MODULE 2

INTRODUCTION TO BASIC LEGAL CONCEPTS AND LEGAL SYSTEMS

1) Basic legal concepts I
Law from a social and a legal perspective. The notion of a legal system. Components of a legal system: norms, rules/standards, definitions, rights.

Law could be defined in a number of ways, according to different approaches or perspectives. We will retain here two different approaches: a sociological and a normative perspective.

Law from a sociological viewpoint
From a sociological perspective, law is a means of social control, characterized by the State monopoly in producing rules and enforcing them with final resort to the use of force. The notion of social control implies a voluntary mechanism towards preventing some acts to be performed in society –as, for example, committing crimes–, and fostering some others –as, for example, paying taxes. While the content of the rules backed by legal power may overlap with other means of social control –such as morals, or religion: the three of them forbid, for example, murder–, the potential resort to State force is a central characteristic of law. Contemporary law is also characterized by its high degree of institutionalization – translated, as a main feature, in the specialization of several bodies which create, apply and solve controversies stemming from legal rules –such as legislatures, administrative agencies and courts.

As any manmade institution, law conveys social values –visions about good and wrong, about what should be prohibited, mandated, permitted, incentivized, about what social institutions should be preserved and which should be modified or left behind. As an authoritative institutional mechanism, which can resort to force in order to enforce its norms, law actually has an effect on the way in which social values and perceptions are constructed. A quick historical and comparative survey can easily show that the contents of law vary significantly, depending on prevalent social values in diverse societies and historical phases. According to a graphic metaphor, law is "frozen politics" –meaning that the content of the law is the formal translation of political agreements made by social groups in power. As law is relatively stable –that is, mechanisms to modify the law tend to require some consensus and to follow formal procedures–, it has traditionally been seen as a conservative institution, and sometimes as an obstacle to social change: usually it takes some time for new social values and perceptions to be reflected in the law and to replace values and perceptions from the past. There is an added symbolic effect of values being enshrined in the law –so law is sometimes the latest social institution to accept changes, after moral perceptions have already changed. Law has been, then, frequently seen as an obstacle to social change. However, law is not static, and change in the law can also be seen as an important driving force to promote the acceptance of changing social values. Thus, modifying the law could be an important mechanism to promote the acceptance of new social values and to change social perceptions. Assessment of cases where the law reflect outdated social values or perceptions is a relevant analytical tool for deciding where to direct efforts for social reform.

These considerations are particularly relevant for mental health issues. Historically, mental health legislation has reflected societal prejudices regarding persons with mental disorders –for example, the idea that persons with mental disorders are dangerous and should be institutionalized for the sake of public security. In turn, the fact that these underlying prejudices were reflected by legislation has caused or reinforced stigma and discrimination against persons with mental disorders. Promotion of a different perception about persons with mental disorders may need the modification of the law reflecting these underlying prejudices, and its replacement by new legislation enshrining a more up to date image of persons with mental disorders –for example, that persons with mental disorders can live, work and be treated in the community. As a socially constructed artifact, law is a function of the power of some groups to impose their views and values about different issues.

Traditional mental health law legislation, for example, has rarely included any participation of persons with mental disorders and users of mental health services as stakeholders –and thus, the vicious circle of under representation, stigma and discrimination was perpetuated. So participatory processes, where all the relevant stakeholders have their views represented, constitutes at least a minimal guarantee in order to ensure that prejudices are not the basis on which legislation is premised.

Law from a normative view point: Law as a system

From a normative perspective, law is a system of norms which are deemed to be created by a legitimate authority. The notion of "system" implies several components, ordered in a particular fashion. As we will see later, law is a hierarchical, multilayered order. Law is basically composed by norms –linguistic utterances which purport to motivate certain behaviours, through means such as sanctions or advantages. We will pay a closer visit to the different components of the legal order.

Components of a legal system: norms, rules/standards, definitions, rights

a) Norms, rules/standards

Generally, the most characteristic components of the law are norms. Norms are linguistic utterances, pronounced by a legitimate authority, seeking to influence the conduct of the audience to which they are directed. This audience is both composed by public authorities and by ordinary citizens. Scholars distinguish, however, between different types of norms. The most typical norms are called rules. Rules clearly state certain behaviour, and link them with a particular consequence. Contemporary legal systems host a variety of rules, some of which will be explained and exemplified here.

On the one hand, primary rules are directed to motivate certain behaviour to the general public. Basically, primary rules may have three different goals: to prohibit or forbid something, to mandate that something is done, or to allow something to be done. Typically, prohibitions –that is, rules forbidding or prohibiting something– state a certain behaviour –for example, stealing, or committing fraud, or injuring someone– and purport to disincentivate it, connecting it with a sanction –the deprivation of a good, such as imprisonment, fines or the obligation to pay damages.

The rule purports to forbids medical o scientific experiments in the context of an armed conflict, so it ties conducting medical or scientific experiments on persons, given certain conditions, to imprisonment for life. In order to do this, it defines the actor, the forbidden

action/s (to subject other to medical or scientific experience, causing his or her death), and other elements which circumscribe the offense (lack of medical justification, armed conflict, the fact that victims are in the power of another party in the conflict), and then proceed to designate the designated punishment (imprisonment for life). The forbidden action is positively described (i.e., the described conduct is the conduct that should not be committed).

Rules mandating something –legal mandates– adopt a slightly different form: they state that if something is not done, then a sanction will follow.
Rules expressly allowing or permitting something –legal permits– typically state the requisites needed for an act to be performed and then order the legal recognition of the act. Read conversely, rules expressly allowing something actually assert that, unless the legal requisites for an act are complied with, the act would not be valid.
Contemporary legal systems not only allow a number of acts to be performed, but also promote some others –typically by offering someone an advantage if he or she performs that particular act. A number of disability related policies are good examples of there: promoting employers to hire persons with disabilities may involve advantages such as tax reductions, credit facilities to perform accommodations, etc. The conduct of hiring persons with disabilities is thus not mandated, but permitted – and actually promoted by the State.

On the other hand, contemporary legal systems are also composed by so called secondary rules. These rules are "rules on rules", or second degree rules, and are generally directed to public authorities. Secondary rules are a necessary component of a dynamic legal system, where existing rules are modified and abrogated, and new rules are constantly been introduced. Thus, a number of secondary rules are directed to design the way in which the legal system recognizes the creation of new rules, and the elimination or modification of existing rules –typically, identifying the competent authority to perform these operations, and the procedure to be followed to do this.

A second set of secondary rules are related to the adjudicatory function performed by courts. Legal sanctions and advantages offered by the law generally not self applicable, and they need a particular procedure to be applied. Thus, to be applied, someone has the burden to proof that the facts that a rule referred to actually occurred, and that, as a consequence, a legal sanction should be imposed, or an advantage offered by the law should be awarded. For example, rules that forbid involuntary commitment in psychiatric facilities without a justified basis often provide sanctions in case of branch of this prohibition, such as fines, disqualification or the award of damages. In order to make these sanctions be applied, someone –i.e. the victim or someone acting on his or her behalf– has the burden of bringing a formal complaint before a court, assert the facts deemed to be in violation of the prohibition at stake, and prove them. Also, as rules are stated in natural languages, and may suffer from linguistic defects –such as vagueness or ambiguity–, there is often controversy around the exact extent to which the law applies to certain facts. The classical scenario to tackle these requirements is that of trials. Secondary rules are, thus, also needed to empower judges, or judicial authorities, in order to perform adjudication, and grant mandatory value to their judgments.

