year-old child is not of major impact. Opinions concerning psychological trauma are at best most nebulous. Furthermore, there are no guarantees that the transplant will become a surgical success, it being well known that body rejection of transplanted organs is frequent. The life of the incompetent is not in danger, but the surgical procedure advocated creates some peril.

It is written in *Prince v. Massachusetts*, 321 U.S. 158 (1944), that "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal distinction when they can make the choice for themselves." The ability to fully understand and consent is a prerequisite to the donation of a part of the human body....

Unquestionably, the attitudes and attempts of the committee and members of the family of the two young men whose critical problems now confront us are commendable, natural, and beyond reproach. However, they refer us to nothing indicating that they are privileged to authorize the removal of one of the kidneys of the incompetent for the purpose of donation, and they cite no statutory or other authority vesting such right in the courts. The proof shows that less compatible donors are available and that the kidney of a cadaver could be used, although the odds of operational success are not as great in such cases as they would be with the fully compatible donor brother.

I am unwilling to hold that the gates should be open to permit the removal of an organ from an incompetent for transplant, at least until such time as it is conclusively demonstrated that it will be of significant benefit to the incompetent. The evidence

here does not rise to that pinnacle. To hold that committees, guardians, or courts have such awesome power, even in the persuasive case before us, could establish legal precedent, the dire result of which we cannot fathom. Regretfully I must say no.

Neikirk and Palmore, JJ., join with me in this dissent.

Case Questions

1. The Court of Appeals of Kentucky is the court of last resort in that state. The *Strunk* decision is now Kentucky law. Does the decision make mental institutions a storehouse of human bodies available for distribution to the more productive members of society whenever the state decides that someone's need outweighs the danger to the incompetent?
2. Which opinion, the majority or dissent, was more persuasive?
3. Where no legal cases have a direct bearing on the issue of a case, should the court turn to other disciplines for authority?

What ethical considerations do you think convinced the dissenters in this case to oppose the operation on Jerry Strunk?

RECOGNIZING LAWS OF OTHER STATES

Conflict of Laws

Every person within the territorial limits of a government is bound by its laws. However, it is well recognized that law does not of its own force have any effect outside the territory of the sovereignty from which its authority is derived. Because each of the fifty states is an individual sovereignty that creates its own common and statutory law, there are often inconsistencies among the laws of the various states. When the facts of a case under consideration have occurred in more than one state or country, and a court must make a choice between the laws of different states or nations, a conflict case is presented.

Another type of conflict-of-laws case involves a situation in which an event occurred in one state and the suit is brought in another state. For example, a driver from Michigan might bring suit in Kentucky regarding an automobile collision in Ohio involving a driver from Kentucky. In this situation, the court must decide whether to apply its own substantive law, the law of the state in which the events occurred, or possibly the law of some other state.

Conflict-of-laws rules have been developed by each state to assist its courts in determining whether and when foreign substantive law (i.e., some other state's contract law, tort law, property law, etc.) should be given effect within the territory of the forum. Always remember that a state court always follows its own procedural law, even when it decides to apply the substantive law of some other state. The rules afford some assurance that the same substantive law will be used to decide the case irrespective of where the suit is tried.

Tort Cases

The traditional approach in tort cases is to apply the law of the place where the wrong was committed—**lex loci delicti commissi**. The place of the wrong is where the last event necessary to make the actor liable takes place or where the person or thing harmed is situated at the time of the

wrong. The following case exemplifies a trend that had been occurring in recent years. The Indiana Supreme Court used the *Hubbard* case to replace the traditional lex loci delicti commissi rule with the **significant relationship rule**. The significant relationship approach is more flexible than a rigid lex loci approach. A court following the significant relationship rule can apply the law of the place that has the most significant contacts with the incident or event in dispute.

Hubbard Manufacturing Co., Inc., v. Greeson
515 N.E.2d 1071
Supreme Court of Indiana
December 1, 1987

Shepard, Chief Justice

The question is whether an Indiana court should apply Indiana tort law when both parties are residents of Indiana and the injury occurred in Illinois.

Plaintiff Elizabeth Greeson, an Indiana resident, filed a wrongful death action in Indiana against defendant Hubbard Manufacturing Co., Inc., an Indiana corporation. The defendant corporation built lift units for use in cleaning, repairing, and replacing streetlights.

On October 29, 1979, Donald Greeson, plaintiff's husband and also a resident of Indiana, happened to be working in Illinois maintaining street lights. He died that day while using a lift unit manufactured by Hubbard in Indiana.

Elizabeth Greeson's suit alleged that defective manufacture of Hubbard's lift unit caused her husband's death. When she raised the possibility that Illinois products-liability law should be applied to this case, Hubbard moved the trial court for a determination of the applicable law. The trial court found that Indiana had more significant contacts with the litigation but felt constrained to apply Illinois substantive law because the decedent's injury had been sustained there. The Court of Appeals expressed the opinion that Indiana law should apply but concluded that existing precedent required use of Illinois law....

We grant transfer to decide whether Indiana or Illinois law applies.

Greeson's complaint alleged two bases for her claim: "the defective and unreasonably dangerous condition of a lift type vehicle sold...by the defendant" and "the negligence of the defendant." Both theories state a cause for liability based on Hubbard's manufacture of the vehicle in Indiana.

The differences in Indiana law and Illinois law are considerable. First, in Indiana a finding that the product represented an open and obvious danger would preclude recovery on the product liability claim...to impress liability on manufacturers the defect must be hidden and not normally observable. Under Illinois law, the trier of fact may find product liability even if the danger is open and obvious.... Second, under Indiana law misuse would bar recovery...In Illinois misuse merely reduces a plaintiff's award....These differences are important enough to affect the outcome of the litigation.

Choosing the applicable substantive law for a given case is a decision made by the courts of the state in which the lawsuit is pending. An early basis for choosing law applicable to events transversing (*sic*) several states was to use the substantive law of the state "where the wrong is committed" regardless of where the plaintiff took his complaint seeking relief....

The historical choice-of-law rule for torts,...was *lex loci delicti commissi*, which applied the substantive law where the tort was committed. *Burns v. Grand Rapids and Indiana Railroad Co.* (1888).... The tort is said to have been committed in the state where the last event necessary to make an actor liable for the alleged wrong takes place.

Rigid application of the traditional rule to this case, however, would lead to an anomalous result. Had plaintiff Elizabeth Greeson filed suit in any bordering state the only forum which would not have applied the substantive law of Indiana is Indiana....To avoid this inappropriate result, we look elsewhere for guidance.

Choice-of-law rules are fundamentally judge-made and designed to ensure the appropriate substantive law applies. In a large number of cases, the place of the tort will be significant and the place with the most contacts....In such cases, the traditional rule serves well. A court should be allowed to evaluate other factors when the place of the tort is an insignificant contact. In those instances where the place of the tort bears little connection to the legal action, this

Court will permit the consideration of other factors such as:

1. the place where the conduct causing the injury occurred;
2. the residence or place of business of the parties; and
3. the place where the relationship is centered.

Restatement (Second) of Conflicts of Laws § 145(2) (1971). These factors should be evaluated according to their relative importance to the particular issues being litigated.

The first step in applying this rule in the present case is to consider whether the place of the tort "bears little connection" to this legal action. The last event necessary to make *Hubbard* liable for the alleged tort took place in Illinois. The decedent was working in Illinois at the time of his death and the vehicle involved in the fatal injuries was in Illinois. The coroner's inquest was held in Illinois, and the decedent's wife and son are receiving benefits under the Illinois Workmen's Compensation Laws. None of these facts relates to the wrongful death action filed against Hubbard. The place of the tort is insignificant to this suit.

After having determined that the place of the tort bears little connection to the legal action, the second step is to apply the additional factors. Applying these factors to this wrongful death action leads us to the same conclusion that the trial court drew: Indiana has the more significant relationship and contacts. The plaintiff's two theories of recovery relate to the manufacture of the lift in Indiana. Both parties are from Indiana; plaintiff Elizabeth Greeson is a resident of Indiana and defendant Hubbard is an Indiana corporation with its principal place of business in Indiana. The relationship between the deceased and Hubbard centered in Indiana. The deceased frequently visited defendant's plant in Indiana to discuss the repair and maintenance of the lift. Indiana law applies.

The Court of Appeals decision is vacated and the cause remanded to the trial court with instructions to apply Indiana law.

Case Questions

1. Under lex loci delicti commissi, how should a court determine where a tort was committed?
2. Why did the Indiana Supreme Court decide to replace the traditional lex loci delicti commissi approach?
3. What contacts were evaluated by the court in determining which state had a more significant relationship with the occurrence and with the parties?

Contract Cases

All states have developed their own conflict-of-laws rules for contractual disputes, which differ from the rules that apply to tort cases. In contractual disputes, depending on the facts involved and jurisdictional preferences, courts have historically applied the law of place in any of the following ways: (1) where the action was instituted **(lex fori)**, (2) where the contract was to be performed **(lex loci solutionis)**, (3) which law the parties intended to govern their agreement, (4) the law of the state where the last act necessary to complete the contract was done and which created a legal obligation **(lex loci contractus)**, and (5) the law of the state that has the greatest concern with the event and the parties **(significant relationship rule)**. A court may choose to follow its own substantive law of contracts and will do so if the application of the foreign law would offend its public policy.

Courts often honor the law intended by the parties to be controlling. The state chosen usually has a substantial connection with the contract, but courts have held that no such connection is necessary if the parties intended that that state's laws govern the agreement. For example, automobile and house insurance contracts generally included a choice-of-law clause, usually a forum selected by the lawyers for the insurance company, and "agreed to" by the insured. If a contract fails to include a choice-of-law clause, courts may still determine the parties' intent by examining the facts surrounding the contract.

One of the important developments in contract law has been the enactment by all states of at least

some provisions of the Uniform Commercial Code (UCC). This code was created in order to enhance the uniformity of state laws regulating certain commercial transactions. The UCC does not apply to all types of contracts. It does not apply, for example, to employment contracts, services, or to the sale of real property. With respect to conflicts of law, the UCC basically follows the significant relationship rule when parties to contracts have not specified a choice of law.

