

LAW

GENERAL INTRODUCTION EU LAW AND BEYOND

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OVERVIEW

LAW

1. Examples
2. Definition
3. Separation of powers
4. Hierarchy of law

Law

GUIDING QUESTIONS



- How to define law?
- Are there different forms of law?
- Who can enact law?
- What was the key idea of Montesquieu and how can it explain Brexit?
- Are there certain categories of law that carry more 'legal weight'?

Law

Examples

Which of the following examples would you qualify as ‘law’?

- Treaty on European Union
- E-Commerce Act
- Austrian Road Traffic Code (*Straßenverkehrsordnung*)
- Law on air pollution (*Immissionsschutzgesetz-Luft*), allowing certain electric cars to drive 130 k.p.h.
- Decree setting a speed limit of 100 k.p.h. for certain sections of the A 12 Inntal motorway
- A national provision that motivates people to have euthanasia
- Directive on electronic commerce in the internal market

Law

Examples

Which of the following examples would you qualify as 'law'?

- Directive on product liability
- Possibility of sending State Secretaries (and not only Ministers) to the Council of the EU
- Codes of conduct
- Ethical Principles for Medical Research Involving Human Subjects
- MCI's General Terms and Conditions of Business
- MCI's House rules
- A judgment of a national court, or of the Court of Justice of the EU

Definition

“Let the term ‘**law**’ refer to **positive** law (as opposed to natural law), i.e. to **existing systems of social rules** that require and (in many cases) **enforce** compliance and **punish** non-compliance.”

- “rules for the regulation of **human** conduct that is backed up by **sanctions**”
- “the existence of a legal system requires that compliance with its [...] rules will be **generally enforced**, but not necessarily compliance with every single rule”
- “[...] the rule of recognition. This rule specifies the criteria of legal validity that any rule, be it primary or secondary, has to meet in order to **be valid** law in the respective legal system”, “typically embodied in the written constitution”
- “In principle, **even grossly unjust norms** may be **valid** law in a given legal system if the established rule of recognition does not contain any provisions to the contrary.”

Law

Examples | answers

Which of the following examples would you qualify as ‘law’?

- Treaty on European Union (EU Member States [MS])
- E-Commerce Act (Austrian Parliament)
- Austrian Road Traffic Code (Austrian Parliament)
- Law on air pollution (Tyrolean Parliament)
- Decree of the Governor of the Land setting a speed limit of 100 k.p.h. for certain sections of the A 12 Inntal motorway (*Landeshauptmann von Tirol, regional executive power, see below*)
- Fictitious example (might be law, but unmoral?)
- Directive on electronic commerce in the internal market (European Parliament and Council of the EU)

Law

Examples | answers

Which of the following examples would you qualify as ‘law’?

- Directive on product liability (Council of the EU)
- Possibility of sending State Secretaries to the Council of the EU (customary law)
- Codes of conduct (soft law)
- Ethical Principles for Medical Research Involving Human Subjects (World Medical Association)
- General Terms and Conditions of Business (MCI)
- House rules (MCI)
- Court judgments (judiciary power, see below)

Further details



- **Soft law**, as opposed to hard law:
 - Not binding: cannot create rights or obligations which can be enforced (in contrast to hard law)
 - Hence it is not directly applicable, does not give rise to a judicial decision enforceable rights and its violation does not per se lead to illegality (in contrast to hard law)
 - Also tries to regulate human behaviour (just like hard law); thus, also normative
 - Examples: ‘comply or explain’, ‘name or shame’
 - **N.B.** (Nota bena; note well) Although soft law is not legally binding (other than hard law), its impact should not be underestimated
- **Customary law**:
 - Unwritten law, not enacted by Parliament (the legislative power); hence, not top-down, but bottom-up
 - E.g. possibility of sending State Secretaries to the Council of the EU
 - Two prerequisites: certain legal practice over a certain period of time (*consuetudo*), plus the relevant actors consider it to be law (*opinion iuris*)

Further details



- **N.B.**
 - The **name** might differ ('law', 'code', 'act'), but the qualification of a document might nevertheless be the same (i.e. a national or regional law).
 - Nowadays EU directives (and regulations) are **normally** adopted by the European Parliament and the Council of the EU, hence the EU product liability directive (only adopted by the Council of the EU) can be seen as an exception.
- **Cross-references:**
 - On the **separation of powers** (laws of parliament vs. a decree of the Governor vs. a judgment of a court) *see below*
 - On the **hierarchy of law** (EU vs. Member States, federal vs. regional law within Member States) *see below*
 - On **morality and ethics**: *related topic*