In the last 30 years, scholars have also paid attention to other kinds of norms, frequently called principles. Principles are also part of the legal system –one can find principles in

constitutions, statutes and other pieces of legislation. Principles have been defined as norms which order that something is done to the best possible extent. Principles differ from rules in a number of ways. In the first place, as opposed to rules, principles do not state clearly either the circumstances to which they apply, or their legal consequences. Secondly, while rules are mutually exclusive –and thus, for example, the same act cannot be at the same time allowed and forbidden, so one of the two rules has to be displaced–, various principles can be applicable to the same situation, and need to be "balanced", according to their relative weight in the particular case. While they may appear to be somehow "fluffy", principles are important component of the legal system, for a number of reasons. First, rules are typically very specific to certain situations, so if a rule does not clearly apply to some circumstances, the legal system may lack guidance about what ought to be done in that particular case. Principles are then employed as "gap fillers": the relevant principles may offer, in situations where there is no clear rule to be applied, guidance about how to act – and about how to decide a case when controversy arises. Second, principles are somehow more abstract norms than rules are, and they can actually explain the sense of a number of rules –scholars say that principles get set in concrete through rules, so a number of rules could be explained by reference to a particular principle.

b) Legal definitions; rights

There are other elements that make part of the law. Some are simpler: for example, legal definitions –components which are necessary for norms to function. Legal definitions do not prohibit, permit or mandate anything: they just state the sense in which a term will be used in certain norms.

But some are more complex, and can actually be constructed with a combination of norms. It is the case of the notion of "right". In normative terms, rights are legal positions granted to legal subjects –human beings or artificially created entities such as corporations or state agencies. These positions can be explained as legally backed expectations that something will be done or not done by others. Thus, if someone has a right, that means that someone has a correlative duty to do or to refrain from doing something. The structure of the notion of "right", then, refers to a right holder, a duty bearer, and a duty to do or to refrain from doing something. A supplementary component of the notion of right is triggered when the duty bearer does not honor his or her duty, and then does what he or she should have not done, or does not do what he or she should have done. In this situation, rights call for "remedies" –that is, the possibility of a legal intervention, performed by a independent and impartial authority (typically, but not always, a judicial body), in order to assess the existence of the violation and to order some kind of restitution or compensation. This feature is frequently referred as "justiciability" or "judicial enforceability" of rights.

c) Legislation and pieces of legislation

From a more practical perspective, law is composed by pieces of legislation and judicial decisions. The notion of norm is somehow more abstract –a norm could be linguistically compared to a sentence, while a piece of legislation is composed by norms, and could be compared to a full text. Thus, pieces of legislation are frequently composed by a number of norms, and by some other elements, such as definitions, provisions to accommodate new pieces of legislation in the existing legal system –for example, legal references to other pieces of legislation, abrogatory clauses, or clauses providing for an orderly presentation and publication of pieces of legislation which suffered a number of modifications.

While in the past part of the law was transmitted orally, contemporary legal systems –characterized by the increasing complexity– are primarily composed by written pieces of legislation and decisions. Contemporary legal systems require law to be public as a requisite for being considered mandatory –thus, formal publication of newly adopted legislation is a common requirement of different legal systems. Generality –that is, the fact of being drafted in general, abstract terms– is also deemed to be a central characteristic of contemporary law. The idea that the law constitutes a system also calls for the existence of a certain order and regularity in the way in which law is created and put together. For example, different pieces of legislation are termed in different ways, depending on their hierarchy –which is often related to the authority who adopted them: constitutions, legislative or parliamentary acts, administrative schedules, municipal ordinances, etcetera.

There have been also important national efforts during the second half of the XX century to standardize the way in which pieces of legislation are drafted –thus, many legislative and regulatory bodies around the world have adopted drafting guidelines, trying to give coherence to the way in which legislation is presented.

2) Basic legal concepts II
Law as a hierarchical, complex and multilayered system. Some graphic metaphors: law as a pyramid or a staircase. Consequences of the hierarchical structure of the legal system: validity of individual norms as a referential notion. "Defects of construction" of the legal system: legal antinomies and legal gaps. Guarantees as remedies to these "defects of construction": the example of the constitutional judicial review.

Law as a complex system

The notion of a legal system implies the existence of a certain order, capable of giving some unity to a diversity of pieces or components. If law purports to give guidance to human behaviour, it is also desirable that it were coherent –that is, not contradictory or confusing. Part of the answer to the question of what makes law a system, and not just a bunch of isolated norms, is the fact that law is ordered as a hierarchical structure.
This means that the legal system has a number of "legal layers", and that there is a hierarchy among them. Hierarchy is expressed through the superiority of some layers over others, and this idea has a number of translations. Some metaphoric translations graphically depict the legal system as a pyramid, or as a staircase, with superior and inferior legal layers.

As we will see immediately, superiority and inferiority are relative concepts: a certain piece of legislation –and the norms contained therein– can be superior to some, and inferior to other pieces of legislation. For example, in legal systems characterized by the existence of a constitution, statutory law –that is, acts adopted by the legislature– is inferior to the constitution, and superior to administrative regulations or schedules.

Consequences of the hierarchical structure of the legal system
The first and probably most important consequence of the hierarchical and multilayered structure of the legal system is that its superior layers govern the way in which inferior pieces of the legal order are created. This supremacy is twofold:
formal and substantive.

Formally, superior norms designate the body that is competent to create new law, and the procedure through which new law is created. Thus, inferior pieces of legislation not following either the rules governing the competent body or the procedure fixed by superior legal layers lack validity. Substantively, superior pieces of legislation also fix the matters that can, cannot or ought to be treated by inferior pieces of legislation. Constitutional or statutory rules sometimes forbid lawmaking bodies from adopting certain contents: for example, they ban the imposition of censorship on the press. In some other cases, the mandate the adoption of certain legislation: it is the case of rules prescribing the regulation of certain rights, like the right to marry, the right to education or the right to health assistance. Superior pieces of legislation sometimes allow inferior legislation on certain topics to be adopted, so it is within the competent bodies´ discretion to adopt it or not. Inferior legislation in breach of a prohibition established by superior legislation is deemed to be invalid. Legislative omissions –that is, lack of legislation where legislation in mandated– is an example of a legal gap.

To put it in another way, the actual validity of a piece of legislation depends on its formal and substantive conformity with superior pieces of legislation. Lack of action –i.e., omission– by the competent body can also be legally relevant, when there was a legal mandate to adopt legislation.
But the hierarchical and multilayered structure of the legal system could also be seen through another –less confrontative– perspective. Superior norms of the legal system tend to be drafted in general terms, and also tend to be more difficult to amend or modify. Thus, there is a necessary complementarity between superior and inferior layers of the legal system: inferior norms are actually needed to put into effect superior norms, specifying their content and scope. Inferior norms offer flexibility and the possibility of an adequate update of the content of legislation, according to pressing changes in the circumstances. Thus, following the distinction between norms we have discussed before, superior pieces of legislation –such as constitutions or statutes– usually contain a greater number of principles, while inferior legislation –such as administrative schedules or regulations–, which are deemed to be guided by those governing principles, usually contains more detailed rules. In this sense, “descending” in the layers of the “pyramid” or the “staircase” which metaphorically represent the legal system amount to a ongoing task of specification of the content of legal duties –from abstract and general principles to more concrete and specific rules. For example, constitutions often include general prohibitions of discrimination on the basis of different factors, such as race, gender and sometimes health condition, disability or mental disability. But to operate properly, this general statements frequently need detailed regulation, in order to specify what constitutes discrimination, which are the consequences of the breach of this prohibitions –i.e., sanctions– and what other kinds of measures need to be put in place to make the prohibition of discrimination to be effective –i.e., training of government officials, public awareness campaigns, affirmative action in order to overcome past and existing prejudices.

