

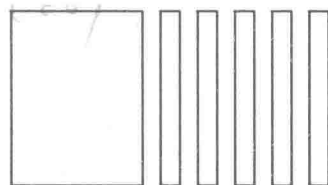
LAW in a BUSINESS CONTEXT

BILL COLE, PETER SHEARS
and
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Chapman and Hall

Law in a Business Context



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Series foreword

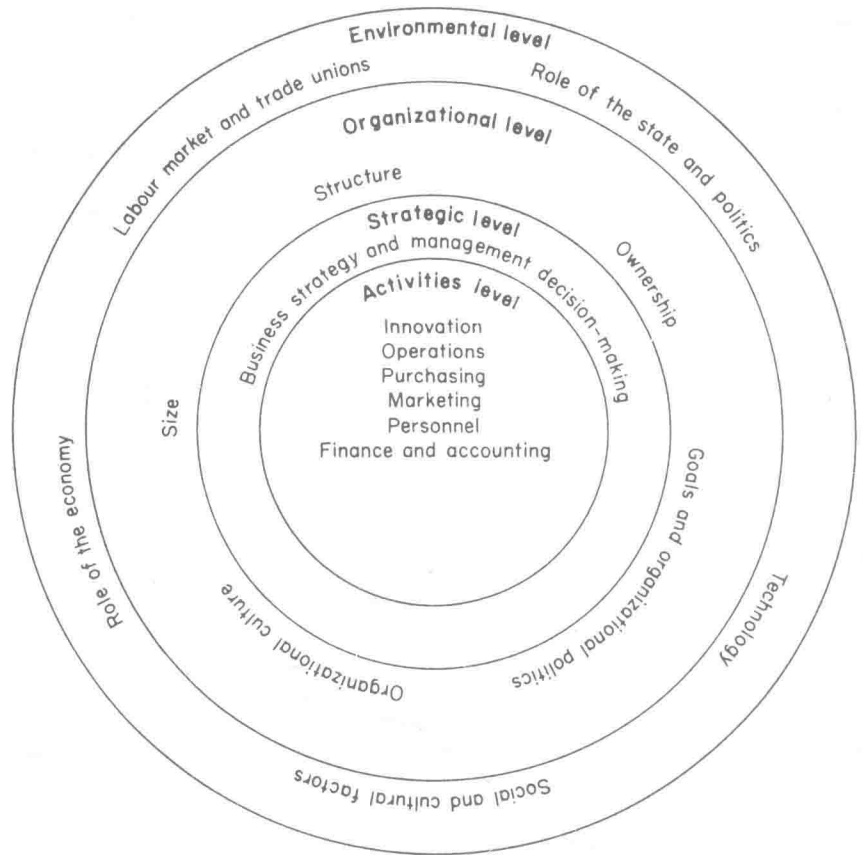


This book is part of the Business in Context series. The books in this series are written by lecturers all with several years experience of teaching on undergraduate business studies programmes. For a number of years we have been conscious that many of the books we were recommending to our students never catered specifically for business studies courses. Although there are some good books covering the different disciplines found in the business studies curriculum, very few of these texts are aimed specifically at the business studies student. Many of the best management texts assume a level of managerial experience and the worst take a simplistic and prescriptive view of business life. The interdisciplinary nature of business studies often means presenting students with a range of books dealing with various specialist topics, which can prove both daunting and expensive.

It is certainly not our intention to offer up our individual texts as a panacea. Indeed, our policy throughout this series is that books are well referenced and the student is guided to further reading on every topic area. However, we do feel that our books provide a focus for the student attempting to seek some meaning in the range of subjects currently offered on business studies programmes.

Business studies has attracted a growing band of students for a number of years and is currently one of the most popular undergraduate courses. Whilst many books have emerged to feed a hungry BTEC market, the undergraduate business studies student has been sadly neglected. One of the causes of that neglect has undoubtedly been the difficulty of many, academics and members of the business community alike, to define business studies, beyond a list of loosely connected subject headings. With this series we hope to make good some of those missing connections.

With the exception of the text, *Business in Context*, which takes the series title as its theme, all our texts take the approach of a particular discipline traditionally associated with business studies and taught across a wide range of business studies programmes. The first books in our series examine business from the perspectives of economics, behavioural science, law, mathematics and accounting. However, whereas in traditional texts it is the subject itself that is the focus, our texts make business the focus. All the texts are based upon the same specific model of business illustrated in the Figure. We have called our model Business in Context and the text of the same name is an expansion and explanation of that model.



