

# THE NATURE AND FUNCTIONS OF LAW

SEVENTH EDITION

HAROLD J. BERMAN

SAMIR N. SALIBA

FOUNDATION PRESS

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SEVENTH EDITION

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## PREFACE TO THE SEVENTH EDITION

Plans for producing the seventh edition of the book began in mid-2007 with a publication date set for 2008 to commemorate the 50th anniversary of the text, first published in 1958. Suggestions for revisions, updates, and changes in the text received the full support of Professor Berman. Sadly, Professor Berman passed away in November of that year; his death required a delay in the production of the 7th edition. This edition serves the dual purpose of a commemorative edition and memorial to Professor Berman.

In 1958, the study of law was a stepchild in the liberal arts curriculum. Courses in constitutional law were offered in most major colleges, but with very few exceptions the teaching of law as such, including the judicial process, criminal law, contract law, tort law and other basic parts of the legal system, was left to the law schools. It was hoped that a book such as this one might help stimulate the introduction of general introductory courses in law into the liberal arts curriculum, and indeed the first edition had that effect and was in fact adopted during the next years in forty colleges, chiefly in departments of political science, sociology, and philosophy, and in general education courses. Since that time there has been an ever-growing realization of the importance of law as an integral part of liberal education—due partly to a perceived need to cross, as law does, departmental boundaries, but due chiefly to a greatly increased recognition of the importance of law itself, and especially the judicial process, in political, economic, and social life. Today this book is one of many that are used in law courses in hundreds of colleges and universities.

Perhaps its principal distinguishing feature is its focus on the special character of law in performing certain social functions. We have chosen to present salient aspects of criminal and civil procedure, aspects of judicial reasoning on the basis of precedents, especially in cases of manufacturer's liability in tort, certain aspects of the law of contracts, and aspects of international human rights law, including race law, and gender law, both at the national and international level—not in order to present a composite picture of the whole legal system but in order to test the success of the legal system in carrying out its basic purposes. Our method is not to make a geological survey of the whole field but rather to sink shafts in those areas that contain the richest deposits.

Thus we kept, in this edition, the concepts and methodology of earlier editions. Our main objective has been to bring the book up-to-date. We have streamlined some parts of the previous edition, deleted a chapter to make room for new materials and added a new chapter. Indeed by closer editing, consolidation, and deletion we have reduced its

## PREFACE TO THE SEVENTH EDITION

size in order to retain its feasibility as a one semester, 45-hour course, without, we think, sacrificing the essence of any of the topics we address.

As in previous editions, we continue to include relevant materials on comparative and international law. The book is on the nature and functions of *law*—not just American law. The main focus to be sure, is on American law, but it is presented as one example of what a legal system can be. In this edition the international and comparative aspect of the law has been given a special and extended emphasis. Indeed, the most significant revisions and additions to the text are meant to highlight and reflect, primarily, the requirements of 21st century legal education and legal practice in an increasingly complex and globalized world. The emphasis has been on “blending” and “harmonizing” the national with the international by placing the study of American law in the context of comparative and world law. Thus, in the first two chapters of the text which deal with jurisdiction of courts and procedure prior to trial, we treat briefly problems raised in civil litigation in international cases in U.S. Courts. Included are materials dealing with the acquisition of judicial jurisdiction over foreign defendants, problems of service of process abroad, forum selection, gathering evidence abroad, the Foreign Sovereign Immunities Act, and the Alien Torts Act. Emphasis is placed on the Hague Service of Process and the Hague Evidence Conventions.

Another facet of internationalization is expressed in the tendency of United States judges to assume greater authority in civil cases and to bring them closer with practices of other countries. This process of convergence of some basic norms within, between and among legal systems is reflected in the joint effort of the American Law Institute (ALI) and its European equivalent, the International Institute for the Unification of Private Law (UNIDROIT), to harmonize procedural law among nations as a means of facilitating transnational commerce. A significant summary of the basic norms and procedures as applied to international civil litigation is included.