Antinomies and gaps in the legal system. Notions and remedies

This hierarchal and multilayered structure also creates some paradoxes and intricacies. Probably the most intriguing could be described as the potential existence of “defects of construction” of the legal system. While superior layers of the legal system purport to govern the behaviour of the competent bodies and the creation of inferior legislation, the fact is that they are not always complied with by the respective bodies. Law does not

describe how the world is: it prescribes how it ought to be. So –as it happens with duties bore by individuals– State authorities with lawmaking power may not comply with the limits and mandates that superior layers of the legal system impose to them, and create law which does not respect the formal or substantive constraints they should have respected. The result of this situation is the creation of unlawful, or invalid law: formally existing law, but incompatible with the limits and mandates imposed by superior pieces of legislation. We have already mentioned a number of examples of these "defects of construction" of the legal system: when it comes to formal limits, pieces of legislation created by an incompetent body, or without following the mandated procedure –that is, the nonobservance of the rules that govern the "who" and the "how" should legislation be adopted. And when it comes to the substantive limits and mandates, the so called "legal antinomies" – that is, when the law imposes a prohibition on lawmaking, and the prohibition goes unattended–, and the so called "legal gaps" –that is, when the law imposes a mandate on lawmaking, but the mandate is not complied with. For instance, if a constitution forbids discrimination on the basis of health condition, disability or mental disability, the existence of statutes, schedules or regulations which deny rights to persons with mental disorders is an example of a legal antinomy. Failure to provide regulations in order to prevent or punish discrimination would be an example of a legal gap.

It should be made clear that these paradoxes and intricacies stem from the fact that certain legal rules apply to the activity of lawmaking.

When it does not come to lawmaking, any behaviour that does not abide the law, or does not comply with a duty, be it a duty to do something or to refrain from doing something, is just deemed to be an illegal behaviour, but does not create a new legal norm. But in both cases, the legal system usually provides for remedies –although the nature of the remedies could be different. As we said before, breaches are usually assessed after they happened, so a special procedure s needed to decide if a breach took place, and to provide for remedies. When someone´s behaviour does not comply with a duty –the duty to do something or refrain from doing something–, remedies are usually directed to force him or her to comply –to do what was due, or to undo and refrain to do what was undue. Judicial mandates of this sort are called, in several legal systems, injunctions. If this is not possible, remedies may impose the duty to pay compensation to the victim of the breach, or sanctions –such as fines, imprisonment, or disqualification.

On the other hand, when there is a breach to the limits or mandates imposed to lawmaking, remedies seek to prevent invalid or illegitimate pieces of legislation to be applied or to be part of the legal system. Thus, typical remedies in this regard are nullifications, declarations of unconstitutionality, declarations of inapplicability and similar orders, tailored to minimize or complete avoid norms considered invalid to have effects. Cases of omission of legislative mandates may trigger a number of different remedies, including orders to adopt legislation, the temporary adoption of a solution by the judiciary, until the competent legislative body complies with its duties, and other solutions. The example of constitutional review by judges is a clear one: through different systems and procedures, judges, or a special judicial body, are entitled to consider allegations of unconstitutionality of norms passed by the legislative body. This means that a piece of legislation that was passed by the legislature and published, is subjected to judicial scrutiny, in order to assess the compliance of formal and substantive rules laid by the Constitution to govern lawmaking.

A number of grounds may justify a declaration of unconstitutionality of a legislative act: that the body was not competent to pass a law on the matter, that the procedure required was not followed, that the substantive regulation adopted by the legislature infringes an individual right, etc. While the solution varies according to different constitutional review systems, remedies adopted when a constitutional breach is found, usually entail the order not to apply the norm deemed to be unconstitutional. But judges conduct a similar scrutiny when regulations adopted by the Administration are allegedly in breach of limits or mandates imposed by legislative acts.

"Defects of construction" of the legal system –and thus the need for a review system to solve controversies about the content and scope of the law– are not limited to the legal antinomies and gaps described. There are a number of other situations than may require judicial clarification of the extent to which law applies. Language in which the law is drafted could be vague or ambiguous, so the scope or meaning of the law may be unclear. Successively passed pieces of legislation on the same matter may be contradictory, so there should be a decision on which one applies and which one should be left aside. References from one piece of legislation to the other, or to factual circumstances may become out of date, rendering parts of legislation meaningless. Laws can also appear to be redundant –a number of different norms may appear to apply to the same facts with the same solution– and judicial review may be needed to assess whether it is really a case of redundancy, or regulations apply to different facts. Law is manmade, so there should be no surprise in the fact that, while the ideal is that the legal system is orderly and coherent, real legal systems do not always honor that ideal.

3) Legal traditions and systems

Different legal traditions: common law, civil/continental law, customary law, religious law, mixed systems. The relative blurring of some of the common law/civil law divide. Legal pluralism: the coexistence and coordination of legal systems.

While the concepts we discussed are rather general, the fact is that there are several historical legal traditions, which merit a more detailed exploration. We will devote some space to these traditions, and to some actual developments regarding them.

There are basically five legal systems: civil law, common law, customary law, religious law, and mixed legal systems. Mixed legal systems are not a single system but to combination of the other systems. Legal systems may apply nationwide, or to a specific territory of a jurisdiction.

Each legal system has particular characteristics, according to the territories and populations it serves. For example, despite their affiliation to the same legal system, there are significant differences between the positive laws of the United States, the United Kingdom, India and Australia. The same could be said about the legal systems of civil law countries such as France, Germany, Brazil and Senegal.

Civil law systems

Civil law systems –also called Roman Canonic, Roman Germanic, Continental law or Codified law systems– give preeminence to legislative sources, and specially to codification, as the main source of lawmaking.

The modern foundation of civil law combines two different rationales: a political one – the place of legislative bodies as representative of the general will– and a technical one –the preference for general

and abstract legislation, ordered in a systematic way.

Civil law countries have drawn mostly drawn their inspiration from the Roman law heritage: they give precedence to written law and preeminence to a systematic codification of their general law. However, there may also be countries which may not have resorted to the technique of codification but which have retained, to varying degrees, a sufficient number of elements of Roman law, in written form, to warrant their inclusion in the civil tradition.

Civil law countries includes all of the European continental countries, and other countries which were influenced by past colonization of European continental countries –such as former French, Spanish and Dutch colonies in the Americas, Africa and Asia.

Common law systems

Countries linked with the English heritage mostly share what is known as the common law system. In the common law system, a great preeminence is granted to judge made law. Judges rely on judicial precedents, decided case by case.

Like that of civil law, the common law system has taken on a variety of cultural forms throughout the world. Notwithstanding the significant nuances that such diversity can sometimes create, and which political circumstances further accentuate, this category includes political entities whose law, for the most part, is technically based on English common law concepts and legal organizational methods which assign a preeminent position to case law, as opposed to legislation, as the ordinary means of expression of general law.

Common law countries include the United Kingdom, members of the Commonwealth and other former British colonies in the Americas, Africa, Asia and Oceania.

Customary law systems

Hardly any countries or political entities in the world today operate under a legal system which could be said to be typically and wholly customary. Custom can take on many guises, depending on whether it is rooted in wisdom born of concrete daily experience or more intellectually based on great spiritual or philosophical traditions. Be that as it may, customary law (as a system, not merely as an accessory to positive law) still plays a sometimes significant role, namely in matters of personal conduct, in a relatively high number of countries or political entities with mixed legal systems. This obviously applies to a number of African countries but is also the case, albeit under very different circumstances, as regards the law of China or India, for example. Indigenous people`s law also consists in a significant degree in customary, non written law.

Religious law systems

Religious legal systems are based on the content of traditional religious texts considered to be sacred and legally binding. Thus, the main way of legal development in the context of these systems is not lawmaking, but interpretation. Two examples of religious law systems are Muslim law –with a permanent, broadly based nature– and to a lesser extent Talmudic law. The Muslim legal system is an autonomous legal system which is actually religious in nature and predominantly based on the Koran. In a number of countries of Muslim

persuasion it tends to be limited to personal status, although personal status can be rather broadly defined.