Full Faith and Credit

Prior to learning about full faith and credit, readers may find it helpful to reread the "Procedural Primer" that begins on page 12 of Chapter I. There can be found a simplified overview of civil procedure, a topic that will be explored in much greater detail in Chapter V.

When beginning a discussion of full faith and credit, it is important to emphasize that each state in the United States is a distinct sovereignty. In the absence of a federal constitutional requirement to the contrary, each state would be entitled to totally disregard the constitutions, statutes, records, and judgments of other states. Clearly, the refusal of some states to recognize and enforce the judgments issued by other states would deny justice to those who had taken their disputes to court. A judgment debtor, the party ordered in the judgment to pay money to winner of the lawsuit (the "judgment creditor"), could flee to a state that refuses to recognize and enforce judgments from the issuing state, undermining public confidence in the law.

The authors of the U.S. Constitution anticipated this problem and addressed it in Article IV, Section 1, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Thus the Constitution requires the states to cooperate with each other and binds them together into one nation. Since final judgments of each state are enforceable in every other state, irrespective of differences in substantive law and public policy, the full faith and credit requirement also helps to preserve the legal differences that exist from state to state. There are some exceptions to the full faith and credit requirement. For example, the requirement does not apply if the judgment-issuing court lacked jurisdiction over the subject matter or person or if the judgment was fraudulently obtained.

Another important benefit of the full faith and credit requirement is that it puts teeth into the doctrine of *res judicata*. Once a valid judgment has been rendered on the merits in one jurisdiction, the claims adjudicated in that lawsuit cannot be relitigated by the same parties in some other jurisdiction.

A state can justifiably refuse to grant full faith and credit to another state's judgment under limited circumstances: for example, when the issuing court has failed to follow the mandates of the U.S. Constitution regarding due process of law. Full faith and credit can be denied when the issuing court did not have minimum contacts with the person of the judgment debtor, or when the judicial proceedings denied the judgment debtor the constitutionally required elements of notice and an opportunity for a hearing.

Article IV, Section 1, only requires that the states provide full faith and credit to other states. The federal Full Faith and Credit Act (28 USC Section 1738), however, also requires all federal courts to afford full faith and credit to state court judgments.

INTERNET TIP

You can read the excerpt from the federal Full Faith and Credit Act (28 USC Section 1738)), online at the textbook's website.

Although a properly authenticated judgment of an issuing state is presumptively valid and binding in all other states, it is not self-implementing. A judgment creditor who has to go to some other state to enforce a judgment will have to begin an action against the judgment debtor in the nonissuing state. Normally, the courts of the nonissuing state will then have to enforce the foreign judgment in the same manner as they would one of their own judgments, even if enforcing the judgment would contravene the enforcing state's public policy. This

was the problem presented in the following case, in which three same-sex adoptive couples sought to overturn an Oklahoma statute which denied them recognition as the adoptive parents of their children. The parents of E.D sued to obtain a supplemental birth certificate, claiming that Oklahoma was obligated under the Full Faith and Credit Clause of the Constitution to recognize the judgment of adoption rendered by a California court.

Finstuen v. Crutcher
496 F.3d 1139
United States Court of Appeals, Tenth Circuit
August 3, 2007

Ebel, Circuit Judge

Defendant-Appellant Dr. Mike Crutcher, sued in his official capacity as the Commissioner of Health (hereinafter referred to as "Oklahoma State Department of Health ('OSDH')") appeals a district court judgment that a state law barring recognition of adoptions by same-sex couples already finalized in another state is unconstitutional. OSDH also appeals the district court's order requiring it to issue a revised birth certificate for E.D., a Plaintiff-Appellee who was born in Oklahoma but adopted in California by a same-sex couple….

I

Three same-sex couples and their adopted children have challenged the following amendment to Oklahoma's statute governing the recognition of parent-child relationships that are created by out-of-state adoptions.

§ 7502-1.4. Foreign adoptions

A. The courts of this state shall recognize a decree, judgment, or final order creating the relationship of parent and child by adoption, issued by a court or other governmental authority with appropriate jurisdiction in a foreign country or in another state or territory of the United States. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree, judgment, or final order were issued by a court of this state. Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.

Okla. Stat. tit. 10, § 7502-1.4(A) (the "adoption amendment").

Each of the three families has a different set of circumstances. Mr. Greg Hampel and Mr. Ed Swaya are residents of Washington, where they jointly adopted child V in 2002. V was born in Oklahoma, and… the men agreed to bring V to Oklahoma to visit her mother "from time to time."…However, they do not… have any ongoing interactions with the state of Oklahoma. After V'sadoption, Mr. Hampel and Mr. Swaya requested that OSDH issue a new birth certificate for V. OSDH did so… but named only Mr. Hampel as V's parent. Mr. Hampel and Mr. Swaya contested that action, prompting OSDH to seek an opinion from the Oklahoma attorney general…. The attorney general opined that the U.S. Constitution's Full Faith and Credit Clause required Oklahoma to recognize any validly issued out-of-state adoption decree. OSDH subsequently issued V a new birth certificate naming both men as parents. The state legislature responded one month later by enacting the adoption amendment.

Lucy Doel and Jennifer Doel live with their adopted child E in Oklahoma. E was born in Oklahoma. Lucy Doel adopted E in California in January 2002. Jennifer Doel adopted E in California six months later …OSDH issued E a supplemental birth certificate naming only Lucy Doel as her mother. The Doels have requested a revised birth certificate from OSDH that would acknowledge Jennifer Doel as E's parent, but OSDH denied the request.

Anne Magro and Heather Finstuen reside in Oklahoma with their two children. Ms. Magro gave birth to S and K in New Jersey in 1998. In 2000, Ms. Finstuen adopted S and K in New Jersey as a second parent, and New Jersey subsequently issued new birth certificates for S and K naming both women as their parents.

These three families brought suit against the state of Oklahoma seeking to enjoin enforcement of the adoption amendment, naming the governor, attorney general and commissioner of health in their official capacities. The Doels also requested a revised birth certificate naming both Lucy Doel and Jennifer Doel as E's parents.

On cross-motions for summary judgment, the district court found that Mr. Hampel, Mr. Swaya and their

child V lacked standing to bring the action.... However, the district court granted summary judgment for the remaining plaintiffs, determining that they had standing and that the Oklahoma adoption amendment violated the Constitution's Full Faith and Credit, Equal Protection and Due Process Clauses.... The court enjoined enforcement of the amendment, and ordered that a new birth certificate be issued for E.D....

OSDH appeals from the district court's conclusion that the Doels and the Finstuen-Magro family have standing and its ruling that the adoption amendment is unconstitutional. The Oklahoma governor and attorney general did not appeal. In addition, Mr. Hampel, Mr. Swaya and their child V timely appeal from the denial of standing, and reassert their claim that the Oklahoma amendment violates their constitutional right to travel....

II

A. Jurisdiction

[The court's expansive discussion of standing, a topic examined in Chapter VI of this text is omitted . The Court concluded that it did could not decide the case brought by Hampel and Swaya (child V), primarily because this family had minimal connections with Oklahoma, and did "not establish the circumstances in which the non-recognition of the adoption would arise," and therefore lacked standing to sue. The court also found that Finstuen and Magro lacked standing. Magro was the children's birth mother and not an adoptive parent, and Finstuen, who was an adoptive mother, could point to "no encounter with any public or private official in which her authority as a parent was questioned." The court ruled that Lucy Doel and Jennifer Doel, the adoptive parents of child E.D., did have standing to maintain their suit].

B. Full Faith and Credit Clause

Having established jurisdiction, we proceed to consider the merits of OSDH's appeal. The district court concluded that the adoption amendment was unconstitutional because the Full Faith and Credit Clause requires Oklahoma to recognize adoptions—including same-sex couples' adoptions—that are validly decreed in other states....We affirm, because there is "no roving `public policy exception' to the full faith and credit due *judgments*"...and OSDH presents no relevant legal argument as to why the Doels' out-of-state adoption judgments should not be recognized under the Full Faith and Credit Clause.

The Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. 4, § 1. The Supreme Court has often explained the purpose and policies behind the Full Faith and Credit Clause.

The very purpose of the Full Faith and Credit Clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

...The Clause is designed "to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states."...The Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation. If in its application local policy must at times be required to give way, such is part of the price of our federal system."..."To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent"....

In applying the Full Faith and Credit Clause, the Supreme Court has drawn a distinction between statutes and judgments....Specifically, the Court has been clear that although the Full Faith and Credit Clause applies unequivocally to the judgments...of sister states, it applies with less force to their statutory laws....*Nevada v. Hall,* 440 U.S. 410,... (1979) However, with respect to final judgments entered in a sister state, it is clear there is no "public policy" exception to the Full Faith and Credit Clause:

Regarding judgments...the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force....

In numerous cases th[e] [Supreme] Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded; that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it.

OSDH stops short of arguing that the Full Faith and Credit Clause permits states to invoke a "policy exception," but contends that requiring Oklahoma to recognize an out-of-state adoption judgment would be tantamount to giving the sister state control over the effect of its judgment in Oklahoma....

Full faith and credit...does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law. ...

A California court made the decision, in its own state and under its own laws, as to whether Jennifer Doel could adopt child E. That decision is final. If Oklahoma had no statute providing for the issuance of supplementary birth certificates for adopted children, the Doels could not invoke the Full Faith and Credit Clause in asking Oklahoma for a new birth certificate. However, Oklahoma has such a statute — i.e., it already has the necessary "mechanism[] for enforcing [adoption] judgments." ... The Doels merely ask Oklahoma to apply its own law to "enforce" their adoption order in an "even-handed" manner....