Similarly, in chapter five, which deals with alternative methods of dispute resolution (ADR), we give special attention to the enforcement of international arbitration in U.S. courts under the Federal Arbitration Act and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Part Four of the new edition has been re-conceptualized to focus on the role of “*Law As a Process of Securing Fundamental Human Rights: Illustrations from National and International Law.*” We retained the two chapters on race and gender rights from the earlier edition, and added a new Chapter 11, “*International Law and Human Rights.*” The primary

*PREFACE TO THE SEVENTH EDITION*

purpose of Part IV's third chapter is to introduce students to the body of international human rights law that is constitutionally based on the United Nations Charter, the Universal Declaration of Human Rights, and on an impressive core of universal and regional human rights treaties and instruments.

SAMIR N. SALIBA

Emory, Virginia  
May 31, 2009

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My wife, Linda Saliba, contributed not only to this but also the fifth and sixth editions in many important ways: proofreading the manuscripts, making corrections, and offering valuable suggestions. Her attention to detail and editing skills are truly remarkable, and I appreciate her contributions more than I can possibly acknowledge.

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## SUMMARY OF CONTENTS

PREFACE TO THE SEVENTH EDITION .....	iii
ACKNOWLEDGMENTS .....	vii

<b>INTRODUCTION</b> .....	1
The Study of Law as Part of Liberal Education .....	1
Proper Purposes of Law Study by Students of the Arts and Sciences .....	4
Understanding the Legal Order as a Vital Part of the Social Order .....	5
Understanding Legal Science as a Vital Part of Social Science .....	7
Understanding Legal Reasoning as a Vital Part of Responsible Social Thought .....	13
What Is Law? .....	14
A Functional Approach to Law .....	24
The Structure and Method of This Book .....	35

### PART ONE. LAW AS A PROCESS OF RESOLUTION OF DISPUTES: ILLUSTRATIONS FROM CIVIL AND CRIMINAL PROCEDURE

CHAPTER 1. THE COMPETENCE AND JURISDICTION OF COURTS .....	47
<b>Section</b>	
1. Outline of a “Civil Action” .....	47
2. The Requirement of a Live Controversy in Civil Cases .....	50
3. The Requirement in Criminal Cases of a Law Specifically Proscribing the Act Charged .....	103
4. Jurisdictional Requirements of a Federal System: The Choice of Court .....	118
5. Personal Jurisdiction .....	128
6. Subject Matter Jurisdiction .....	138
7. Choice of Forum in U.S. Litigation .....	146
8. U.S. Legislative Jurisdiction .....	148
CHAPTER 2. CIVIL PROCEDURE PRIOR TO TRIAL .....	150
<b>Section</b>	
9. Categorization of Facts .....	150
10. Pleading .....	152
11. Supplementing the Pleadings: Discovery .....	168
12. Pretrial Management and the Pretrial Conference .....	182
13. A Comparative View: Civil Procedure in Germany .....	186

## SUMMARY OF CONTENTS

CHAPTER 3. CRIMINAL PROCEDURE PRIOR TO TRIAL.....	192
Section	
14. Criminal Justice in America: Preliminary Observations .....	192
15. The Constitutional Foundations of Criminal Procedure Prior to Trial: Preliminary Observations.....	199
16. Constitutional Restrictions on Police Searches and Sei- zures .....	208
17. The Prosecutor's Phase of the Pre-Trial Criminal Process	246
CHAPTER 4. THE TRIAL .....	284
Section	
18. The Science and the Art of Proof .....	286
19. Trial by Jury .....	302
20. The Trial Judge.....	312
21. The Responsibility of the Lawyer to the Court and to the Client .....	320
CHAPTER 5. ALTERNATIVE METHODS OF DISPUTE RESO- LUTION: MEDIATION AND ARBITRATION IN DOMES- TIC AND INTERNATIONAL PRACTICE .....	350
Section	
22. The Need for Alternative Pathways to Justice: An Over- view.....	351
23. Mediation .....	357
24. Arbitration .....	360
25. International Commercial Arbitration .....	370
 <b>PART TWO. LAW AS A PROCESS OF MAINTAINING HISTORICAL CONTINUITY AND DOCTRINAL CONSISTENCY: ILLUSTRATIONS FROM MANUFACTURERS' LIABILITY IN TORT</b>	
CHAPTER 6. REASONING BY ANALOGY OF PRECEDENT .....	385
Section	
26. Legal Reasoning .....	385
27. Case Analysis .....	396
28. Development of the Doctrine of Manufacturers' Liability for Negligence .....	403
29. Reasoning From Case to Case.....	435
CHAPTER 7. REASONING BY ANALOGY OF DOCTRINE AND STATUTE .....	454
Section	
30. The Development of Doctrines of Manufacturers' Liability Without Fault .....	454
31. Later Developments in the Law of Manufacturers' Liability for Products That Cause Injury .....	479
32. Reasoning From Doctrine and Precedent: A Comparative and Historical Analysis.....	492