Religious legal systems are common in Arab and other Muslim countries, and in the Vatican.

Mixed legal systems

The term "mixed" –or "hybrid" or "composite"– does not refer to a separate legal system, but to the coexistence of different legal systems in the same national territory. Thus this category includes countries where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application. This situation has been called by legal sociologists and anthropologist "legal pluralism": examples of it are the coexistence of civil law and customary indigenous law in countries of Latin America like Bolivia, Ecuador, Colombia, Peru and Mexico, the coexistence of customary indigenous law with common law in countries such as South Africa, and the coexistence of common law and religious Muslim law in Asian Muslim countries. Mixed legal systems, or legal pluralism, usually resorts to rules of coordination –coexistent legal systems "observe" each other, and develop their own limits and mutual accommodation.

Confluence between legal traditions and some consequences for mental health legislation

Finally, while traditions may have been notoriously different, some of the most characteristic traces that divided legal systems such as common law and civil law are gradually becoming blurred. Statutory law is increasingly more important in a number of areas in common law countries. And case law, specially constitutional and high court case law, is increasingly important in civil law countries. Countries characterized by mixed legal systems have also tended to register customary law in a written format, in order to gain legal certainty about the rules to be applied as an exception to civil law.

A number of consequences of this mix of diversity and confluence of legal systems regard the way in which mental health law is devised in different legal contexts.

On the one hand, mental health regulations must take into consideration the particular features of each legal system, in order to avoid undermining their effectiveness. In countries where religious or customary law are dominant or influential, careful assessment of compatibility of the proposed regulations with existing standards –which often requires reinterpretation of traditional standards– is a necessary previous step to any legal reform process. In common law systems, research about judicial precedents which may potentially be in conflict with the proposed regulations is also advisable.

On the other hand, is it a fact that written statutory law is becoming a central source of law in most legal systems. Detailed, far reaching legislation is frequently better suited for the complex, interdisciplinary character of mental health regulations. Legislation should, of course, be drafted taking into consideration its interaction with other sources of law.
(partially adapted from http://www.juriglobe.ca/eng/

4) The rule of law and the doctrine of the division of powers

Rule of law and the doctrine of the division of powers in a democratic state. The notion of checks and balances. The legislature, the administration and the judiciary as branches of government. The role of the different branches in the creation, application and adjudication of the law.

Rule of law and the division of powers

Constitutional law usually provides for a list of fundamental rights for individuals under the jurisdiction of the State, and devises the structure and functions of the governmental bodies. The notion of "rule of law" conveys the idea that governmental power is not absolute, and that the powers of individual public servants and collective public bodies are previously determined and limited by the law. Democracy implies the existence of different means of control of State power: the rule of law –that is, the subjection of public authorities to law– is one of them. Further means include elections –the electoral and temporary mandate of state authorities such as members of parliament, representatives, senators or presidents–, checks and balances –that is, the mutual control of the branches of government–, the publicity of state acts, the respect for freedom of expression and the right to criticize the government, among many others.

Checks and balances

The graphic notion of "checks and balances" is deeply related to the doctrine of the separation of powers in a democratic state. Modern democracy was conceived as an answer to the absolute power of monarchies. An underlying notion of representative democracy is that, given that power cannot by permanently exercised by the whole population –it would be unpractical and paralyzing–, it should be granted to representative public authorities, designed through elections which reflect the public´s majoritarian preferences. However, in order to avoid concentration and abuse of power by representative authorities, the institutional design of the State should provide means to control the natural trend of human beings to accumulate power and ignore its limits. The doctrine of separation of powers purports to achieve this goal by dividing government functions into different branches, and trusting to each branch the partial control of the others. The final effect of these institutional design is a net of multiple and mutual, crossed controls –related to the distribution of competences, the appointment and removal of public officials, the allocation of budget, the request of explanations from public officials, the initiation of inquiries or investigations, etc.

The legislative, the executive and the judicial branches and their respective functions

The conventional theory of democracy –reflected in several constitutional models– distinguishes between an elective legislative body –called, among other denominations, parliament, assembly, congress or legislature–, an executive branch, which is the head of the Administration, and a judiciary, in charge of solving controversies under the law. In some political systems, the legislative body is unicameral, while in others it is bicameral –i.e., a house of representatives and a senate. In parliamentary systems, the head of the executive is elected by the legislature, while in presidential systems, the head of the executive –usually a president– is directly elected by the population. The executive cabinet usually includes a number of politically appointed ministers or secretaries. The Administration, under the rule of the Executive, is non-elective, frequently based on merits,

or on an organized professional career. The Judiciary is regularly non elective –with some exceptions– and the basis for its independence and impartiality is not political affiliation, but merit and technical knowledge. The continental European tradition has also devised a judicial professional career, in a similar fashion to the administrative professional career. Part of the definition of the functions of the different branches of government is based on their role in relation to law. As law is a means to impose duties and burdens –and to threaten with sanctions in case of non compliance– to the general population, the doctrine of separation of powers has devoted careful interest in distinguishing functions among the different branches of government, in order to avoid undue accumulation of normative power in one of them. Thus, it can generally be said that the legislative branch has the power to create the law, the administrative branch to apply it, and the Judiciary to adjudicate on its basis.

However, "checks and balances" also include instances of joint exercise of some lawmaking functions. For example, the Executive branch is often granted legislative initiative – that is, the power to introduce legislative bills in order to be considered by the legislative branch–, the power of formal adoption and publication of legislative statutes, and the power to veto legislation. This participation of the Executive branch in lawmaking usually calls for collaboration –and not confrontation– between both political branches. Once a legislative statute or act was passed by the legislature, and later adopted and published by the Executive branch, there may still be need for further Administrative regulations or schedules, in order to implement legislation. As we said before, the general terms of a legislative statute may need specification to be successfully applied. Administrative regulations and schedules should of course be in line with the legislative statute they purport to put into effect –the contrary would amount to a breach of the supremacy of the legislative statute over Administrative regulations, and, where judicial remedies are available, to the possibility of challenging the validity of Administrative regulations before courts.

Both the Legislature and the Administration have, in turn, internal sections and an internal procedure that should be followed for legislation of regulations to be approved. In the legislative process, for example, after the formal introduction of a bill in the legislature, its first examination is usually assigned to committees, often organized by matter – constitutional issues, criminal issues, labor issues, health and welfare issues, etcetera. Discussion of a bill by committees often involves consultation of experts and interest groups, some opportunity to present views and proposals by civil society organizations, by academic and scientific institutions, and –in some cases– by the general public. Public hearings and presentations, and nowadays transmission by the media may also be available, especially when important issues are under consideration. Committees are usually allowed to introduce amendments to the initial bill. Approval by the respective committees allows treatment in houses or chambers, unless a special majority requires urgent treatment. The legislature, as a collective body, is usually by different parliamentary groups, and often consensus among them is needed both for approval of a bill by committees and by houses.

The modern legislative procedure is characterized by public house sessions, where members of parliament publicly voice their positions regarding a particular bill under treatment, and finally a formal voting takes place. Treatment of bills require a certain quorum –that is, the presence of a certain percentage of the total members of the legislature–, and their approval requires a certain majority –usually simple majority for

ordinary bills, and sometimes more stringent majorities for designated matters. If the legislature is bicameral, the procedure is repeated, and certain rules apply if the bill approved by one house is modified by the other –e.g., the bill returns to the house of origin, and a special majority is required to insist in the bill initially approved in that house.

The expansion of the Welfare State in the 20th century has extended the functions of the Administration to a large number of areas. The Administration is in charge of issuing regulations and schedules, necessary to implement legislative statutes or acts. It is also in charge of the so called police power, regarding a number of matters of public interest – security, transit, commerce, health, labour, education, environment, telecommunications, etcetera. Through the exercise of police power, Administrative authorities are in charge of supervising the observance of the law governing all these matters, specially when activities are carried on by private parties.