Oklahoma continues to exercise authority over the manner in which adoptive relationships should be enforced in Oklahoma and the rights and obligations in Oklahoma flowing from an adoptive relationship. And Oklahoma has spoken on that subject:

After the final decree of adoption is entered, the relation of parent and child and all the rights, duties, and other legal consequences of the natural relation of child and parent shall thereafter exist between the adopted child and the adoptive parents of the child and the kindred of the adoptive parents. From the date of the final decree of adoption, the child shall be entitled to inherit real and personal property from and through the adoptive parents in accordance with the statutes of descent and distribution. The adoptive parents shall be entitled to inherit real and personal property from and through the child in accordance with said statutes.

After a final decree of adoption is entered, the biological parents of the adopted child, unless they are the adoptive parents or the spouse of an adoptive parent, shall be relieved of all parental responsibilities for said child and shall have no rights over the adopted child or to the property of the child by descent and distribution....By way of illustration, the right of a parent in Oklahoma to authorize medical treatment for her minor child,...extends...to adoptive parents as well. Whatever rights may be afforded to the Doels based on their status as parent and child, those rights flow from an application of Oklahoma law, not California law....

The rights that the Doels seek to enforce in Oklahoma are Oklahoma rights....

We hold today that final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause. Therefore, Oklahoma's adoption amendment is unconstitutional in its refusal to recognize final adoption orders of other states that permit adoption by same-sex couples. Because we affirm the district court on this basis, we do not reach the issues of whether the adoption amendment infringes on the Due Process or Equal Protection Clauses.

We reverse the district court's order in this matter to the extent it held that the Magro-Finstuen plaintiffs had standing and directed OSDH to issue new birth certificates for the Magro-Finstuen plaintiffs. The order and judgment of the district court in all other respects is affirmed.

Case Questions

1. Why did the authors of the Constitution create the Full Faith and Credit Clause?
2. Why did Oklahoma refuse to recognize the California judgment?

CHAPTER SUMMARY

In this chapter readers have learned that federal and state constitutions, statutes, judicial opinions, and administrative rules constitute the primary sources of American law. Summary explanations were provided as to how each primary source contributes to the making of American law.

The importance of the federal and state constitutions as the fundamental sources of the rule of

law was emphasized. Because of the federal constitution, Congress's right to legislate is confined, and because it is limited, the state legislatures, as sovereigns, retained the constitutional right to pass laws pursuant to the police power. But where state laws directly conflict with a constitutionally enacted federal statute, the federal law is supreme.

There was a major emphasis in this chapter on judicial decision making and the important role of the doctrine of stare decisis.

Readers have learned that laws can vary from state to state both procedurally and substantively. Federal and state laws can also differ. States, for example, can elect to provide a higher level of procedural protections than is required either under the U.S. Constitution or by federal statute. Last, we have seen that state choice-of-law rules provide methods for ensuring cooperation between states and that the Full Faith and Credit Clause of the U.S. Constitution helps to preserve differences between the states.

CHAPTER QUESTIONS

1. Elizabeth Fedorczyk slipped and fell in a bathtub in her cabin on board the M/V *Sovereign*, a cruise ship sailing in navigable waters. She brought a negligence suit against the ship's owners and operators in a state court in New Jersey. The defendants removed the case to the U.S. District Court for the District of New Jersey on the basis of diversity jurisdiction. Neither partyaddressed the admiralty issue in their pleadings. The trial court entered summary judgment in favor of the defendants. The plaintiffs appealed to the U.S. Court of Appeals. The appeals court, in order to rule on the appeal, had to determine whether it should apply admiralty law to this dispute or follow instead the substantive law of the state of New Jersey. Which option should the Court of Appeals choose, and why?

   Fedorczyk v. Caribbean Cruise Lines, LTD, No. 95-5462, (3rd Circuit 1996)

2. Sludge, Inc., entered into a contract with XYZ, Inc., whereby Sludge was to build a building for XYZ in Detroit, Michigan, at the price of $1 million. Sludge was incorporated in Ohio; its principal place of business was in Chicago, Illinois. XYZ is a Delaware corporation with its home office in New York. The contract was negotiated primarily in Chicago but became effective when it was signed at XYZ's home office. There was a dispute concerning the agreement, and XYZ sued Sludge in a federal district court in Ohio. Which state law would govern the dispute if the court follows (1) the lex fori approach, (2) the lex loci contractus approach, or (3) the lex loci solutionis approach?

3. Lorretta Klump, at the time a resident of Illinois, was injured in an automobile collision in which her vehicle was struck by a vehicle driven by Curt Eaves, also an Illinois resident. This incident occurred in Illinois. After the accident, Lorretta moved to North Carolina, where she retained a local attorney, J. David Duffus Jr., to represent her in a lawsuit she wanted to file in Illinois against Mr. Eaves. She subsequently moved back to Illinois, where she maintained regular contact with Attorney Duffus. Lorretta's doctor and her insurance carrier were both situated in Illinois. She filed a malpractice suit against Duffus when he failed to file her Illinois suit prior to the lapsing of the Illinois statute of limitations. The jury awarded a judgment in plaintiff's favor in the amount of $424,000, but the defendants appealed on the grounds that the trial court did not have *in personam* jurisdiction over them. Duffus argued on appeal that since his allegedly negligent acts occurred in North Carolina, he could not be

subject to personal jurisdiction in Illinois. Is Duffus correct? Why or why not?

Klump v. Duffus, Jr., No. 90-C-3772, U.S. Court of Appeals (7th Circuit 1995)

4. Evian Waters of France, Inc., a New York corporation, was an importer of natural spring water from France. Evian contracted in 1987 with Valley Juice Limited, of Boston, Massachusetts to become Evian's exclusive New England distributor. Valley came to believe that Evian was violating its exclusivity rights in New England and filed breach of contract and other claims in a suit it filed in Massachusetts state court. Evian, believing that Valley had not paid it for contract water it had delivered, also filed suit in Connecticut. Both suits were removed to federal court on the basis of diversity jurisdiction, and the two suits were consolidated in the U.S. District Court for the District of Connecticut. The case was tried to a jury, which found in favor of Evian. Valley appealed to the U.S. Court of Appeals for the Second Circuit. Before reviewing the appellant's claims, the appeals court had to determine what state's law applied when two suits, which were initially filed in different states, were consolidated for trial, as in this case. Evian argued that a provision in its agreement withValley provided that New York law should apply. Valley contended that if the states' laws conflict, Massachusetts law should apply. How should the court of appeals resolve this dispute?

Valley Juice Ltd., Inc. v. Evian Waters of France, Inc., Nos. 94-7813, 94-7817, 95-7709, U.S. Court ofAppeals (2nd Circuit 1996)

5. On May 20, Arnie Walters's car crashed into a train owned and operated by the Regional Transit Authority at its crossing in Smithville. As a matter of law, the court found that the "Smithville crossing is extremely hazardous." On December 1 of that same year, Ole and Anna Hanson ran into a RTA train at the same crossing while George was driving them home from a party. Does the doctrine of stare decisis require that the court in *Hanson* accept the conclusion announced in the *Walters* case?

6. While en route to jury duty, Evans sustained a personal injury as a result of carelessness on the part of the county commissioners in permitting the concrete steps at the El Paso (Colorado) county courthouse to deteriorate. The lower court dismissed the complaint under the doctrine of governmental immunity. On appeal, the Supreme Court of Colorado, in its opinion dated March 22, 1971, decided to abolish governmental immunity for that state. The courts stated, "Except as to the parties in this proceeding the ruling here shall be prospective only and shall be effective only as to causes of action arising after June 30, 1972." Why might a court make its decision effective as a precedent some fifteen months after the date of its decision?

Evans v. Board of County Commissioners, 174 Colo. 97, 482 P.2d 968 (1971)

7. P. Whitney, a West Virginia contractor, was under contract with the state of West Virginia to construct State Route 2 near East Steubenville, just across the border from Steubenville, Ohio. Since the area was very hilly, Whitney used high explosives, such as dynamite and nitroglycerin, to clear the way for the road. One particularly large blast damaged a storeroom of the Steubenville Plate and Window Glass Company, located across the border in Ohio. The damage was extensive, and most of the stored glass was broken and rendered unusable. Keeping in mind that the blasting was done in West Virginia and the damage occurred in Ohio, which state's law will govern the action brought in a West Virginia court by Steubenville Plate Glass against Whitney?

Dallas v. Whitney, 118 W. Va. 106 (1936)

NOTES

1. You might want to refresh your memory and review this material in conjunction with your current reading.
2. L. Fuller, *Anatomy of the Law* (New York: Praeger, 1968), p. 85.
3. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
4. *Carter v. Carter Coal Co.*, 298 U.S. 495 (1936).
5. *Adair v. United States*, 208 U.S. 161 (1908).
6. *Hammer v. Dagenhart*, 247 U.S. 251 (1981).
7. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
8. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
9. *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937).

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Mr. Abdelrahman MAHDY

UPDATE: An Overview of the Egyptian Legal System and Legal Research

By Dr. Mohamed S. E. Abdel Wahab

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1. Introduction

The Arab Republic of Egypt lies in the northeastern part of Africa. Whilst most of the country is located in Africa, the easternmost part, the Sinai Peninsula, is considered part of Asia and is the only land bridge between the two continents. Egypt is divided into two unequal parts by the Nile River, and its terrain is mostly desert except for the Valley and Delta of the Nile, the most extensive oasis on earth and one of the main centers of habitation in Egypt. While Cairo is the largest city and the capital of Egypt, Alexandria, the second largest city, remains the principal port of Egypt on the Mediterranean.

With an area of more than one million square kilometers (1,001,450 sq. km.), Egypt prides itself in having extensive borders and is the sixteenth most populous country in the world with a population of approx. 99,413,317 people, according to the July 2018 Central Intelligence Agency World Factbook estimate. Unsurprisingly, most of the population is concentrated near the banks of the Nile River, which amounts to about 40,000 sq. km. This is because the land near the banks of the Nile is the only arable agricultural land in Egypt. However, there are ongoing efforts toward expansion of urban development and populating the desert in order to reduce the heavy concentration of the population along the Nile. Ever since 2014 onwards, Egypt has witnessed the development of an impressive array of infrastructure projects and road networks for better connectivity and the government is embarking on more and more projects to boost economic development across all sectors and offer better living conditions for all Egyptians.