The model comprises four distinct levels. At the core are found the activities which make up what we know as business and include innovation, operations and production, purchasing, marketing, personnel and finance and accounting. We see these activities operating irrespective of the type of business involved, and found in both the manufacturing and service industry as well as in the public and private sectors. The second level of our model is concerned with strategy and management decision-making. It is here that decisions are made which influence the direction of the business activities at our core. The third level of our model is concerned with organizational factors within which business activities and management decisions take place. The organizational issues we examine are structure, size, goals and organizational politics, patterns of ownership, and organizational culture. Clear links can be forged between this and other levels of our model, especially between structure and strategy, goals and management decision-making, and how all aspects both contribute to and are influenced by the organizational culture. The fourth level concerns itself with the environment in which businesses operate. The issues here involve social and cultural factors, the role of the state and politics, the role of the economy, and issues relating to both technology and labour. An important feature of this fourth level of our model is that such elements not only

operate as opportunities and constraints for business, but also that they are shaped by the three other levels of our model.

This brief description of the Business in Context model illustrates the key features of our series. We see business as dynamic. It is constantly being shaped by and in turn shaping those managerial, organizational, and environmental contexts within which it operates. Influences go backwards and forwards across the various levels. Moreover, the aspects identified within each level are in constant interaction with one another. Thus the role of the economy cannot be understood without reference to the role of the state; size and structure are inextricably linked; innovation is inseparable from issues of operations, marketing and finance. The understanding of how this model works is what business studies is all about, and forms the basis for our series.

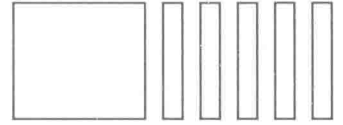
In proposing this model we are proposing a framework for analysis, and we hope that it will encourage readers to add to and refine the model and so broaden our understanding of business. Each writer in this series has been encouraged to present a personal interpretation of the model. In this way we hope to build up a more complete picture of business initially through the eyes of an economist, a behavioural scientist, a lawyer, a mathematician and an accountant.

Our series therefore aims for a more integrated and realistic approach to business than has hitherto been the case. The issues are complex but the authors' treatments are not. Each book in this series is built around the Business in Context model, and each displays a number of common features that mark out this series. First we aim to present our ideas in a way that students will find easy to understand and we relate those ideas wherever possible to real business situations. Secondly we hope to stimulate further study both by referencing our material and pointing students towards further reading at the end of each chapter. Thirdly we use the notion of 'key concepts' to highlight the most significant aspects of the subject presented in each chapter. Fourthly we use case studies to illustrate our material and stimulate further discussion. Fifthly we present at the end of each chapter a series of questions, exercises, and discussion topics. To sum up, we feel it most important that each book will stimulate thought and further study, and assist the student in developing powers of analysis, a critical awareness and ultimately a point of view about business issues.

We have already indicated that the series has been devised with the undergraduate business studies student uppermost in our minds. We also maintain that these books are of value wherever there is a need to understand business issues and may therefore be used across a range of different courses covering BTEC Higher, and some professional and masters courses.

David Needle and Eugene McKenna
January 1989

Preface



This book is one of the Business in Context series. It has been written by a team of lecturers all of whom are lawyers and involved in teaching law to business studies students. All business studies courses contain a substantial legal input because the law provides not only the environmental framework against which a business operates but also creates some of the range of operational choices which it is the business of management to make. In addition it supplies the organizational framework within which the business must operate.

Despite this, most traditional law texts reproduce the legal rules in greater or lesser depth with no real attempt to show how they integrate with the functions of business. Our purpose in writing this book as part of the series has been to try to fill what we see as a very real gap in the market for business studies students who are seeking an easily intelligible introduction to the business world.

Much of the material presented in a traditional business law book will be found in this book, and the table reproduced on the back cover of this book illustrates where the usual core material can be found. This book is not written as a law textbook and the degree of detail into which it has been possible to go is necessarily limited. At the end of each chapter we have made suggestions for further reading which themselves provide further sources. We are deeply conscious that not all business studies students have access to a comprehensive law library nor would we expect this to be necessary. Emphasis has been placed on principle rather than on too much detail. The references include not only academic texts, cases and statutes, but practical (and sometimes free) guides issued by, for example, trade associations, government departments, banks and the Equal Opportunities Commission.