The Administration is frequently also in charge of providing some public services, or closely regulating and overviewing its provision, when providers are private. Public services provided or closely supervised by the Administration usually include police, health, education, sanitation, garbage collection, road maintenance, prisons, etc.

A number of procedures regulate administrative decision making: the administration issues general regulations and schedules, considers applications for individual permits by private parties to carry on business activities, outsources some services, contracts with private parties in order to receive supplies necessary for its functioning, applies administrative sanctions to private parties deemed not to comply with regulations, and also to public servants which are found in breach of their duties, organizes its administrative career and deals with internal staffing issues, etcetera.
A parallel, and equally important interactive process carried among the political branches is the proposal, approval, execution and overview of the execution of the budget. The Executive usually has the initiative to propose the budget to the legislative branch, which in turn is in charge of its discussion and approval. Most of the spending is carried out by the Administration –the government´s most expanded branch–, which in turn has to give account of its spending according to the approved legislative previsions.

Courts, in turn, are granted powers to review Administrative regulations and behaviour, and, in legal traditions where constitutional review is available, also to review if legislative statutes are in line with the constitution. The Judiciary, however, is not allowed to review acts or regulations or state behaviour on its own initiative: it usually requires someone having a standing to bring a legal action, thus provoking the intervention of a judicial body. Standing is usually granted to individuals or groups of individuals whose rights or interests are allegedly affected by the impugned norm or conduct. Some kinds of procedure –such as the criminal procedure, and the administrative procedure– also grant standing to public authorities, i.e. a public prosecutor, or an administrative agency, to file complaints on behalf of the public interest. The typical scenario of the judicial procedure is the trial, where plaintiffs and defendants discuss on contested factual allegations, on the applicable law and its interpretation, and on the kind of extent of the remedy to be adopted. While the structure of trials depend a lot on the type of matter at stake, they are usually composed by preliminary phases –where avenues for conciliation are exhausted–, the formal presentation of the complaint by the plaintiff and formal answer by the defendant –where the extent of the controversy is defined–, an evidentiary phase, where the parties are allowed to present

testimony and proof of their allegations, and the pronouncement of the sentence. Depending of the legal system and the type of procedure, there may exist possibilities for appeal or review. Once the decision is considered final, and in the case of the complaint be considered totally or partially founded, the remedial phase –the actual implementation of the sentence– takes place.

5) International law

International law. States and the international community as a lawmaking forum. Sources of international law: customary law, international treaties. The notion of "soft" or "nonbinding" law. Interaction and dialogue between international and national law. The problem of adoption. The problem of incorporation. The problem of hierarchy. The problem of self executability.

International law: general notions

Besides creating and managing their own legal systems, States also are involved in the creation, development and application of International Law. International law requires some supplementary explanations, because the frame of domestic (or national) law may not always be the best comparison to understand its meaning and scope. However, international law –and, within its domain, international human rights law– plays an important role in the agreement of minimum common legal standards among nations, and also as an model source for domestic law.

International law is agreed upon and developed by States, in the domain of their international relations, or in the context of international and regional organizations, which are indeed created by States. While in the domestic or national sphere there are centralized bodies which create, apply and adjudicate on the basis of national law, international law is a rather decentralized system, and is mostly dependent on the voluntary participation of the States. International law can be created in different "scales": in a bilateral way, between two States, or in a multilateral way, with the participation of more than two states. And there are very diverse multilateral fora: some are universal –such the United Nations–, some are regional –such as the Council of Europe, the European Union, the Organization of American States, and the Organization of African Unity– and some others gather countries with a similar background or heritage –such as the League of Arab States.

There is no equivalent to a "world government", and international courts have a voluntary jurisdiction –that is, their power to decide cases depends on the express recognition of the involved States to do so. If a State has not made such recognition, it is not bound by the court's jurisdiction. While domestic law applies without asking the consent of its recipients, international law only becomes mandatory when the States voluntarily express their consent in being obliged by it. Furthermore, while legal threatens and sanctions at the domestic level are very well developed, sanctions in international law are still weak, and their application is highly dependent on the State´s will to accept them. For example, human rights treaty bodies make "recommendations", but their views are not mandatory in the strict sense of the term. Specifics of human rights treaties will be dealt with in Module3.
International customary law and international treaties

There are two main sources of international law. The first one is international custom, or international customary law, which is defined as a constant material practice by the states,

accompanied by the conviction of its mandatory character. However, international law has increasingly being codified in the XX century, so its most important source –specially in the field of international human rights law, and in many others– are treaties, or international conventional law. Treaties are the equivalent of contracts between States: they are formal voluntary agreements through which States interchange legal duties. The procedure to adopt and ratify treaties has, in turned, also been codified, and thus the guiding treaty in this matter is the Vienna Convention on the Law of Treaties. One could generally distinguish between two kinds of treaties: bilateral and multilateral treaties. Bilateral treaties are concluded between two states. Multilateral treaties are concluded among a number of States, and they are generally open to the ratification of other States. A typical example of multilateral treaties are treaties which create international organizations –like the United Nations Charter, or the Treaty of Maastricht (the treaty which constitutes the European Union).

Another example of multilateral treaties, particularly relevant for the subject of mental health, are Human Rights treaties. Human Rights treaties –also called covenants, pacts, conventions and, when ancillary to another treaty, protocols– have some characteristic features. While traditional bilateral and multilateral contracts mainly recognize mutual duties among States, when ratifying human rights treaties, States recognize before the international community duties regarding the persons under their territory and jurisdiction. That means that human rights treaties are treaties where States recognize rights not to other States, but to human beings –thus self limiting their sovereign power and opening to international scrutiny the way in which they treat their nationals and other persons under their territory and jurisdiction. The International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights are examples of Human Rights treaties. Recently, in December 2006, a new treaty regarding the rights of persons with disability, which includes persons with mental disabilities, was adopted by the UN General Assembly. The new treaty is called Convention on the Rights of Persons with Disabilities. Module 3 will offer a more detailed review of these notions,

Treaties are only mandatory for States that have ratified them on a voluntary basis. When ratifying them, States are generally allowed to make reservations, through which they exclude the application of certain provisions of the treaty –however, the reservations made cannot defeat the treaty´s object and purpose.

International, and especially multilateral treaties, usually devise some method for the solution of controversies –which normally means the allegation that a State party to the treaty has not honored its duties under the treaty. Human Rights treaties are no exception to this trend: besides listing a number of human rights and correlative State duties, they regularly create or designate a supervisory body, and some monitoring mechanisms. There are a number of monitoring mechanisms available in different Human Rights treaties. The treaties adopted under the universal human rights system –that is, the sphere of the United Nations–, generally create a supervisory body called Committee (such as the Human Rights Committee, or the Committee against Torture).

Regarding the monitoring mechanisms, the treaties of the universal human rights systems resort to two main mechanisms. The first one is the so called State report mechanism, by which States are bound to present periodic reports to supervisory bodies called Committees, to inform them about the measures adopted, the progress made and

the problems faced in the implementation of the concerned treaty.

The second one is the so called complaint mechanism, through which States grant individuals or groups of individuals the right to file complaints, once the domestic remedies have been exhausted with no satisfactory solution, before international supervisory bodies, when there is an alleged violation of the rights set forth by the respective treaty. After consideration of the allegation and of the State´s answer, the supervisory body issues its views or considerations about the case, stating if a violation has been found. Treaties also provide for other supervisory measures, such as inquiry procedures and country visits, when there are allegations of situations of gross violations of the concerned human rights. Regional treaties –such as the European Convention for the Protection of Human Rights Freedoms, and the American Convention on Human Rights– also provide for complaint mechanisms, with a more formal judicial setting and procedure: both of these treaties, for example, establish a human rights court, with the power to issue mandatory decisions and remedies.