Egypt has been a coherent political entity since 3200 B.C. and was one of the first civilizations to develop

irrigated agriculture, urban life, and large-scale political structures. On the muddy banks of the Nile, the oldest political and administrative systems were established along with Egypt's first central state. These systems have come a long way and are now used in the modern institutions and administrative systems and have also been used in the formulation of the constitution, parliament, responsible government and judicial authority since the 19th century.

2. The Egyptian Legal System

The Egyptian legal system is built on the combination of Islamic (*Shariah*) law and Napoleonic Code, which was first introduced during Napoleon Bonaparte's occupation of Egypt in 1798 and the subsequent education and training of Egyptian jurists in France.

The Egyptian legal system, being considered as a civil law system, is based upon a well-established system of codified laws. Egypt's supreme law is its written constitution. With respect to transactions between natural persons or legal entities, the most important legislation is the Egyptian Civil Code of 1948 (the "ECC"), which remains the main source of legal rules applicable to contracts. Much of the ECC is based upon the French Civil Code and, to a lesser extent, upon various other European codes and upon Islamic (*Shariah*) law, especially in the context of personal status.

Despite the non-existence of an established system of legally (*de jure*) binding precedents, judicial decisions do have persuasive authority. Courts are morally and practically expected to uphold the principles and judgments of the Court of Cassation for civil, commercial, and criminal matters, and the Supreme Administrative Court for administrative and other public law matters.

It is worth noting that the classical dichotomy of public and private law has resulted in the crystallization of a separate set of legal rules applicable to transactions involving the State (or any of its institutions, subsidiaries, or state-owned enterprises) acting as a sovereign power. This entailed the establishment of the Egyptian Council of State (*Conseil d'Etat*) by virtue of Law No.112 of 1946 as amended by Law No. 9 of 1949, which consists of administrative courts vested with the power to decide over administrative disputes pertaining to administrative contracts and administrative decrees issued by government officials. These courts apply administrative legal rules, which are not entirely codified; hence, because often no applicable legislative rules exist, the scope of judicial discretion is ample in light of the established principles laid by the supreme courts.

On January 25, 2011, an Egyptian revolution (the "Revolution") took place and transmogrified the country's political landscape, deposing the former regime led by the now defunct National Democratic Party, which has been in power for many years. Eighteen days after the Revolution had started, and specifically on February 11, 2011, the former President Mohamed Hosni Mubarak has, considering the Revolution's demands, resigned and the Supreme Council of the Armed Forces (the "SCAF") was entrusted with running the State's affairs until such time when power is transferred to an elected President.

Following the January 2011 Revolution, the SCAF issued a constitutional declaration on February 13, 2011 ("Declaration 1"), leading to the following resolutions;

- the Egyptian Constitution of 1971 was suspended,
- the SCAF shall be temporarily entrusted with running the State affairs for a period of six months or until the elections of the Parliament, Shura Council and President,
- dissolution of the then existing Parliament and Shura Council, and
- Constitution of a committee to amend some of the Constitution's provisions.

A second constitutional declaration was issued by the SCAF on March 30, 2011 ("Declaration 2") setting out the fundamentals of a temporary constitution (although not referred to as such), including the organization of the presidential elections, parliamentary elections and Shura Council elections. Declaration 2 also organized in its sixtieth Article the mechanism for the drafting of a new constitution, where it states that the members of the Parliament and the Shura Council who are not appointed (i.e. who

are elected) shall convene upon the invitation of SCAF to elect a constituent assembly composed of one hundred members to prepare a draft of a new constitution within a maximum period of six months from the date of its composition. The said draft constitution shall then be presented to the people for public referendum within fifteen days and enter into force from the date of the people's approval in the referendum.

By virtue of the supplementary constitutional declaration issued on June 17, 2012 ("Declaration 3"), it has been stipulated that the SCAF shall assume the legislation authority until the election of the parliament and its exercise of its competencies. Declaration 3 further sets out that in the event of the existence of any obstacle hindering the constitution drafting committee from exercising its functions, the SCAF shall have the right to appoint a new drafting committee. It is worth mentioning that Declaration 3 bestows on the SCAF, the President, the Prime Minister, the Supreme Council for Judicial Entities or one fifth of the members of the drafting assembly the authority to submit a request to the said committee requesting the reconsideration of a provision which is believed to be in violation with the purposes or main principles of the Revolution and its principal goals or with the main principles of former Egyptian constitutions.

The Parliament had appointed the constitution drafting committee, which was later dissolved by virtue of a court judgment. A new committee was formed by the Parliament to undertake the drafting task. However, it is worth noting that Declaration 3 was revoked by the then elected President on August 12, 2012, and the power to appoint a new drafting committee, in the event of existence of any obstacle hindering the constitution drafting committee from exercising its functions, was then vested with the President.

The then constituted committee presented a draft Constitution, which was approved in a public referendum and the draft was officially adopted as the Constitution of the country on 25 December 2012.

On June 30, 2013, Egypt witnessed another Revolution and the 2012 Constitution was suspended temporarily. The powers of the President were, according to the prevailing constitutional principles, temporarily transferred and assumed by the President of the Supreme Constitutional Court (Counselor Adly Mansour).

On July 20, 2013, president Adly Mansour issued a decree constituting a committee of ten experts to propose amendments to the Constitution. That committee concluded its work on August 20, 2013. As a second step to amend the Constitution, President Adly Mansour, on September 1, 2013, issued a decree constituting a second committee of fifty people representing all spectra of the Egyptian community (the "Committee of the 50"). This Committee of the 50 began its work on 8 September 2013 and ended its mission within the 60 days' time limit. The Committee of the 50 drafted the new Constitution and it was approved in public referendum in 2014 by 98.1% of the votes.

In May 2014, President Abdel Fatah El-Sisi became Egypt's newly elected President with a phenomenal endorsement and support of 97% of the votes. In the 2018 presidential elections, President Abdel Fatah El-Sisi was re-elected for a second presidential term.

In November 2018, one-fifth of the members of the House of Representatives proposed amendments to some articles of the 2014 Constitution, and, following due consideration of the proposed amendments, they were approved in mid-April 2019 and a public referendum followed on April 19-22, 2019, with an approval rate of 88.83% of the votes (the "2019 Constitutional Amendments"). Amongst the notable amendments are: women are allocated at least one-quarter of the number of seats in the House of Representatives (Article 102) and that the presidential term of office is extended to six years (instead of four) and any president may not be re-elected for more than two consecutive terms (Article 140 (1)), noting that the current second term of the President shall be six Gregorian years starting from the date of his election in 2018 and he may be re-elected for another consecutive term (Article (241 bis)). The 2019 Constitutional Amendments also provided that the President shall appoint the heads of the judicial bodies or authorities and shall head the Supreme Council for the Judicial Authorities. The members of that council include: the head of the Supreme Constitutional Court, the heads of other judicial authorities, the head of the Cairo Court of Appeal and the Attorney-General. The 2019 Constitutional Amendments have

re-introduced a second chamber of the Parliament under the name of the House of Senates (Article 248).

3. The Executive Power

3.1. The President

The President of Egypt is the Head of the State, and he is also the Supreme Commander of the Armed Forces and Head of the Executive Authority (the Egyptian Cabinet). In addition, the President heads the Supreme Council for the Judicial Authorities (Article 185 of the 2019 Constitutional Amendments). The President assumes the customary powers normally afforded thereto under a presidential political system.

Requirements to Hold Office: Article (141) of the Egyptian Constitution clearly states that a presidential candidate of Egypt must meet certain requirements. First, he/she must be an Egyptian national, born to Egyptian parents and neither his/her parents nor his/her spouse may have held another citizenship. He/She must enjoy both political and civil rights. Moreover, his/her age should not be less than 40 calendar years on the day of registration as a candidate.

Term(s) of Office: According to Article (140) of the Constitution, after being elected by direct secret ballot, with an absolute majority of valid votes (Article 143), the President will serve six consecutive calendar years commencing on the day the term of his predecessor ends. The President may only be re-elected once. However, the current second term of the President shall be six Gregorian years starting from the date of his election in 2018 and may be re-elected for another consecutive term (Article (241 bis)).

Powers: According to Article (146) of the Constitution, the President of the Republic assigns a Prime Minister to form the government and introduce his/her program to the House of Representatives. If his/her government does not win the confidence of the majority of the members of the House of Representatives within thirty days at the most, the President shall appoint a Prime Minister who is nominated by the party or the coalition that holds the majority or the highest number of seats in the House of Representatives. If the government of such prime minister fails to win the confidence of the majority of the members of the House of Representatives within thirty days, the House shall be deemed dissolved, and the President of the Republic shall call for the election of a new House of Representatives within sixty days from the date on which the dissolution is announced. In the event the government is chosen from the party or the coalition that holds the majority or the highest number of seats in the House of Representatives, the President of the Republic shall, in consultation with the Prime Minister, choose the Ministers of Defense, Interior, Foreign Affairs and Justice.

According to Article 102 of the Constitution, the President may appoint no more than 5% of the members of the House of Representatives. The President shall call the House of Representatives to session (Article 115). According to Article 151 of the Constitution, the President represents the State in its foreign relations and concludes treaties and ratifies them after the approval of the House of Representatives. Voters must be called for referendum on the treaties related to making peace and alliances, as well as those relating to sovereign rights. In all cases, no treaty which is contrary to the provisions of the Constitution or which results in ceding any part of the State's territory may be concluded. However, the President, after consulting the Cabinet, may pardon the convicts or reduce their punishment (Article 155).

In case an event, which requires taking urgent measures that cannot be delayed, occurs while the House of Representatives is not in session, the President of the Republic shall call the House for an urgent meeting to present the matter thereto (Article 156).