*SUMMARY OF CONTENTS*

**PART THREE. LAW AS A PROCESS OF PROTECTING  
AND FACILITATING VOLUNTARY ARRANGEMENTS:  
ILLUSTRATIONS FROM THE LAW  
OF CONTRACT**

**CHAPTER 8. CONTRACT LAW AS A PROCESS OF PROTECT-  
ING VOLUNTARY ARRANGEMENTS ..... 515**

**Section**

- 33. What Kinds of Voluntary Arrangements Are Enforceable  
as Contracts? ..... 516
- 34. Contract and the Distribution of Risks: Herein of Mistakes  
and Unanticipated Events ..... 549
- 35. Remedies for Breach of Contract ..... 576
- 36. A Reprise on Contract Damages ..... 608
- 37. Contracts in the Global Marketplace ..... 612

**PART FOUR. LAW AS A PROCESS OF SECURING  
FUNDAMENTAL HUMAN RIGHTS: ILLUSTRATIONS  
FROM NATIONAL AND INTERNATIONAL  
LAW**

**CHAPTER 9. CIVIL RIGHTS FOR BLACK AMERICANS: RACE  
RELATIONS LAW, 1865–2003 ..... 618**

**Section**

- 38. Race and the Constitution ..... 618
- 39. Legislative Interment of Jim Crow ..... 651
- 40. Enforcement of Title VII by EEOC ..... 662
- 41. The Evolution of Affirmative Action ..... 687

**CHAPTER 10. THE LAW OF GENDER EQUALITY ..... 704**

**Section**

- 42. Equal Protection and the Problem of Gender ..... 704
- 43. Gender Equality and Abortion Law: The Right of Repro-  
ductive Autonomy ..... 715
- 44. Sexual Harassment as Gender Discrimination ..... 720

**CHAPTER 11. INTERNATIONAL LAW OF HUMAN RIGHTS .... 730**

**Section**

- 45. The Historical Basis of Human Rights ..... 731
- 46. The International Law of Human Rights ..... 743
- 47. “International Convention on the Elimination of all Forms  
of Racial Discrimination” ..... 765
- 48. “Convention on the Elimination of all Forms of Discrimi-  
nation Against Women” ..... 781

**BIBLIOGRAPHY ..... 801**

**TABLE OF CASES ..... 809**

**INDEX ..... 817**

## DETAILED TABLE OF CONTENTS

	Page
PREFACE TO THE SEVENTH EDITION -----	iii
ACKNOWLEDGMENTS -----	vii
<b>INTRODUCTION</b> -----	<b>1</b>
The Study of Law as Part of Liberal Education -----	1
Proper Purposes of Law Study by Students of the Arts and Sciences -----	4
Understanding the Legal Order as a Vital Part of the Social Order -----	5
Understanding Legal Science as a Vital Part of Social Science -----	7
Understanding Legal Reasoning as a Vital Part of Responsible Social Thought -----	13
What Is Law? -----	14
A Functional Approach to Law -----	24
The Structure and Method of This Book -----	35
<b>PART ONE. LAW AS A PROCESS OF RESOLUTION OF DISPUTES: ILLUSTRATIONS FROM CIVIL AND CRIMINAL PROCEDURE</b>	
CHAPTER 1. THE COMPETENCE AND JURISDICTION OF COURTS -----	47
<b>Section</b>	
1. Outline of a “Civil Action” -----	47
2. The Requirement of a Live Controversy in Civil Cases---	50
2.1 Feigned Controversies -----	52
Lord v. Veazie -----	52
Notes and Questions -----	57
2.2 Advisory Opinions -----	59
Matter of State Industrial Commission -----	59
Note: “Case Law; Common Law” -----	61
Questions -----	61
United States Constitution, Article III -----	62
Opinions of the Justices, 1793 -----	62
Questions -----	65
Note -----	65
2.3 Moot Cases: Unripe Controversies -----	67
Cole v. Chief of Police of Fall River -----	67
Note: “Common Law” and “Equity”: An Historical Outline -----	68
Notes and Questions -----	71
Note: Declaratory Judgments -----	73