Soft law

There is another important component of international law, although it has not a mandatory character. It is referred to as "soft law", or nonbinding law. It is the case of a number of international instruments –usually called, among other denominations "Declarations", ¨Principles¨, "Guidelines", "Programs of Action", "Rules" or "Safeguards"– which are not open to ratification by States, but are intended to serve as interpretive standards, and also as a model for domestic legislation, policy and practice in a number of different fields. As interpretive standards, "soft law" instruments usually clarify the content of mandatory and general human rights duties, when it comes to their application to specific situations or specific groups of persons. On the other hand, "soft law" instruments usually do not provide for any overview mechanisms, and do not establish the possibility of filing complaints based on their breach. In the area of the rights of persons with disabilities, for example, one could mention at least two important "soft law" instruments: the United Nations Standard Rules for the Equalization of Opportunities of Persons with Disabilities, adopted in 1993, and the United Nations Principles for the Protection of the Mentally Ill and the of Mental Health, adopted in 1991.

Adoption, incorporation, self executability, subsidiary protection

There are a number of important issues regarding the interplay of international and national –or domestic– law. From the viewpoint of international law, once a country has acquired international obligations, it is obliged to comply them in good faith, regardless of the content of its domestic law. This means that a country cannot invoke its domestic law to justify noncompliance with international obligations. At the same time, international law is usually drafted in general terms, and requires domestic implementation –that is, adoption of domestic measures to give full application to the duties agreed upon internationally. The mutual relation between international and domestic law gives rise to a series of questions, some of which will be summarized here.

The first problem has to do with the procedure designed in domestic law for a country to express its willingness be bound be international law –especially by international treaties. This issue is often referred as the problem of "adoption" of international law by countries. This is traditionally a matter of the constitutional law of each country, even if a number of nations have developed further statutory legislation on the celebration of treaties.

Adoption of international treaties usually involves a number of steps, and at least two branches of government –and sometimes three. It is common that the Executive branch, which is generally in charge of the foreign relations of a country, is entitled to negotiate and sign treaties. The next step usually involves approval by the Legislative body, or by part of it. In some countries, a judicial body, such as the Supreme Court, or the Constitutional Court, are in charge of assessing the compatibility of the treaty proposed for approval with the domestic constitution. Once these steps have been complied with, the Executive is normally entrusted the formal deposit of the instrument of ratification. That is the way to become bound by the international treaty.

Then, there is the so-called problem of "incorporation" of international law –and especially of international law that refers to the rights of individuals, such as International Human Right law – in national law. The question here has to do with the status of international law in domestic law: when a country ratifies a treaty, how does this fact change the domestic legal system? Can people under the jurisdiction of the State directly invoke provisions of the binding international law before the domestic courts?

Generally, two different answers have been given to these questions. On the one hand, most of the common law tradition follows a separate, "dualistic" approach. This means that, in principle, international law and domestic law are separate legal systems, and that international law does not apply locally, and cannot be invoked before domestic courts. The only way to open an avenue for the local application of international provisions is "conversion", that is, the adoption of national legislation reproducing the content of international provisions –but then, what applies is a domestic piece of legislation, although its content may be coincident with the content of international provisions. The United Kingdom, and –generally– the Commonwealth countries have followed this orientation.

A second answer to this problem, called "monistic" approach, is more typical of civil law countries. It consists in the direct incorporation of international law into domestic law. This means that, once an international norm is properly adopted by a certain country, it automatically becomes part of domestic law. If this is the case – that is, if a country has chosen the system of direct incorporation of international law into domestic law– a second question arises: the problem of "hierarchy" of international law within the domestic legal system. As we have seen before, the legal system is a complex, hierarchical and multilayered system. Thus, the relevant question here is what is the legal hierarchy of international law, *vis à vis* the different layers of the domestic legal system –i.e. the constitution, legislative statutes, etc.

Again, a number of different answers are given to this question, depending on the different legal traditions. In some countries, international law has the same hierarchy as the legislative statutes. So the last one passed prevails over the previous one, a kind of implicit "repeal". "Monistic" countries where the US constitution was influential – such as Argentina, Mexico and Venezuela– used to follow this orientation. In other countries, international law is placed over the domestic legislative statutes, but below the Constitution. France, Germany, Greece, Italy and Portugal are examples of this trend. Yet in others, international law, or certain kinds of treaties – such as international human rights treaties, or commercial integration treaties – are granted constitutional status, and placed at the same level as that of the Constitution. This is the case of The Netherlands, Guatemala and Honduras.

Argentina and Colombia grant constitutional hierarchy to international human rights treaties. As we have explained before, inferior pieces of legislation could be in contradiction with superior pieces of legislation, and this could also happen with international law, once it becomes incorporated into domestic law. Thus, depending - of course, - on the hierarchy granted to international law, a legislative statute or an administrative regulation could be found to be contrary to the provisions of an international treaty, and the respective legal system may provide for remedies in such cases.

A different, but also relevant issue, when international law is incorporated into domestic law automatically or through "conversion"– is the so called problem of self executability of treaty provisions. While the incorporation and hierarchy issues speak of international law as a whole, the problem of self executability is referred to the particular provisions or clauses of a treaty. Thus, some clauses could be deemed to be self executable, while others not. That a certain provision or clause is self executable means that it can be directly applicable, without further need of specification or regulation. This of course depends on the degree of precision of the duty which stems from the provision.

Some clauses are by definition non self executable: it is the case of those clauses which require the States to adopt adequate measures for a certain goal, but leave the State with a margin of discretion to choose the adequate measures. For example, according to Art. 2 (e) of the Convention for the Elimination of All Forms of Discrimination against Women, States should undertake "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise". The choice and content of these measures are left to the State. On the other hand, duties that stem from some other clauses are rather determinate or determinable: for example, a provision which forbids the State from giving different treatment to marital and extramarital sons and daughters, states a clear duty which does not need further specification. Here, any example of differential treatment could be deemed to be in contradiction with this provision.

Finally, the protection granted by international law in the form of remedies before international courts or bodies, is considered subsidiary to the protection offered by national institutions, such as the courts of law. This means, that in order to resort to international courts or bodies, the victim has to show that he or she has exhausted the domestic remedies, with no results, or that domestic remedies are clearly ineffective.

6) Areas of law: a summary introduction

Private law and public law as material components of the legal system. Civil and criminal law. Substantive and procedural law.

Private law and public law

Law is conventionally organized by areas, according to the kind of subject which it intends to regulate. According to these lines, there is a traditional distinction between private and public law. Private law basically regulates relationships between private parties. Typical examples of this are contract law –which regulate the way in which private parties bargain and reach mandatory agreements–, torts law –which regulates the compensation of damages produced between private parties–, property law –which regulates ownership of goods by private parties–, inheritance law –which regulates the transfer of property after death–, and family law –which regulates institutions such as marriage and parenthood.

In turn, public law regulates the functions of governmental bodies –it is the case of constitutional and administrative law–, and the relations of state authorities with private parties –largely a function of administrative law. Criminal law is another example of a field of interaction between public authorities and private parties.

While these distinctions may be useful classificatory tools, they should not be taken literally. Private law involves public regulations, and the participation of public authorities: rules regarding contracts, torts, property, inheritance or family are adopted by public authorities. Indeed, when conflicts regarding all these matters arise, actors often need to resort to the judiciary –a public authority– in order to enforce rights, duties and sanctions. Furthermore, a number of areas which were traditionally considered a private matter are now heavily regulated, and often involve state inspections, the need for permits and compliance with state regulations. A good example of this is labour law, which in principle involves private parties, but where the steady participation of the State as regulator and inspector casts doubts about the possibility of considering it a part of private law without any qualification. But the argument is also applicable to a number of areas that were traditionally considered to be part of private law, and have become increasingly "public".