3.2. Cabinet

As the chief executive body of Egypt, the Cabinet consists of the Prime Minister, his/her deputies, the Cabinet Ministers, and their deputies. In addition to its management of daily affairs and setting strategies for development and reform in all areas, it has a role in shaping the agenda of the houses of Parliament by

proposing laws to Parliament, as well as amendments during parliamentary meetings. It may also make use of procedures to speed up parliamentary deliberations.

Articles (167) of the Constitution clearly defines the legal capacity of the Cabinet as follows:

- To collaborate with the President of the Republic in the making of general policies and supervise its implementation.
- To maintain the security of the nation, and to protect the rights of citizens and the interest of the State;
- To direct, coordinate and follow up on the work of the ministries and their affiliated public bodies and organizations;
- To prepare draft laws and decrees;
- To issue and monitor the implementation of administrative decrees according to law.
- To prepare the draft for the State General Plan.
- To prepare the draft for the State General Budget.
- To seal loan agreements and grant the same in accordance with the articles of the Constitution.
- To follow up on the execution of laws.

In addition, Article (168) of the Constitution, the minister shall, within the framework of the State's general policy, develop the Ministry's general policy in collaboration with the competent authorities, supervise the implementation thereof and provide guidance and oversight. Traditionally, the Cabinet consists of:

- Ministers of State, who have considerably more transient portfolios since positions may be created and dissolved in reaction to a shift in government priorities or a change in the specific qualifications of candidates without altering the departmental structure. The Ministers of State have specific tasks or agencies that they must oversee, e.g. the Ministry of State for Environmental Affairs, Ministry of State for the Peoples' Assembly, and the Ministry of State for Administrative Development.
- Ministers without portfolio, ministers who are not in charge of a particular department such as the Chief of the Egyptian Intelligence Services.
- Chairmen of Departments, who are men/women that head important departments, which do not fall under the jurisdiction of any of the ministers. The first category thereof answers directly to the President, such as the National Council for Women. The second category answers directly to the Prime Minister, such as the Chairman of Suez Canal Authority, Sports Authority, and Youth Authority.
- Ministers-Delegate, who have been delegated duties by the ministers to assist them in some areas of their departments. They rarely are asked or invited to attend cabinet meetings.

3.3. Ministries

Access the list of Ministries.

- Ministry of Agriculture and Land Reclamation
  - Central Laboratory for Agricultural Expert Systems
- Ministry of Defense
  - Armed Forces
  - Ministry of Justice
  - Ministry of Culture
  - Supreme Council of Culture
  - The General Organization for Books and National Documentary
  - Egyptian Museum
  - National Cultural Center (Cairo Opera House)
  - Egyptian General Authority for Books
  - General Authority Cultural Centers

    - National Organization for Urban Harmony
    - Academy of Arts
    - Cultural Development Fund
- Ministry of Education and Technical Education
    - General Authority for Educational Buildings
    - E-Learning
    - General Authority for Libraries
- Ministry of Foreign Affairs
- Ministry of Industry and Trade
    - Cotton Arbitration and Testing General Organization
    - Export Development Authority
    - Productivity and Vocational Training Department
    - Egyptian Export Promotion Center
    - Egyptian International Trade Point
    - National Navigation Company
    - Egyptian Commercial Service
    - General Organization for Exports and Imports Control
    - Egypt Expo and Convention Authority
    - Egyptian Cooperation for Exports Guarantee
    - Egyptian Bank for Export Development
    - Intellectual Property Unit
    - Industrial Development Authority
    - Egyptian Organization for Standardization and Quality
    - Industrial Control Authority
    - Industrial Modernisation Authority
    - Productivity and Vocational Training Authority
    - Industrial and Mining Projects Council
    - Al Amiria Printing Press
    - Tebbin Institute for Metallurgical Studies
    - Egyptian Accreditation Council
    - Chemical Administration
    - Industrial Modernization Center
    - Human Resources Unit
    - Qualifying Industrial Zones
    - Technology and Innovation Industrial Council
    - Industrial Training Council
    - Trade Information Center
    - Egyptian Competition Authority
    - Foreign Trade Training Center
    - National Quality Institute
    - Social Fund for Development
- Ministry of Parliamentary Affairs
- Ministry of Housing, Utilities and Urban Communities Development
    - New Urban Communities Authority
    - Housing and Building National Research Center
    - Real Estate Market Place
- Ministry of State for Immigration and Egyptian Expatriates Affairs
- Ministry of Manpower
- Ministry of Religious Endowment (Awqaf) and Islamic Affairs
    - Dar Al-Iftaa Al-Masriyyah
    - Supreme Council for Islamic Affairs
- Ministry of Higher Education and Scientific Research

    - Egyptian Universities Network
    - National Committee for Education Science and Culture
    - Academy of the Arabic Language
    - National Authority for Remote Sensing and Space Sciences
    - Academy of Scientific Research and Technology
    - National Research Centre
- Ministry of Water Resources and Irrigation
    - National Water Research Center
- Ministry of Supply and Internal Trade
    - General Committee for Foreign Aids
    - General Authority for Supply Commodities
    - Consumer Protection Agency
    - Internal Trade Development Authority
    - Egyptian Holding Company for Containers and Storage
    - Authority for Jewelry Stamps and Balances
- Ministry of Social Solidarity
    - Sector for Social Affairs
    - National Organization for Social Insurance
    - Fund for Drugs Control and Treatment of Addiction
    - National Center for Social and Criminological Research
    - Nasser Social Bank
    - General Committee for Foreign Aids
- Ministry of Investment and International Co-operation
    - General Authority for Investment and Free Zones
    - Capital Market Authority
    - Cairo and Alexandria Stock Exchanges
    - Egyptian Investment Portal
- Ministry of Finance
    - Customs Authority
    - Egypt Mint Authority
    - Egyptian Tax Authority
    - Equal Opportunities Unit
    - General Authority For Governmental Services
    - Large Taxpayer Center
    - Public Treasury Authority
    - Real Estate Tax Authority
    - Vehicle Scrapping & Recycling Program
- Ministry of Communications and Information Technology
    - Information Technology Industry Development Agency
    - Information Technology Institute
    - Technology and Innovation Entrepreneurship Center
    - National Postal Organization
    - National Telecommunication Regulatory Authority
    - Software Engineering Competence Center
    - Smart Village
    - Chamber of Information Technology and Communications (CIT)
    - Eternal Egypt Kenana Online
- Ministry of Petroleum and Mineral Resources
    - Egyptian Petroleum Research Institute
    - Egyptian General Petroleum Company
    - Egyptian Natural Gas Company
- Ministry of Electricity and Renewable Energy

    - New and Renewable Energy Authority
    - Nuclear Materials Authority
    - Atomic Energy Authority
    - Egyptian Electricity Utility and Consumer Protection Regulatory Agency
- Ministry of Environmental Affairs
    - Egyptian Environmental Affairs Agency
- Ministry of Planning and Administrative Reform
- Ministry of Health and Population
    - General Organization for Teaching Hospitals and Institutes
    - Egyptian Ambulances Organization
    - Egyptian Drug Authority
    - Central Department for Laboratories
- Ministry of Civil Aviation
    - Egypt Air Holding Company
    - Egyptian Aviation Academy
- Ministry of Transportation
    - National Authority for Tunnels
    - Maritime Transport Sector
    - Egyptian Maritime Data Bank
    - General Authority for Roads, Bridges and Land Transport
- Ministry of State for Military Production
- Ministry of Antiquities
    - The Grand Egyptian Museum
- Ministry of Public Enterprise Sector
- Ministry of Water and Irrigation
    - Egyptian General National Organization for Drainage
    - Egyptian General National Organization for Beaches Maintenance
    - Egyptian General National Organization for the High Dam and Aswan Watertank
    - Irrigation Authority
    - National Center for Water Research
    - Egyptian General Survey Authority
    - Electrical and Mechanical Authority
    - Ministerial General Bureau

4. The Legislative Power – Parliament

The Parliament of Egypt is located in Cairo. As the legislative authority, it has the power to enact laws, approve general policies of the State, approve the general plan for economic and social development and the general budget of the State, supervise the work of the government, ratify international conventions, and to vote to impeach the President of the Republic (Article 159) or replace the government and its Prime Minister in a vote of no-confidence (Article 131).

The Parliament was, since 1980, a bicameral legislature. It formerly consisted of two chambers:

- The People's Assembly and
- The Shura Council.

Under the 2014 Constitution, the Parliament contained only one chamber, which is the House of Representatives. The Shura Council was abolished, but later on, in the 2019 Constitutional Amendments, the second chamber of Parliament was resurrected under the name of "House of Senates". That said the Parliament now consists of two chambers:

- The House of Representatives and

- The House of Senates.

Under the Constitution, every year, the Parliament meets for one nine-month session, but under special conditions, the President may call the Parliament into session.

4.1. The House of Representatives

The House of Representatives (formerly under the name of People's Assembly) was founded in 1971 as a result of the adoption of the old Constitution of 1971. According to Article (106) of the Constitution, the House of Representatives should be composed of no less than four hundred and fifty members elected by direct secret public ballot. A candidate for the membership of the House of Representatives must be an Egyptian citizen, enjoying civil and political rights, a holder of at least the certificate of basic education, and should not be below 25 Gregorian years of age on the day of opening candidacy registration. The President of the Republic may appoint no greater than 5% of the members. According to Article (106), the term of membership in the House of Representatives is five calendar years, commencing from the date of its first session. For the parliamentary elections of 2016, it resulted in 90 women with 15% of the total members (such great percentage is gained by women for the first time), 9 persons representing the disabled, 8 Egyptians members abroad, and the percentage of youth under 35 who reaches more than a quarter of the members Parliament. The President has appointed 28 members of the House of Representatives.

4.1.1. Jurisdiction and Duties

Competences of the House of Representatives are as follows:

Legislation: It is the main duty of the House; it includes the right of the President, the Cabinet or any Representative to propose draft laws, which shall be referred to the competent specialized committees of the House for review and submission of a report to the House. A committee may seek the opinion of experts on the matter in question (Article 122 of the Constitution).