In the text we have cited a number of cases by way of illustration and as authorities. Where these are essential to enable the student to understand the point being made their facts have been briefly given, and where they are referred to simply as additional reference material their names have been given as a starting point for further research or discussion. It is not intended that the cases cited should be seen as either definitive or exhaustive.

Case studies have been given in all chapters to illustrate the themes under discussion, sometimes with the addition of contemporary newspaper cuttings. Questions for discussion and problems for further consideration are given at the end of each chapter to provoke further thought.

The introductory chapter of the book sets the scene by considering the role and purpose of law, not in the abstract but in terms of its relevance and cost to business. Emphasis is placed on the different ways in which the law can be used by a business to achieve its objectives, including lobbying for change. An attempt is made to evaluate the use of the courts to bring an action as well as outlining other possible alternatives to settle disputes.

The remaining chapters pursue the themes of the business model by considering the interaction of the law with the business at work. The provision of legal environmental constraints reflecting changing economic and social conditions is illustrated by considering some of the rules of contract and tort, though other examples of these occur in later chapters dealing with particular business functions.

The organizational choices affecting a business are discussed not only in the chapter concerned with partnerships and companies, but also at the many points where legal differences make a choice important, for example the choice between employees and independent contractors in the selection of personnel, and the provision of in-house or external credit when considering marketing strategy.

The chapter on research and development deals in more detail than is common in most business law books with the options a business has to protect its inventions. It also draws together some discussion of intellectual property, the enforceability of restrictive covenants in employee contracts and limitations imposed by health and safety legislation on designers and developers.

The chapter on personnel concentrates on the constraints imposed by the employment protection legislation, perhaps soon to be supplemented by the Community's social charter. Illustrations of the impact of the Community on the UK are given in case studies and referred to throughout.

Occupational limitations on the grounds of health and safety, nuisance and occupiers' liability are presented, together with reference to statutory environmental controls increasingly emanating from the EC, as the framework for production. There is also a consideration of product liability and the EC product liability directive implemented in the Consumer Protection Act 1987.

The chapter on marketing considers the sale of goods, and the provision of consumer credit. It also includes a section on advertising, voluntary controls and trade associations, casting a wider net than more traditional texts.

Money is a recurring theme. Most business decisions are related to it. The raising of finance is considered separately from the formation of a company in a chapter devoted to finance which also covers wrongful trading and an outline of insurance, already referred to in the sections on professional and product liability. The issue of taxation as it affects a business is raised several times but not separately covered in the finance chapter. Clearly this is an area which involves social and economic policy and is directly responsible for some of the organizational and strategic choices a business will make. We have alluded to tax at appropriate points to enable the student to see the interrelation of these issues but because the tax regime is all embracing, changes annually and is very complicated it is really not possible in a short book of this nature to give any complete

picture of its current structure. With increasing interdependence between the countries of Europe, and the increasing importance of EC directives on fiscal matters, the impact of tax will certainly remain one of the most important elements in a business strategy; businesses must be aware of this and should be prepared to take appropriate professional advice.

No chapter is self-sufficient. For example the advantages of being able to raise capital are discussed in the chapters on finance and organizational structure and the problem of insurance for professional and employers' liability is considered at appropriate points as it arises. Thus the book itself mirrors the Business in Context model of inter-dependent relationships. If this book helps students to appreciate this role of law in business, then it will have achieved its objective.

Comparative treatment table

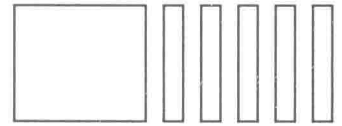


Because the law content of this book is presented in a format designed to illustrate the series model Business in Context and does not follow the usual order of a straightforward legal textbook it was thought useful to offer a table showing where the so-called traditional elements of a business studies law text could be found. Within the book most topics commonly covered by a business law course will be found, perhaps with some others less often discussed.