Further details



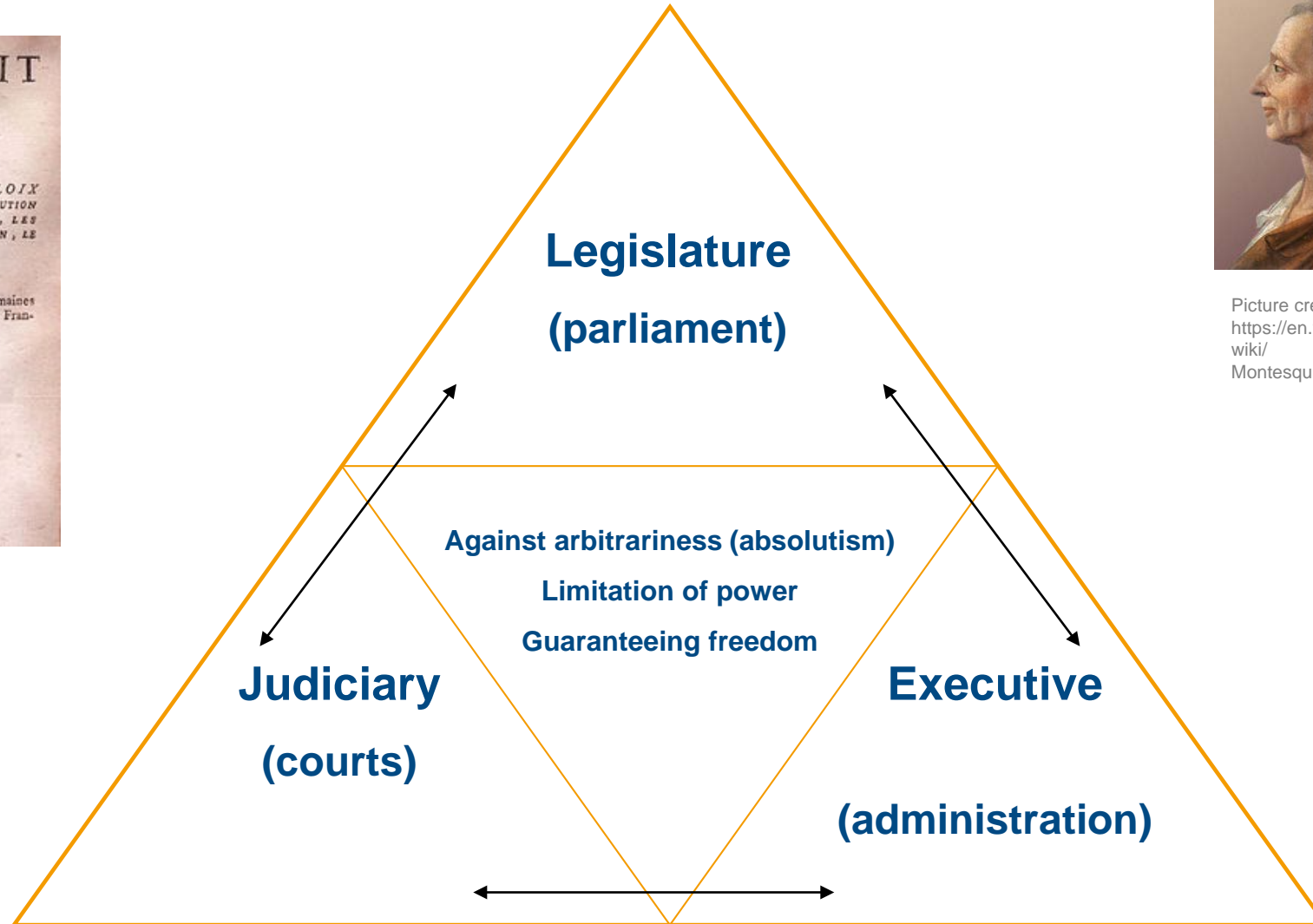
- Order (*Ordnung*)
 - E.g. road traffic – doesn't matter whether left-hand or right-hand driving
- Fairness (*Gerechtigkeit*)
 - Law has a function of morality and also a social function | *related topic*
- Power (*Herrschaft*)
 - Law also has a function to maintain leadership
 - E.g. Constitutional law
- Control of power (*Herrschaftskontrolle*)
 - Constitutional review
 - Checks and balances
 - Separation of powers