Under Article 121 of the Constitution, the convocation, or formal gathering, of the House of Representatives is valid only when a majority of the members attends. Once a majority has been achieved, then the voting process begins on draft laws; decisions are made on the basis of majority rule, provided that such majority constitutes not less than one third of the House members.

Under Article 123 of the Constitution, the President is entitled to have issue with or object to some laws. The President can send back the draft law if s/he disagrees with it, even if it was approved by the House of Representatives. S/he has a time period of thirty days to return the draft law after he/she informs the House. In a case in which the draft law is not returned in the assigned time, it is endorsed as a law and promulgated. However, if it is returned within the time period, then the House of Representatives may endorse it for the second time by a majority vote of two-thirds. In that case, it is also considered a law and promulgated.

In case the House of Representatives is not elected, the Constitution gives the President the right to issue decrees having the force of law, provided that they should then be presented to, discussed and approved by the new House of Representatives within fifteen days from the commencement of its session. If such decrees are neither presented nor discussed by the House, or if they are presented but not ratified thereby, their force of law shall retroactively be revoked without need for issuing a decision to that effect, unless the House confirms its effectiveness during the previous period or decides to settle the consequences thereof (Article 156).

On a different note, legislation (statutes) constitutes the main source of legal rules. Codified statutory rules rank below the Constitution and international conventions. However, they rank higher than executive regulations, decrees, internal regulations, custom, and general principles of law. According to Article (2) of the Constitution, Islamic Law (*Sharia*) became the principal source of legislative rules. [1] Such

wording simply implies that any new law that is being enacted or considered for enactment should not be in contravention of any prevailing principles of Islamic Law (*Sharia*). Nevertheless, whilst all statutes regulating personal status issues (such as inheritance, marriage, divorce, alimony, etc.) are derived from Islamic norms, penal law rules as codified in the Penal Code are entirely western, secular rules. Since this Article was first enacted in the 1980 amendment to 1971 Constitution, it is argued that this amendment operates only with respect to post-1980 legislation and does not have a retroactive effect. Accordingly, any legal rules which are inconsistent with general principles of Islamic Law (*Sharia*), that have been enacted prior to 1980 remain in full force and effect (such as penal law rules), unless abolished or replaced by new laws.

It is worth noting that Egypt has enacted a number of new statutes to respond to contemporary standards of global economic and business reform including, without limitation: Investment Law, Anti-Money Laundering Law, Intellectual Property Rights Law, Competition Law, Consumer Protection Law, Electronic Signatures Law, Banking Law, Taxation and VAT Laws, Public Private Partnership (PPP) Law, Arbitration Law, etc.[2]

Approval of Plan and Budget: The House of Representatives has one of the most important capacities in the State, which is to approve of the State's general budget, as Article (101) of the Constitution specifically state that the general plan for economic and social development should be approved by the House of Representatives.

Under Articl2 125 of the Constitution, drafting the Budget is a serious matter and must be presented to the Assembly by the Cabinet within a period not exceeding six (6) months as of the end of the fiscal year in order to be voted upon. With respect to taxation, the Constitution states that taxes or duties may not be levied, charged, amended or abrogated except by virtue of a statute (Article 38). Accordingly, individuals or legal entities are not obliged to pay any taxes or duties except those provided under the law.

4.1.2. Committees

Under the Regulation of the House of Representatives, there are 25 specialized committees of the House helping exercise its legislative and monitoring duties:

- The Constitutional and Legislative Affairs Committee;
- The Plan and Budget Committee;
- The Economic Affairs Committee;
- The Foreign Relations Committee;
- The Arab Affairs Committee;
- The African Affairs Committee;
- The Defense and National Security Committee;
- The Proposals and Complaints Committee;
- The Manpower Committee;
- The Industry Committee;
- The Medium sized, Small sized and Very Small seized Projects Committee;
- The Energy and Environment Committee;
- The Agriculture, Irrigation, Food Security and Livestock Committee;
- The Education and Scientific Research Committee;
- The Religious and Religious Endowments Committee;
- The Social Solidarity, Family and Disabled Persons Committee;
- The Information, Culture and Antiques Committee;
- The Tourism and Civil Aviation Committee;
- The Health Affairs Committee;
- The Transportation and Communications Committee;
- The Telecommunication and Information Technology Committee;
- The Housing, Public Utilities and Reconstruction Committee;

- The Local Government Committee;
- The Sports and the Youth Committee; and
- The Human Rights Committee.

4.2. The Senate

The Senate is concerned with studying and proposing what it sees as tools to support democracy, national unity, social peace, the basic values of society, supreme values, rights, freedoms and public duties, and deepen and expand the democratic system (Article 248). The Senate shall consist of a number of members determined by law, not less than 180 members. Two-thirds of the members of the Council shall be elected by direct secret ballot. The President of the Republic shall appoint the remaining one-third and the elections shall be held in accordance with the law.

4.2.1. Functions of the Senate

According to Article 249 of the Constitution, the opinion of the Senate shall be taken on the following:

- Proposals to amend one or more provisions in the Constitution.
- Projects concerning the general plan for Social and Economic Development
- Treaties of reconciliation and alliance and all treaties relating to sovereign rights.
- Draft laws and draft law supplementing the Constitution referred to it by the President of the Republic or the House of Representatives.
- Whatever the President of the Republic refers to the Senate concerning the general policy of the State or its policy in Arab or foreign affairs.

5. The Judicial Authority

5.1. The Court System

As the third independent authority of the State, the Egyptian Judiciary is comprised of administrative and non-administrative courts, a Supreme Constitutional Court, penal courts, civil and commercial courts, personal status and family courts, national security courts, labour courts, military courts, as well as other specialized courts or circuits.

The Egyptian Court system is composed of a number of tiers: the Courts of First Instance, Court of Appeal and the Court of Cassation which sits at the apex of the judiciary. The classical dichotomy of public and private law has resulted in the establishment of the Council of State (*Conseil d'Etat*), which consists of administrative courts vested with the power to decide over administrative disputes pertaining to administrative contracts and administrative decrees issued by government officials and public law entities. The Supreme Constitutional Court was established in 1970 replacing the Supreme Court established in 1960 and has exclusive jurisdiction to decide questions regarding the constitutionality of laws and regulations, as well as negative and positive conflict of jurisdiction.

Generally, the Egyptian judges are familiar with civil law systems' concepts, and despite the huge case backlog and time-consuming proceedings, the principles of due process and judicial review are inherently cherished and respected. Accessibility to justice is an indispensable principle of the Egyptian legal system. Judges enjoy judicial immunity and cannot be dismissed by the Executive Authority. However, due to the large amount of cases before the courts, courts experience backlog, which adversely affects the efficiency of the entire judicial system. Furthermore, fees to administer judicial proceedings are not very high, and judicial aid through appointing lawyers as representatives for those who are unable to afford a lawyer is generally available.

5.2. The Supreme Constitutional Court

The Supreme Constitutional Court is an independent body in the Arab Republic of Egypt. It is currently located in the Cairo suburb of Maadi.

The Court is the highest judicial power in Egypt. By virtue of Article 25 of the Supreme Constitutional Court's Law No.48 of the Year 1979, the court is empowered to:

- Determine the constitutionality of laws and regulations;
- Decide on jurisdiction disputes between judicial bodies or authorities of judicial competence;
- Decide on the disputes that might take place as a result of enforcing two final contradictory rulings issued by two different judicial entities; and
- Interpret the laws issued by the Legislative Authority and the decrees issued by the Head of the State in case of any divergence with respect to their implementation.

The President of the Republic chooses the head of the Constitutional Court from among the five oldest deputy heads of the Courts (Article 193 of the Constitution).

5.3. Court of Cassation

In 1931, the Court of Cassation was established to provide exclusive and uniform interpretation and application of the law. The Court of Cassation is at the apex of the non-administrative courts in Egypt and is based in Cairo.

The Court of Cassation's jurisdiction hears challenges brought to it by either adversary or by public prosecution; it also includes the examination of lawsuits that arose from a judge's action. When such a dilemma occurs, the courts assume the role of a court of merit rather than a court of law.

Another function of the Court is to give rulings in cases of reparations for all violated verdicts. The Court issues annual collections on approved judicial principles in the title "Rulings and Principles of the Court of Cassation". According to Article (107) of the Constitution, the Court of Cassation is entrusted with deciding over the validity of the membership of the delegates of the House of Representatives.

5.4. Court of Appeal

There exist around eight Courts of Appeal in Egypt, all located in major cities. These are second-degree courts that review the awards of the courts of first instance. Their review covers questions of fact as well as questions of law. Judges of sufficient experience and seniority sit as judges in the Courts of Appeal.

Appeals from rulings rendered by the Courts of First Instance should be made within specific time frames, otherwise an appeal will be rejected, as such, time limits are mandatory. Judgments rendered by a Court of Appeal are final only open to challenge before the Court of Cassation, and usually on points of law or lack/inconsistency of reasoning.

5.5. Court of First Instance

The Courts of First Instance are first degree courts, which have the competence to consider lawsuits filed before them only if they fall under their jurisdiction; their rulings are, generally, subject to appeal. The Courts of First Instance are divided into Primary Courts and District Courts. Cases are mainly divided between both Courts on the basis of their value, leaving minor cases less than 40000 EGP (forty thousand Egyptian pounds) to be decided by the District Courts. Appeals made on the judgments of the District Courts are brought in front of a Primary Court with an appellate body, which is at the same standing of the Court of Appeal.

Judges sitting in Courts of First Instance are relatively young and rank below the judges of the Courts of Appeal and the Court of Cassation in terms of experience and seniority.

5.6. Family Court

This court was founded in 2004 to provide a specialized judicial tool for family disputes. This court aims at providing social peace and comfort for the children caught in the middle of disputes relating to tutelage, divorce, alimony and custody. Such courts also aim to sustain amicable settlements for family problems through specialized and professional guidance agencies.