# *DETAILED TABLE OF CONTENTS*

## CHAPTER 1. THE COMPETENCE AND JURISDICTION OF COURTS—Continued

Section	Page
2.4 Political Questions-----	74
United States Constitution, Article I, Section 8-----	75
Article II, Section 2, Amendments II, III, V-----	75
United States v. Sisson-----	76
Questions-----	77
United States v. Sisson-----	78
Notes and Questions-----	79
2.5 Standing to Sue-----	86
Tileston v. Ullman-----	86
Notes and Questions-----	86
2.6 Justiciable and Non-Justiciable Controversies-----	90
Poe v. Ullman-----	90
Notes and Questions-----	96
Griswold v. Connecticut-----	96
Notes and Questions-----	97
2.7 Judicial Self-Restraint: Two Views-----	99
The Symbols of Government (Thurman Arnold)-----	99
The Problems of Jurisprudence (Lon L. Fuller)-----	101
Questions-----	103
3. The Requirement in Criminal Cases of a Law Specifically Proscribing the Act Charged-----	103
3.1 "Common Law Crimes"-----	104
Ohio v. Lafferty-----	105
Questions-----	109
Note-----	111
3.2 Strict Construction of Criminal Statutes-----	113
McBoyle v. United States-----	113
Questions-----	114
3.3 The Doctrine of Analogy in Criminal Cases-----	116
No Crime Without a Law-----	116
4. Jurisdictional Requirements of a Federal System:	
The Choice of Court-----	118
4.1 The Division of Judicial Authority Between State and Federal Courts-----	119
4.2 The Division of Judicial Power Within State and Federal Court Systems-----	121
4.3 Appellate Organization of the Federal Court System-----	124
Notes and Questions-----	126
5. Personal Jurisdiction-----	128
The Constitutional Inquiry-----	129
The Statutory Inquiry-----	130
General Jurisdiction-----	131

*DETAILED TABLE OF CONTENTS*

CHAPTER 1. THE COMPETENCE AND JURISDICTION OF  
COURTS—Continued

Section	Page
Specific Jurisdiction-----	132
Notes and Questions-----	133
5.1 Notice-----	136
6. Subject Matter Jurisdiction-----	138
6.1 Immunity From Judicial Jurisdiction-----	144
7. Choice of Forum in U.S. Litigation-----	146
8. U.S. Legislative Jurisdiction-----	148
CHAPTER 2. CIVIL PROCEDURE PRIOR TO TRIAL-----	150
Section	
9. Categorization of Facts-----	150
The Bramble Bush (Karl N. Llewellyn)-----	150
Note-----	151
10. Pleading-----	152
10.1 What is Pleading?-----	152
Handbook of the Law of Code Pleading (Charles E. Clark)-----	152
Notes-----	153
10.2 Modern Pleading: The Federal Rules of Civil Procedure-----	154
Complaint-----	155
Summons-----	155
Answer-----	156
Questions-----	158
10.3 Provisions to Insure Honesty in Pleading-----	158
Notes and Questions-----	160
10.4 Facts Pleading Versus Notice Pleading: A Compar- ative Perspective-----	162
11. Supplementing the Pleadings: Discovery-----	168
The National Law Journal (Geoffrey C. Hazard)----	171
Questions-----	173
Note and Questions-----	173
11.1 Federal Discovery in Extraterritorial Civil Litigation-----	175
Notes and Comments-----	178
Notes and Questions-----	180
12. Pretrial Management and the Pretrial Conference-----	182
12.1 Pretrial Conferences and Settlement: Rule 16----	182
Notes and Questions-----	183