This point is relevant for this course, because one of those areas is health law. Health regulations may of course take into consideration the nature of the provider of health services –whether it is public or private. But provision of private health services is deeply regulated, and the matter of state supervision, so what governs relations between health care providers and health care users is rarely the "free will of the parties", and could be better described as publicly regulated contractual and semi contractual relations, were an important part of the duties involved are determined by public decisions, without any freedom for the parties to leave them aside. Due to the important issues at stake –life and health of human beings– the Government has a responsibility to regulate mental health facilities, including mental health institutions, regardless of the public or private nature of the service provider. This is done through an array of different means: i.e. accreditation of institutions, monitoring of human rights conditions, establishment and supervision of quality of care and service standards, set up of mandatory complaint systems, regulation of compulsory admission and treatment and creation of mechanisms to review these decisions. This means that a number of areas of the law are not mainly organized around the public/private divide: they actually try to establish mandatory minimum regulations according to the nature of the interests at stake, regardless of the fact that actors involved are public or private.

Civil law and criminal law

Some other classifications of areas of law draw on the kind of sanctions and the procedure to apply them. Here, a traditional distinction refers to civil law and criminal law. Civil law basically resorts to monetary compensation –among other sanctions– in case of breach of the duties it imposes. Furthermore, the application of sanctions is largely a function of the individual will of the private right holder.

Thus, in cases of torts or breach of contracts, the victim of the violation has the power to decide to take legal action, and may actually prefer not to do it. On the other hand, criminal law typically resorts to harsher sanctions –such as imprisonment or, in some jurisdiction, capital punishment. However, *mens rea* guilty intention on the part of the accused that too beyond reasonable doubt is required to be proved by the prosecution.

Criminal law is still largely dependent on state action: criminal prosecution is in most of the cases initiated by public prosecutors and on behalf of the State´s interest in maintaining the integrity of the legal order and protecting the public. There may, however, be some exceptions to the clear lines of distinction depicted here.

Substantive law and procedural law

Another traditional distinction is that of substantive and procedural law. While substance speaks about the material regulation of the relation between persons subjected to the law, procedure refers to the mechanisms through which substantive law is put into effect. The main subject of procedural law is the rules that govern different sorts of trials and the activity of the judiciary, although the definition can also encompass lawmaking procedures –for example, the administrative regulation procedure, or the legislative procedure, procedures before the administration, and not only the ones related to judicial adjudication.

Thus, typical procedural issues deal with standing –that is, who is entitled to initiate a certain legal action–, formal requisites, time frames, evidence, appeal or review, implementation of the final decision, etcetera. Procedural schemes often follow the lines of some distinctions between substantive areas of law. For example, there are differences between civil procedure and criminal procedure; in some jurisdictions, private law procedure is different from labour law procedure, etcetera. Other relevant difference between legal systems is the predominant character of the procedure: whether it is oral, or written. Oral procedures mainly rely in oral testimony before a court, while written procedures rely on the written briefs, documents and evidence presented by the parties, which is orderly accumulated in a dossier. Oral testimonies are transcribed and inserted in the written dossier.

The substantive/procedural distinction can also be applied to provisions regarding each area of the law. Health law, and mental health law in particular, are not exceptions, and the line of distinction can be useful to clarify the sense of a number of regulations. For example, as it will be explored in future modules, international human rights law standards regarding mental health treatment prescribe a right to the least restrictive treatment in terms of affecting freedoms. This is a substantive or material provision. In order to put it in effect, a number of procedural safeguards should be considered: the need for consent for hospitalization; absent this consent, the need to meet a series of conditions, if the health authority deems that involuntary commitment is needed; the possibility of review of the decision on involuntary commitment by an independent body; the further possibility of appeal before a judicial body. Procedural safeguards also include access to files and information, access to a lawyer or a representative, the possibility of producing evidence, etcetera.

7) Human rights/fundamental rights

The notion of human rights/fundamental rights. Human rights and State duties. A tripartite classification of duties: duties to respect, to protect and to fulfill. The problem of the application of human/fundamental rights norms between private parties. Breaches of duties and protection of rights. The idea of legal remedies or guarantees.

The notion of human rights/fundamental rights

We have already had an overview of the notion of right. We would focus here on the notion of human rights –which will be treated with more detail in Module 3.

Rights may recognize different sources, and their importance may vary according to the type of values protected those rights. Some rights are created by the free agreement of private parties: for example, rights agreed upon when concluding a contract. However, the development of law in the last two centuries has generally converged in the idea that there are certain rights which every human being should be granted, following the sole condition of being human. The legal notion of international human rights is rather recent –it has only clearly been formulated as a legal (and not only a political or ethical) ideal in the second half of the 20th century. The idea that every human being should be entitled with a number of rights obviously has a universal drive, and it is not strange that the forum where the notion was presented and developed is the international arena. The adoption of a series of international human rights instruments, starting with the Universal Declaration of Human Rights in 1948, is a corollary of the idea that human rights are universal, and not dependent on the jurisdiction under which human beings live. Before the adoption of this notion, governments were considered sovereign to decide the treatment they granted to the persons under their jurisdiction. Human rights are universal –they are predicated of every human being–, inalienable –they cannot be bought or sold– and imprescriptibly –they do not get exhausted by time or by their lack of exercise.

From a more practical viewpoint, international law started to codify human rights –that is, to adopt treaties regarding human rights– since the 1950s, as a reaction to the Holocaust and to other genocides committed during the Second World War. The adoption, in 1966, of two important treaties, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, could be considered the birth of a mature universal human rights system. Since then, the universal human rights system has adopted five more substantive treaties –the Convention for the Elimination of All Forms of Racial Discrimination, the Convention against Torture, the Convention for the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention for the Protection of Migrant Workers and their Families–, a number of optional protocols to theses treaties, and a large number of "soft law instruments". Two new conventions are recently adopted: Convention to Prevent and Eradicate Forced Disappearances, and Convention on the Rights of Persons with Disabilities. A number of diverse specialized areas complement this panorama: there are human rights components in the fields of international refugee law, international humanitarian law, international labour law, international education law, international criminal law, among others.

The development of human rights law has also been possible through regional efforts. Three regions of the world –Europe, the Americas and Africa– have also adopted regional human rights treaties, and respectively provided for a regional human rights protection system.

While the notion of human rights is mainly due to international developments, an equivalent idea –the idea of fundamental rights, or constitutional rights– has basically aroused in domestic legal context, and is linked with the adoption of constitutions which not only organize the structure of government, but provide for a list of rights that public authorities are bound to respect and guarantee. The source of fundamental or constitutional rights is usually the constitution, or a Bill of Rights granted constitutional status. As we have discussed before, a number of countries also incorporate international human rights instruments to their domestic law, and there is sometimes a certain overlap between the

content of domestic constitutions and the content of international human rights treaties. Both the notions of fundamental (or constitutional) rights, and that of human rights, are meant to limit the power of State authorities, setting some prohibitions they cannot breach –for example, resorting to torture as a method for criminal investigation–, and some mandates they have to comply with –such as providing for access to courts, or providing free and mandatory primary education. In this sense, they are said to impose limits to the sovereignty of public authorities, and to protect individuals and groups (including minorities) from abuse and discrimination.