5.7. Economic Courts (Circuits)

The enactment of Law No.120 of 2008 created specialized Economic Courts. The underlying philosophy of the new Law is to create a specialized forum that retains original competence over economic matters in both criminal and civil proceedings and offers expedited commercial and investment justice.

The new law does not create a new order of courts but establishes new circuits within the hierarchy of non-administrative courts, specifically at the level of Courts of Appeal. The new law gives Economic Courts jurisdiction over criminal, as well as civil and commercial, economic matters. Such newly created Circuits are intended to provide a “one stop shop” for investors and disputants engaged in economic activities.

Appeal is available under this new law for cases involving amounts of L.E. 5,000,000 or less. Cases in excess of this sum are tried directly in appellate circuits. Review by the Court of Cassation is available for the latter larger cases, but not the former. Nevertheless, review by the Court of Cassation is available in all criminal matters.

5.8. Egyptian State Lawsuits Authority

The Egyptian State Lawsuits Authority (ESLA) is an Egyptian judicial institution that was established in 1874, nine years before the Egyptian national courts were established in 1883.

The authority does not perform a truly judicial function; its role is confined to representing the State before national and international courts and arbitral tribunals. The law states that the Egyptian Lawsuits Authority has the power to plead on behalf of the State. ESLA is engaged in all cases involving the State or a State-owned entity.

5.9. Public Prosecution

The Public Prosecutor is appointed by the President of the Republic out of three nominees by the Supreme Judicial Council, the deputy heads of the Court of Cassation and the heads of the courts of appeal and the assistant attorneys. The Public Prosecutor’s term of office is four years or until reaching the retirement age, whichever earlier, and his post is for one period (Article 189 (2) of the Constitution). The Public Prosecution, headed by the Public Prosecutor, has two major functions, which are: (a) to file criminal actions when acting as public prosecutors before a criminal court; and (b) to hold the right to initiate actions even if the plaintiff has relinquished his/her right to do so.

Public prosecutors investigate crimes, visit crime scenes, question the accused, issue search warrants, and order the imprisonment of the accused for a period of four days prior to trial or prosecution. If the Public Prosecution needs further imprisonment of the accused, it may request from the district judge to issue an order of a pre-trial detention for a period of a maximum of fifteen days. This period may be renewed for a similar duration; however, in no event shall the total of the latter periods exceed forty-five days. Notwithstanding this, if the pre-trial investigations have not completed, the period of the forty-five days may be consecutively extended for a similar period and different time limits may apply depending on the case.

Moreover, joining the public prosecution is the natural path to becoming a judge. Nevertheless, some

members of the Public Prosecution remain within the latter and get promoted to District Attorneys, Attorneys General, and potentially may qualify for the post of the Public Prosecutor.

5.10. Administrative Courts (State Council – Conseil d' Etat)

As previously, mentioned, any administrative dispute to which an administrative body is party is a matter handled by the Administrative Court and falls under its jurisdiction. Administrative Courts have a separate structure, where the Supreme Administrative Court sits at the apex of such structure. There are also departments for opinions and legislation, which advise public entities on diverse aspects of public law such as administrative contracts, tenders, ministerial decrees, etc.

In any governmental authority or agency, there exists an in-house member of the State Council (in addition to a department for legal affairs) whose opinion should be sought with respect to any administrative law matter.

6. Jurisdiction of the Courts

With respect to jurisdiction, it is necessary to distinguish between national jurisdiction in pure domestic cases and international jurisdiction regarding disputes involving a foreign element. A brief overview of both seems to be in order.

National or domestic jurisdiction is shared between two main judicial bodies:

- General courts; and
- Administrative courts (State Council).

Whilst courts of general jurisdiction are concerned with the settlement of civil, criminal, commercial and personal status matters, administrative courts are concerned with the settlement of administrative or public law matters governed by the *jus imperii*. The criteria for establishing general jurisdiction could be based on the value of the dispute, nature of the dispute, or territorial jurisdiction of the court.

With respect to the value of the dispute, general jurisdiction is divided between:

- **Trial courts:** dealing with disputes of not more than L.E. 40,000 (forty thousand Egyptian pounds), and their judgment shall be final (non-appealable) in case the amount of the dispute does not exceed 5,000 (five thousand Egyptian pounds).
- **Higher courts** (such as the Court of First Instance): dealing with disputes, which did not fall with the jurisdiction of the trial courts, and their judgments shall be final (non-appealable) in case the amount of the dispute does not exceed 40,000 (f0rty thousand Egyptian pounds).

With respect to territorial competence, courts of general jurisdiction are divided according to cities and suburbs. For example, there are Giza courts, Cairo courts, Alexandria courts, Mansoura courts, etc. Within each city, there might be a number of courts, such as the North Giza Court of First Instance and the South Giza Court of First Instance.

One Court of Appeals is in Cairo, one in Alexandria, one in Tanta, one in Ismaileya, one in Beni Suef, one in Mansoura, one in Assiut, and one in Qena. As for the Court of Cassation, there is only one in the whole country and it is located in Cairo.

With respect to international jurisdiction, Egyptian courts assume jurisdiction regarding international commercial disputes involving a foreign element on the basis of any of the following criteria:

- Cases in which the defendant is Egyptian, unless the dispute pertains to immovables located in a foreign state;
- Cases in which the defendant, despite being a foreign national, is either domiciled or resident in

Egypt, unless the dispute pertains to immovables located in a foreign State;
- Cases involving property (movables or immovables) located in Egypt even though the defendant is a foreign national who is not domiciled or resident in Egypt;
- Cases pertaining to an obligation created, performed, or required to have been performed in Egypt;
- Cases pertaining to a bankruptcy or insolvency declared in Egypt;
- Cases in which the defendant voluntarily submits to the jurisdiction of Egyptian courts (full effect to the principle of party autonomy);
- Claims, counterclaims, defenses, incidental questions, and other issues which are closely connected to cases filed before Egyptian courts;
- Cases involving interim and provisional measures to be executed in Egypt.

The above-mentioned principles represent the diverse criteria for establishing jurisdiction of Egyptian courts both on national and international levels.

With respect to the effect of choice of law and exclusive jurisdiction clauses in international contracts, it should be noted that Egyptian law, like most legal systems, upholds the principle of party autonomy to the extent it does not contravene mandatory Egyptian law principles. Thus, parties to a contract are free to agree on an applicable law and exclusive jurisdiction, and their agreement will normally be upheld by courts insofar as their agreement does not violate public policy considerations or fundamental mandatory norms.

7. Arbitration

Alongside court litigation, arbitration has established itself as a prominent method for resolving business, commercial, and investment disputes. An Arbitration Law No.27 of the Year 1994 was enacted which governs both domestic and international arbitration. Egyptian courts are generally arbitration friendly and judges have generally accepted and supported arbitral proceedings. An arbitral award, by virtue of the Arbitration Law, is not reviewed on the merits.

Thus, if the parties to a contract agree on an arbitration clause or agreement in disputes capable of settlement by arbitration (the criteria for arbitrability under Egyptian Law being the possibility of settlement), Egyptian courts will not review the subject matter of the dispute. However, an arbitral award rendered may only be subject to nullity proceedings in Egypt if: (a) the Seat of Arbitration is in Egypt or (b) the parties have agreed, if the Seat is in a different State, that the law applicable to the proceedings is the Egyptian Arbitration Law No.27 of the Year 1994. Such nullity action may be brought for a number of exclusive grounds, though most are procedural.

8. Enforcement of Judgments and Appeals

Enforcement of judgments and awards is possible when an award is final, which is the case for awards rendered by the Court of Appeal, some of the awards rendered by the Court of First Instance such as a judgment determined by the parties to be final, or final arbitral awards. However, other judgments and awards rendered by the Court of First Instance may also be enforceable if provided for in the law, such as in summary judgments, unless the judgment provided for the depositing of a security or in commercial matters upon depositing a security. The judge may issue and provide for enforcement, while at the same time enjoying the right to deposit a security upon enforcement, such as in judgments issued to pay pension, wages or salaries,

Enforcement of the judgment may entail seizure of property or assets as follows: (a) conservatory seizure over movables or immovables (this is an interim or provisional measure of protection that may be ordered by the court to protect the interest of creditors); (b) seizure with a view to sell the seized property or assets (applicable to both movable and immovable); and (c) garnishment effected under the hands of third parties and seizure of employment wages.

However, pursuant to Egyptian law, certain rights, assets or property may not be seized, such as industrial property rights, supplementary rights *in rem* like mortgages and concessions etc., rights of servitude, current accounts, funds or assets needed for public utilities, saving funds, and investment certificates.

Creditors may also induce voluntary enforcement of judgments by threatening to institute bankruptcy or liquidation proceedings against the debtor. Judgments rendered by the Court of First Instance are subject to appeal by the losing or respondent party, and judgments rendered by the Court of Appeal are equally subject to challenge before the Court of Cassation, whose review of the judgment does not hinder or impede enforcement *per se*.

With respect to the right of appeal, the party who lost his case before the Court of First Instance is entitled to appeal the judgment before the Court of Appeal, provided that the prescribed period of appeal is observed, which is usually 40 days as a general principle, unless a specific provision indicates otherwise.

Egyptian courts will generally recognize and enforce foreign judgments if the following conditions are satisfied: (a) Egyptian courts do not have jurisdiction over the dispute, and the foreign court which rendered the judgment enjoys jurisdiction pursuant to its rules on international jurisdiction; (b) the parties have been notified of the proceedings and validly represented before the competent court; (c) the judgment or award is final and binding pursuant to the rules prevailing under the law of the foreign court; and (d) the foreign judgment is not in conflict with a prior award or judgment rendered by Egyptian courts and is not in contravention of the prevailing public policy considerations.