Law

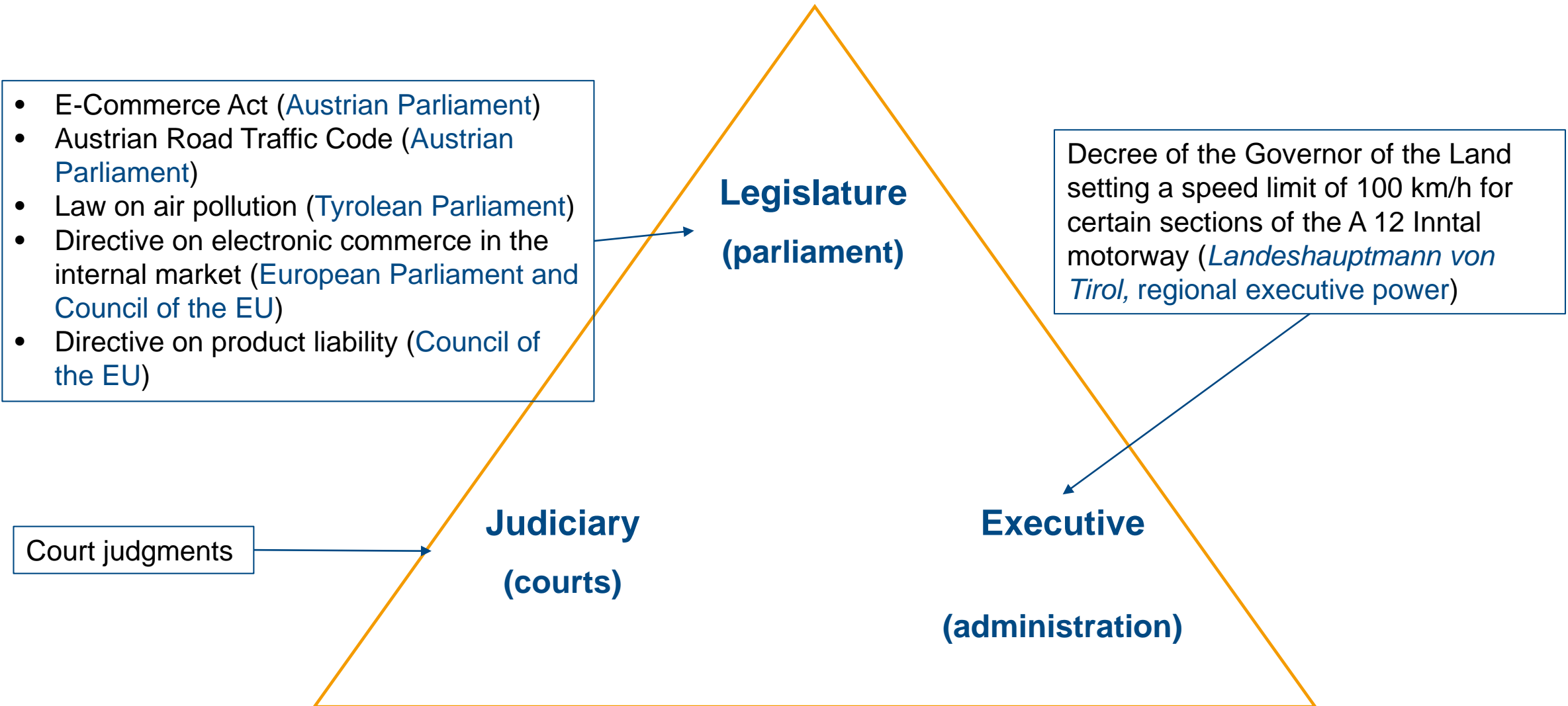
Separation of powers



Picture credit:
<https://en.wikipedia.org/wiki/Montesquieu>



Separation of powers | plus examples



Law

Hierarchy of law



CJEU judgment of 17 December 1970,
Internationale Handelsgesellschaft,
11/70, EU:C:1970:114, para. 3



Law

Hierarchy of law | plus examples

EU Primary law (EU MS): Treaty on European Union

EU Secondary law

- Directive on electronic commerce in the internal market (European Parliament and Council of the EU)
- Directive on product liability (Council of the EU)