Nature of law	Chapter 1
Sources of law	Chapter 1
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Offer and acceptance	Chapter 2
Consideration	Chapter 2
Terms	Chapter 2
Mistake	Chapter 2
Misrepresentation	Chapter 2
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Breach	Chapter 2
Remedies	Chapter 2
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General defences	Chapter 2
Negligence	Chapter 2
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Vicarious liability	Chapter 5
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Product liability	Chapter 5
Supply of goods	Chapter 6
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Terms	Chapter 7
Dismissal	Chapter 7
Redundancy	Chapter 7
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Employee inventions	Chapter 4
Trade unions and industrial relations	Chapter 7
Intellectual property	
Patents	Chapter 4
Copyright	Chapter 4
Trade marks	Chapter 4
Insurance	Chapter 8

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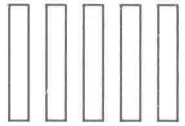


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The legal background

1



Introduction

Most aspects of life are governed by law, and business is no exception. There is no generally accepted definition of 'law' – in fact its meaning may vary with its context – but to most people 'law' connotes a body or set of rules. These rules not only proscribe certain kinds of conduct by rendering them criminal (imposing a penalty or punishment where the rules are broken) but also, equally important for business, provide an enabling mechanism to allow the achievement of desired business objectives. For example, rules define how to make a legally binding contract, how to set up a new company, or how to register a patent. The only penalty for failure to follow the rules is failure to achieve business objectives.

Any business in determining its strategy must be guided by commercial considerations. In translating the strategy into day-to-day objectives a knowledge of the relevant law is essential both (a) to minimize the risk of breaking the criminal law, with its attendant penal sanctions and potential bad publicity, and (b) to achieve the objectives in the most cost-effective way. The use of tax planning is an obvious example.

The law in England has developed continuously – without major foreign interference or take-over – since the Norman Conquest and before. The range of interests which it has been concerned to balance (Key concept 1.1) has varied enormously in that time.

The potential list might include: *Rival landowners/neighbours*; *Crown/State v. People*; *Business v. Consumers*; *Employers v. Employees*; *Landlords v. Tenants*; *Business v. Environment*.

From this it can be seen that the law is essentially fluid. In this chapter we will try briefly to lay the essential groundwork by addressing the questions: 'Where does law come from?' 'How and why does it change?' 'How and by whom is it enforced?' 'How is it useful to business?' and 'How much does it cost?'.

One of the strategic purposes of the law may be said to be the creation of a balance between competing interests. The traditional depiction of justice by a pair of scales, or balance, illustrates this very clearly.

KEY CONCEPT 1.1

LAW AS THE BALANCE BETWEEN COMPETING INTERESTS

These questions are central to the Business in Context model as explained in the Series Editors' Foreword – which guides the layout of this book. In Chapters 1 and 2 we deal with the environmental aspects of law pertaining to business by examining those influences which have led to the development of law and the legal process. We will examine the various roles played by the state, the European Community and society in general. In so doing we will develop a clearer idea about how laws are administered in the United Kingdom and also how they change. An issue we will raise here is the way businesses are not simply passive recipients of the law, but will actively seek to influence and change those laws which affect their operation, thus illustrating the two-way process of influence in our model. In Chapter 3 we examine the organizational context of business by focusing upon those laws and legal processes pertaining to the setting up and administration of a business as a legal entity. Chapters 4–8 concentrate on the functional areas of business by examining those laws and legal processes which cover business activity and management strategy related to the innovation, production, marketing, personnel and finance functions. The layout of this book traces the path of the Business in Context model from the outer to the inner levels.

Classification of law

In order to understand the legal system as it regulates business activity it is important to appreciate that, whilst there are several ways to classify the law, there are two fundamental classifications relevant to business.

Public law and private law

Public law consists of those fields of law which are primarily concerned with the state itself, and includes criminal law, constitutional, and administrative and social welfare law. Private law is that body of rules primarily concerned with the rights and duties of individuals towards each other. The areas of law which most affect business transactions, such as those concerning contracts, tort, commerce, employment, etc. are part of private law (Figure 1.1).

Tort A tort is a civil wrong which arises independently of agreement and which is normally remediable by an action for damages.

Contract A contract is an agreement which the law will enforce.

Figure 1.1 Classification of English Law.

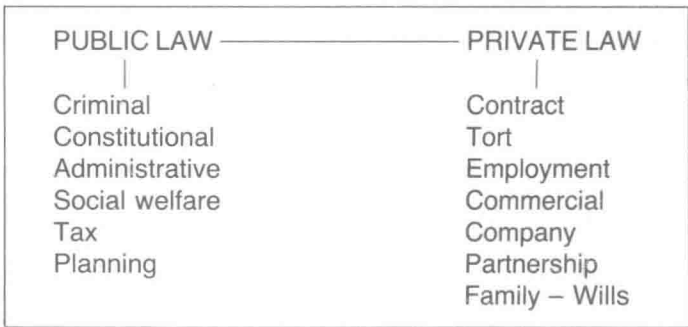




Figure 1.2 Classification of English Law.