Human rights and State duties

This diploma will devote a module to international human rights law, but a few preliminary ideas could be a useful introduction to this topic. As international human rights law is created and adopted by States, international human rights instruments centrally establish State duties, as correlative to recognizing human rights for persons. The traditional conception of human rights saw State action as a threaten to individual rights –and the same is true to the traditional conception of fundamental or constitutional rights enshrined in 18th and 19th century domestic constitutions. Thus, human rights were originally conceived as guarantees against undue interference of State officials in individual freedoms. This conception, however, proved to be insufficient, for a number of reasons. While the historical experience certainly shows that the State could constitute a threaten to basic rights of persons, State action is also needed to protect and promote rights –and thus, human rights cannot only be seen as requiring abstention from the State, but also require positive actions.

While the distinction between negative and positive duties has traditionally been linked with the distinction between civil and political rights and economic, social and cultural rights, the fact is that every right –be it called civil, political, economic, social or cultural– imposes both negative and positive duties to the State. Negative duties are those which require the State to refrain from doing something –such as torturing, enforcing discrimination, imposing censorship on the press or deprive human beings of their sources of food. Positive duties require States to act –for example, to provide access to courts, to medical services, to regulate private conduct or to protect groups in situation of vulnerability, such as children, refugees, persons with disabilities or indigenous groups. A useful classification, developed by human rights scholars and later adopted by some human rights monitoring bodies, can help to grasp these features. According to this classification, every human right imposes the State three kinds of duties:

a) Duties to respect: duties to respect imply an ongoing existence of a link between the right holder and the good or interest which is protected by that right, such as freedoms or entitlements. State action is seen as a potential threat to this situation. Thus, duties to respect focus on preventing the State from unduly intervening in the right holder's sphere of autonomy and security. Emphasis is placed on State abstention from interference with right holders; but State action could be necessary, for example, to prevent State agents from undue intervention, or for reparation purposes once the duty has been breached. For example, States should refrain from enacting legislation which discriminates against persons with mental disorders, and should refrain from employing involuntary admission to mental health institutions when a number of (restrictive) conditions are not met.

b) Duties to protect: duties to protect also imply an ongoing existence of a link between the

right holder and the good or interest which is protected by that right. But in this case, it is action by third parties which is seen as a potential threat. Thus, duties to protect focus on State action to prevent third parties from unduly interfering in the right holders ´ sphere of autonomy and security. Emphasis is placed on State action that is necessary to prevent, stop, or obtain redress or punishment for third party interference. This is typically achieved through State regulation of private party conduct, inspection and monitoring compliance, and administrative and judicial sanctions to noncompliant third parties.
For example, States should enact legislation to protect persons with mental disorders from inhuman and degrading treatment in private institutions, and to prevent acts of discrimination on the basis of mental disorder or condition in fields such as housing, medical insurance, employment in the private sector, etcetera.

c) Duties to fulfill: duties to fulfill imply a different situation. In this setting, the right holder has no access, or has difficult access to the good or interest that is protected by the respective right. Thus, in this case, State action is seen as an aid to facilitate, provide or promote that access. The State is not seen as a threat, but as a proactive agent oriented to change the status quo –a status quo which is deemed to fall short of a normative standard. Therefore, emphasis is placed on State action directed to identify problematic situations, provide relief and create the conditions that would let right holders manage their own access to the goods protected by rights. While socioeconomic factors –that is, income– were seen as the main obstacle preventing persons from access to social goods, considered to be indispensable, cultural factors are nowadays also envisaged as relevant. Hence, removal of socioeconomic obstacles and change of discriminatory patterns against social groups in a vulnerable position could be seen as supplementary, rather than radically opposed, to satisfying these rights. Examples of duties to fulfill include the provision of adequate mental health services in case of need, and adoption of measures to eradicate stigma and prejudices against persons with mental disorders.

As it will be seen along the diploma, all these dimensions are crucial when it comes to mental health and human rights. Mental health service users should be protected from undue State action –i.e., against unjustifiable involuntary commitment, or application of restrictions or unnecessary treatment and interventions–, and from undue third party action –from discrimination from the general public, and from ill treatment from private mental health care providers–, but they should also need adequate mental health services and other State action to ensure full social inclusion.

The notion of "duties to protect" also raises an important and ongoing discussion, which is the possibility –or the desirability– of extending human rights duties to private parties, and not only to the State. Interestingly, this discussion has also been introduced in the field of domestic constitutional law in a number of jurisdictions: while traditionally fundamental or constitutional rights were seen to apply only to relations between the State and individuals, probably since the incorporation of labour rights to constitutions, specially after the second half of the 20th century, the question of the so called horizontal application of fundamental rights, or application of fundamental rights between private parties, has been under permanent debate.

The fact is that human rights instruments –and also constitutional provisions– actually require or allow the State to impose duties on private parties –so duties between private parties can be seen as a direct effect of the recognition of human rights. When a particular right is

recognized, threatens to its full enjoyment can be originated both in State or in private action. Thus, there is always some private to private dimension in human rights, regardless of the conceptual decision of considering to extend the application of human rights –or fundamental rights– directly between private parties, or indirectly through the mediation of State duties regarding third parties. The constitutional tradition of common law countries has been reluctant to accept the application of fundamental rights between private parties, while the trend in civil law countries can generally be said to be the opposite.

An overarching human rights (and constitutional rights) principle, the prohibition of discrimination, can offer good examples of what has been said. Discrimination could be defined as an unjustifiable distinction based on traits such as gender, race, religion, mental or physical conditions, which denies, restricts or affects a right or its exercise. There are some clear negative duties stemming from this principle: the State cannot introduce unjustifiable legal distinctions based on these categories (for example, it cannot deny a right on the basis of race or gender). But the goals of antidiscrimination law go beyond this negative approach: modern anti discriminatory legislation purports to eradicate denial of equal opportunities based on group stereotypes or prejudices. To this effect, the law resorts to positive measures, such as the so called affirmative action –that is, the adoption of measures intended to promote the access of previously underrepresented groups to social spheres such as employment or political activity–, or the removal of barriers to participation –such as the imposition of accessibility and "reasonable accommodation" duties for persons with disabilities. Antidiscrimination law does not only target State action: it also purports to enlarge equality of opportunities to the private sector, thus applying not also to State, but also to public actors. For example, the prohibition of discrimination on the basis of disability may apply to private parties, such as employers, builders, insurance providers, private transportation, private businesses, etcetera.

Breaches of duties and remedies

To close this module, it is important to recall the importance of remedies, as a necessary complement to the notion of rights. The pragmatic vision of the common law has coined a very graphic phrase regarding this point: "there is no right without a remedy". If rights impose duties –either to State or private actors–, they would be meaningless if the breach of those duties is not followed by the possibility of denouncing the breach and claiming some kind of redress: compliance with legal duties will completely depend on the good will of the duty bearer and, absent this good will, nothing will follow. The existence of adequate remedies has also an important preventive/deterrent effect on duty bearers: knowing that sanction will probably follow the breach of legal duties can be a powerful incentive for compliance, other than moral conviction.

There are a number of mechanisms to protect rights –they would be more deeply explored in Module 8. Some of them are preventive: it is the case of procedures established to monitor conformity of a decision making process with the legal rules that govern it. Another example is the existence of mechanisms of administrative supervision of the compliance with legal duties, such as monitoring bodies or inspectorates to health facilities. The intervention of external bodies, such as review bodies or judicial authorities, can also play a preventive role –interim measures, or injunctions, can be directed to prevent an imminent violation to occur. A number of remedies are, though, only triggered after a violation has been committed. It is the case of torts, and of criminal and administrative sanctions. Violations committed by omission usually require proof of the omission, and

remedies can be directed to order the positive duty to be performed. While international human rights law provides a limited number of international remedies, the employment of the international human rights protection system is subsidiary –that is, it can only be used when efforts to solve the situation domestically have failed. Thus, developing legislation to ensure rights –such as right of mental health service users– in the domestic level not only requires the establishment of substantive provisions stating the content of the rights and duties, but also adequate remedies to cope with violations of those duties.