Austrian Parliament

- E-Commerce Act
- Austrian Road Traffic Code

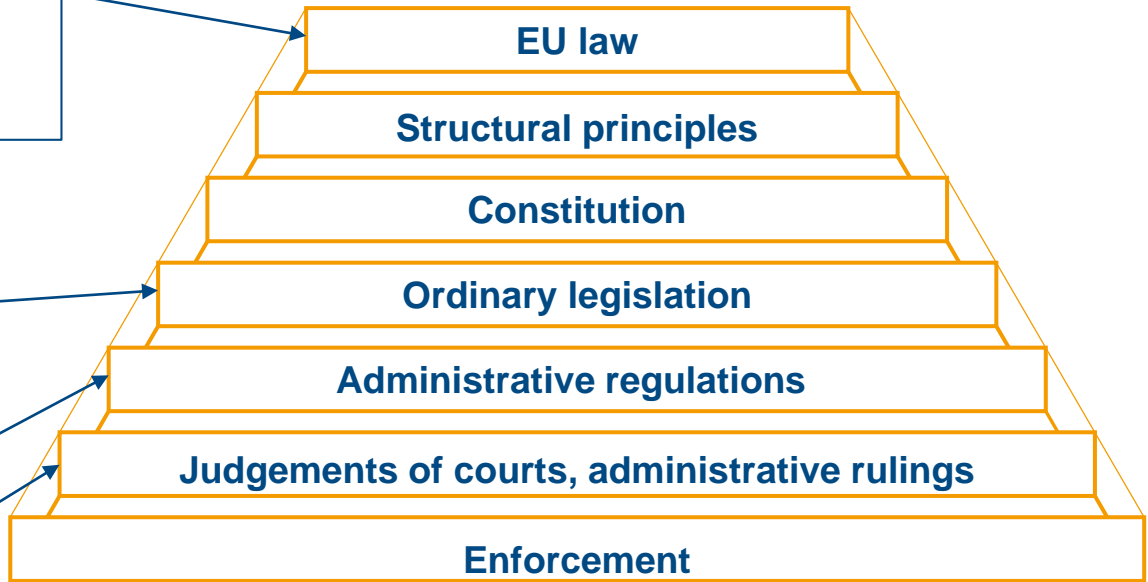
Regional Parliament

- Law on air pollution

Decree of the Governor of the Land
(*Landeshauptmann von Tirol*, regional executive power)

Court judgments

- Codes of conduct (soft law)
- Ethical Principles for Medical Research Involving Human Subjects (World Medical Association)
- General Terms and Conditions of Business (MCI)
- House rules (MCI)



Literature mentioned on slides



- Hinsch, W. (2013). Legitimacy: Where Justice Meets the Law. In S. Vöneky, B. Beylage-Haarmann, A. Höfelmeier, & A.-K. Hübler (Eds.), *Ethik und Recht - Ethics and Law: Die Ethisierung des Rechts - The Ethicalization of Law* (pp. 17–40). Springer.
- Montesquieu, Charles de Secondat, Baron de. (1927). *De L'esprit des Loix: Avec des notes de Voltaire, de Crevier, de Mably, de la Harpe, etc.* Nouvelle édition entièrement refondue. Tome premier. Librairie Garnier Frères.
- Wesel, U. (1997). *Geschichte des Rechts: Von den Frühformen bis zum Vertrag von Maastricht*. C.H. Beck.



❑ How to define law?

- ✓ Law is the binding order for a human community (e.g. population of a certain state or the EU), which can be enforced by force if necessary.

❑ Are there different forms of law?

- ✓ At EU or at national (federal or regional) level, written or unwritten (e.g. customary law), enacted by different branches of power, binding (hard law) or not (soft law).

❑ Who can enact law?

- ✓ Different branches of power, but mainly by the legislative branch of power (Parliament).



- What was the key idea of Montesquieu and how can it explain Brexit?
 - ✓ Separation of powers in order to avoid the abuse of power.
 - ✓ UK Supreme Court judgment of 24 January 2017, *R vs Secretary of State*: in the context of Brexit, government cannot decide without Parliament
 - ✓ UK Supreme Court judgment of 24 September 2019, *Miller*: suspension of Parliament was unlawful

- Are there certain categories of law that carry more ‘legal weight’?
 - ✓ Hierarchy of law (at EU and at national level, including supremacy of EU law)