Civil law and criminal law

Civil law is concerned with an individual's private rights and duties, whereas criminal law deals with relations between the state and the individual (Figure 1.2). If a criminal prosecution is successful the person found guilty will be punished, by imprisonment, probation, fine, etc. If a civil action is successful, the person bringing the action (the plaintiff) will normally be compensated in damages by the losing party (the defendant), although there are other equitable remedies which are available, such as an order for specific performance, an injunction, or a declaration. We will deal with each of these in turn.

An order of specific performance is an order of the court directing the defendant to carry out the agreed terms of a contract. It will not be granted unless damages (the normal remedy for breach of contract) are inappropriate, nor will it be granted for ordinary items of commerce for which substitutes could readily be purchased. As an example if X contracts to sell Y a particular original painting and then refuses to deliver, an order for specific performance could be granted. Damages will not suffice, Y wants that painting and there is no other available for purchase. However, the remedy is not a right, it is an equitable remedy and therefore at the court's discretion. Orders of specific performance will not be granted to enforce personal contracts, such as where Z agreed to sing at a concert but then refused after all the tickets has been sold, because the court is unable to supervise the performance, and even if they could insist that Z performed, they would have no way of ensuring that his or her performance would be of a suitable standard.

Injunctions are also equitable remedies at the discretion of the court. Examples include an order to stop making an unacceptable noise at a certain time (e.g. student discos interfering with neighbours' enjoyment of peaceful evenings at home by the television), or an order not to procure a breach of employment contract (by picketing a certain place of work and persuading the employees not to work).

A declaration is a discretionary court ruling on a point of law at the plaintiff's request usually clarifying the plaintiff's position or a disputed point of law, for example a ruling that a local authority had no legal authority to speculate with ratepayers' money, or that the plaintiff was the subject of sexual discrimination contrary to the Sex Discrimination Act 1975.

It is possible for one act to be both a civil and a criminal wrong. For example, if you take your car to a garage for repair and the garage proprietor steals it, then clearly a crime (theft) has been committed. Additionally the breach of contract by failure to repair according to the terms of the contract will be a civil wrong giving rise to an action for damages. Another example is where an employer's negligence in providing unsafe plant for use by his employee at work causes injury to the employee: the employee will be able to sue in civil law for compensation for his or her injury, and at the same time, the employer may be prosecuted in criminal law for breach of the Health and Safety at Work Act 1974.

The criminal law extends from murder, treason and rape to failing to sign your driving licence, sounding the horn while the car is at rest or conversing with a bus driver.

Likewise, civil law is very wide ranging and still growing! The most important areas within its scope, as far as business is concerned, are contract law, the sale of goods and services, the provision of credit and hire purchase, contracts of employment and leases between landlord and tenant. Civil law also includes the law of tort (Chapter 2), property law, the law of succession, trusts and family law (Figure 1.2).

Where does law come from?

There are many ways of considering this but for simplification there are four main sources of law: custom, precedent, legislation and the European Community. We will deal with each in turn. Custom is the earliest source of law and the European Community the most recent and increasingly important.

Custom

Over the years the established standards became accepted not just as desirable but mandatory of the development of voluntary Codes of Conduct in many industries today. Under the English legal system each time a case comes to court for a decision the judgment of the court forms a pattern or precedent for a later case covering the same legal points. Elementary rules of justice require that like cases be decided alike. Thus an adjudication on the basis of what is customary (Key concept 1.2) becomes an established rule of law or precedent. For example in *Fisher v. Bell* (1961) a prosecution was brought under the Offensive Weapons Act 1959 alleging that the defendant in displaying a flick-knife in his shop window had 'offered for sale' an offensive weapon contrary to the provisions of the Act. The prosecution

KEY CONCEPT 1.2

CUSTOM AS A SOURCE OF LAW

Historically the earliest source of law is custom. Much of what we loosely call commercial or mercantile law owes its origin to *custom*, i.e. the market place developed its own form of what today we would call 'self-regulation'.