If the foreign award or judgment satisfies the above-mentioned conditions, a request for enforcement is submitted to the court whose jurisdiction encompasses the place of enforcement. Such request is submitted in accordance with the general rules for filing cases, and the competent Egyptian court will then render its *exequatur* without reviewing the foreign judgment on its merits. The prescription period with respect to enforcement requests and actual enforcement is 15 years in accordance with the general rules on prescription under the Civil Code.

9. Enforcement of Arbitral Awards

With respect to enforcement of foreign arbitral awards, a request for enforcement should be submitted to the competent court, which, in the case of international commercial arbitration, is the Court of Appeal. The request should be accompanied by the original text of the award or a signed copy thereof, a copy of the arbitration agreement, an Arabic translation of the award ratified by an authorized entity if the award is rendered in a foreign language, and a copy of the minutes verifying submission of the award in the registry of the competent court. As a requirement for the enforcement, the award-creditor should submit an application for depositing the award with the clerical division of the competent court. That deposit application will be sent to the Arbitration Technical Bureau within the Ministry of Justice to render its opinion on the application.[3] The Technical Bureau shall render its opinion, whether to accept or reject the application for depositing the award, after ascertaining that: (i) the award did not violate the public order of the Arab Republic of Egypt or decide on a dispute that cannot be subject to compromise; (ii) the deposit application has been filed with the proper competent court.[4] After depositing the award with the clerical division of the competent court, the Chief Judge of the court issue its order whether to accept or reject the request for enforcement.[5]

The request for enforcement of an arbitral award will not be accepted unless the period for filing a nullity action has lapsed in cases where a nullity action is possible.[6] The conditions of enforcement under the Arbitration Law are: (a) the inexistence of a conflicting prior Egyptian award on the same issue; (b) absence of any contravention to Egyptian public policy considerations; and (c) valid notification of the arbitral award.

It should be noted that the conditions for enforcement of arbitral awards are more relaxed than those of foreign judgments, due to the provisions of the Arbitration Law and the impact of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), to which Egypt is a

signatory, without reservations.

At the stage of recognition or enforcement, arbitral awards, like foreign judgments, are not reviewed on their merits.

10. Primary Materials

Egyptian Codes (Statutes) are published in Arabic in the Official Gazette (a special journal dedicated to publishing statutes only) available in Arabic in book format. Prime Minister's and Minister's Decrees are published in the Egyptian Gazette, which is available in Arabic in book format. However, an electronic version of all such statutes, decrees, and regulations should be available in Arabic on the Legislation And Development Information Systems (LADIS), i.e. Tashreaat website.

LADIS or Tashreaat publishes all laws, decrees, etc. This is in addition to court rulings and some legal articles, most of which are in Arabic, but some of which are in English. Tashreaat also has specialized pages for human rights, IPRs, and Constitutions of Arab countries. They offer legal opinions on diverse aspects of law, and they publish a monthly legal bulletin.

Unlike common law countries, Egypt does not have dedicated periodicals or reports where cases and court judgments are published. Moreover, not all court rulings are published. However, the Technical Bureau of the Court of Cassation, the Technical Bureau of State Council are legally assigned the function of publishing their judgments. These Judgments have been published in book format in what we call "Collection of Awards." These are organized in chronological order by Judicial Years. The judgements of the Constitutional Court should be published in the Official Gazette. Despite the Constitutional Court having no technical bureau assigned the function of publishing its judgments, the Court regularly publishes its judgments in book formats like the Technical Bureaus of the Court of Cassation and the State Council. Nowadays soft copies of such rulings are available on CDs, USB sticks and some databases such as Tashreaat. However, databases are not entirely complete, so a manual search through the "Collection of Awards" is still important.

It is worth noting that the Supreme Constitutional Court does have a website available in Arabic, English and French, where some useful information and documents can be viewed, including awards rendered by the Court.

Egypt's information portal, the Information and Decision Support Center for the Cabinet (IDSC), provides information on a wide variety of issues. The website provides studies, reports, laws, statistics, working papers, and periodicals (daily, weekly, monthly, quarterly, and annually). This is available free of charge. However, not all information is available in English. This website is not dedicated to legal information; it provides economic, scientific, industrial, commercial, social, historical, geographical, and political information. It also offers interactive services.

The Middle East Library for Economic Services is the website of the Middle East Library. The website of the Legal Arab Information Network is another example of a subscription-based database that contains information on Arab laws, agreements, cases, research, etc.

11. Political Parties

Egypt, according to the Constitution, has a multiparty system. As per the Constitution, nationals have the right to constitute assemblies, syndicates, unions and parties in accordance with the law. Law No. 40 of the Year 1977 regulates the formation of political parties in Egypt and it prohibits the formation of religious-based political parties in order to maintain a secular political environment. The Constitution further states that political parties shall not be established on the basis of gender or race.

Following the Revolution, several Articles of the said law have been amended. One of the most important

amendments introduced to the said law is the method for constituting a party, which was amended to be as follows:

A notice shall be sent to the Political Parties Committee accompanied by the certified signatures of at least 5000 founders from a minimum of 10 governorates, with a minimum of 300 members from each governorate. The party's statutes and other documentation shall also be sent to the Political Parties Committee. The latter shall make its decision with respect to the notice within fifteen days.

11.1. Notable Parties

The political parties as represented in the House of Representatives are:

- Al-Massreyeen al-Ahrrar (Free Egyptians) Party (65 members)
- Mostakabl Watan (Future of Nation) (54 members)
- The New Wafd Party (36 members)
- Homatelwatn Party (18 members)
- Democratic People (13 members)
- Al Moatamar Party (12 members)
- Al Nour Party (11 members)
- The Conservative Party (6 members)
- The Democratic Peace Party (5 members)
- Egyptian Socialist Democratic Party (ESDP) (4 members)
- Masr al-Hadytha (Modern Egypt) Party (4 members)
- Al-Haraka El-Watanya Al-Hadytha (4 members)
- Freedom Party (3 members)
- Masr Baladi (2 members)
- National Progressive Unionist Party (2 members)
- The Revolutionary Guards Party (1 members)
- Al Ithad Party (1 members)
- The Arab Democratic Nasserist Party (1 members)
- Al-Sarah Al-Masry Al-Hur (1 members)
- Reform and Development Party (1 members)

12. Governorates

Egypt is divided into 27 governorates (*muhafazah*). The governorates, as sorted by the transliterated Arabic name, are the following:

- Ad Daqahliyah (Dakahleya)
- Al Bahr al Ahmar (Red Sea)
- Al Buhayrah (Beheira)
- Al Fayyum (Fayum)
- Al Gharbiyah (Gharbeya)
- Al Iskandariyah (Alexandria)
- Al Isma'iliyah (Ismailia)
- Al Jizah (Giza)
- Al Minufiyah (Menufeya)
- Al Minya (Minya)
- Al Qahirah (Cairo)
- Al Qalyubiyah (Kalyubeya)
- Al Uqsur (Luxor)
- Al Wadi al Jadid (New Valley)

- Ash Sharqiyah (Sharkeya)
- As Suways (Suez)
- Aswan
- Asyut
- Bani Suwayf (Beni Suef)
- Bur Sa'id (Port Saïd)
- Dimyat (Damietta)
- Janub Sina' (South Sinai)
- Kafr ash Shaykh (Kafr el Sheikh)
- Matruh
- Qina
- Shamal Sina' (North Sinai)
- Suhaj (Sohag)

It is worth mentioning that two governorates had been created in 2008 (Helwan and 6th of October) and then abolished in 2011. Most governorates have a population density of more than 1000 per km square.

13. Official Websites

- Egyptian Government Services Portal
- Egypt State Information Service
- Governments on the WWW: Egypt

14. Inter-Governmental Organizations

- African Union (AU)
- The League of Arab States
- Organisation Internationale de la Francophonie (OIF)
- Organization of Arab Petroleum Exporting Countries (OAPEC)
- Common Market for Eastern and Southern Africa (COMESA)

15. Law Faculties (Public Universities)

- Cairo University
- Alexandria University
- El Mansoura University
- Zaqaziq University
- Menoufia University
- El Miniya University
- Benha University
- South Valley University
- Helwan University
- Tanta University
- Assiut University
- Suez Canal University
- Beni Suef University

16. Important Libraries

- Bibliotheca Alexandria

- General Organization for Dar Al -Kutub and National Documents
- Egyptian Libraries network
- National Library of Egypt

17. Legal Guides

- GUIDE: Multinational Reference (Law Library of Congress)
- Multinational Collections Database: Egypt (Law Library of Congress) provides bibliographic information on materials in our reference collection
- FindLaw: Egypt
- ForIntLaw: Egypt (Washburn University Law Library)
- Islamic Family Law: Egypt (Emory University Law School)
- UPDATE: Sources of Online Legal Information for African Countries by Vincent Moyer, GlobaLex, January 2019.
- World Legal Materials from Africa: Egypt (Cornell Legal Information Institute)
- WWW-VL Islamic Law: Egypt (European University Institute, Italy)

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[1] Prior to the 1980 amendment to the Constitution of 1971, Islamic Law (Sharia) was merely a source, amongst other sources, for legislative rules.

[2] An up-to-date comprehensive information on Laws and Regulations pertinent to economic, commercial, and business activities in Egypt could be found at: (1) The Egyptian Investment Portal (Economic Laws), (2) The Egyptian Investment Portal (other Laws and Regulations) where over 40 statutes could be downloaded or viewed online, and (3) The American Chamber of Commerce in Egypt has a very comprehensive website that provides up-to-date information on doing business in Egypt with useful information on all relevant statutes.

[3] Second Article, Decree of the Ministry of Justice No. 8310 of 2008.

[4] Fourth Article, Decree of the Ministry of Justice No. 8310 of 2008, as amended by Decree of Ministry of Justice No. 6570 of 2009 and Decree of Ministry of Justice No. 9739 of 2011.

[5] Seventh Article, Decree of the Ministry of Justice No. 8310 of 2008, as amended by Decree of Ministry of Justice No. 9739 of 2011.

[6] That period is 90 days calculated from the date of notifying the award to the losing party.