3 LEGAL AND SOCIAL RELATIONSHIPS AND THE RECORDKEEPING NEXUS

In the previous chapter it was established that a culture of trust depends on a community's value system, which in turn is essential to how it regulates itself. Legal and social relationships are a particular way of exploring the recordkeeping-law-ethics nexus from concepts found in archival science, modern recordkeeping concepts, jurisprudence and ethics. The notion of social relationships as networks that form the basis of a juridical system, in which documents witness the relationships, is a central tenet of archival science. The initial reason for the preservation of documents has been to confer certainty on relationships between persons in a given society. This usually means that documents that preserve rights and power have been considered the most important.[1] Social relationships are also bound by ethical considerations sanctioned by their own 'communities of interest' within norms of a universally acceptable moral community. The legal and social relationship model can be applied to a record as 'a business transaction' that creates, alters and 'destroys' the relationship, that is equally relevant to electronic transactions. The model is also predicated on the need for an approach that cuts across a number of legal and normative systems and can have universal application, but particular legal systems will of necessity contextualise the concept.

[1] Paola Carucci, *Le Fonti Archivistiche: Ordinamento e Conservazione*, Carocci, Rome, 1998 (1983), p. 52.

3.1 Legal and social relationships: jurisprudential and ethical dimensions

3.1.1 A legal relationship as a jurisprudential concept

'The notion of a legal relationship is a shorthand way of saying two persons are related by some act, event or dealing'.[2] From a recordkeeping view the event, act or dealing automatically triggers a transaction or a series of transactions within a business process (see Fig. 1, A Simple 'Business' Transaction). As a result of the transaction, the persons participating are related to each other, legally and socially. Legal relations in the strict sense only apply to acts as facts, which have a legal consequence, recognised by the legal system.[3] Although Simon Fisher's definition above does not differentiate the event from the act, it is useful to distinguish between them, using the Kantian notion of an act which involves acting intentionally, and thus accepting responsibility for the act, from an event, which does not include a human element of choice.[4]

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[2] Simon Fisher, 'General Principles of Obligations', in *The Law of Commercial and Professional Relationships*, ed. Simon Fisher, F.T. Law & Tax, South Melbourne, 1996, p. 17.

[3] In jurisprudence the abstract definition of a legal relationship is referred to as a 'jural relation'. There is no systematic treatment of the term 'jural relation' in most Anglo-American legal writings. Although Roman law did not have a term for jural relations, a number of German writers in the 1860s included the concept in legal treatises. For Albert Kocourek the jural relationship is the rule of law applied to social events that have a legal consequence. Since the law does not govern every possible situation of fact it follows that a jural relation, likewise, does not attach to every situation of fact. He defines 'legal relations' as actual or assumed relationships, and 'jural relations' as the abstraction of the juristic elements of a legal relation. Albert Kocourek, *Jural Relations*, 2nd edn, The Bobbs-Merrill Company, Indianapolis, 1928, p. vi, p. 31 and pp. 75-76, footnote 3. An example in civil law systems of the term 'legal relationship' is in the Italian 'rapporto giuridico' defined as 'every interpersonal relationship regulated by law'. G. Leroy Certoma, *The Italian Legal System*, Butterworths, Sydney, 1985 pp. 19-20.

[4] See Chapter 4. Kant differentiates an act as a human ability from an event as a fact which an animal can trigger because there is no requirement for a motive or an intention. Events within the Kantian view are relevant to the movements of animals only. Processes in computers may be seen as events or acts, the former raising the question of accountability for the outcomes of the processes. For a discussion on outcomes of automated machines as agents, see Chris Reed, *Internet Law: Text and Materials*, Butterworths, London, 2000, p. 181, footnote 8.

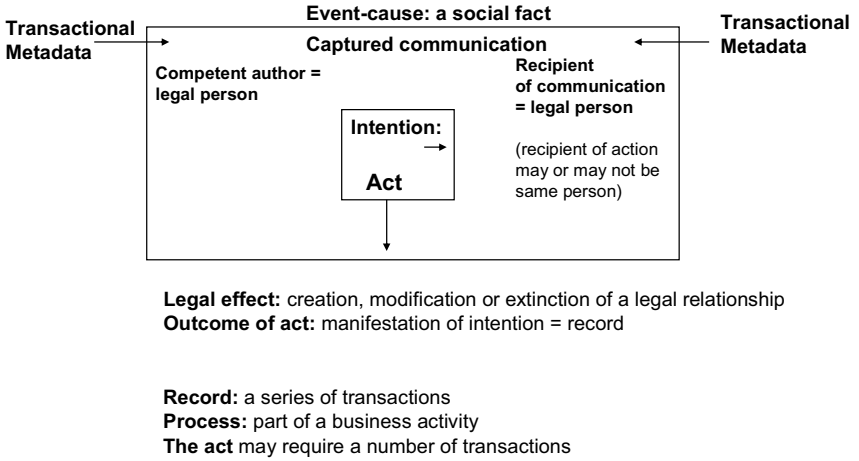

Fig. 1 A Simple 'Business' Transaction

3.1.2 An ethical dimension of a legal relationship

A number of ethical principles, including Kantian duties, 'virtues' in virtue ethics, the notion of trust in the 'ethical demand', and rights-based ethical theories, are relevant to the nature of legal and social relationships. Rights and duties are prevalent in the deontological tradition, and for this reason this form of ethics lends itself to the notion of reciprocal rights and duties, which is also the basis of legal relations. It is therefore appropriate to view legal and ethical elements as a composite part of social relationships, even if in practice the legal aspects are sanctioned under different rule-systems.

If legal relations in the strict sense only apply to acts as facts which have a legal consequence recognised by the legal system, facts which create rights and obligations of no direct legal consequence, are simply social relationships. If we take the view of law as classified by judicial remedies rather than rights and obligations, only litigation or the threat of litigation can clarify the legal rights of parties to the action.[5] An ethical dimension

[5] Jane Stapleton, 'A New "Seascape" for Obligations: Reclassification on the Basis of Measure of Damages,' in *Classification of Obligations*, ed. Peter Birks, Clarendon Press, Oxford, 1997, pp. 193-231.

has no place in judicial remedies unless it is built into the kind of remedies available, for example damages in unintentional torts.

Do all social relationships involve an ethical dimension? If we subscribe to the interpretation of virtue ethics which only allows one to have moral relationships with those with whom one holds the same moral views, then the answer is 'no'.[6] Social relationships within this context are possible only within a community of shared moral views, and are very limited outside of the moral norms of one's community. If we consider the 'ethical demand' view, a social relationship would arise with anyone or everyone. And if we applied the Kantian universality of the 'categorical imperative', it would apply in all relationships. Relations between strangers are founded on the respect for the dignity of persons in Kant's equal value for each person. This is a principle that is found in most of the 'caring professions'. It is both a negative norm in that it limits the way we act against persons, but it is also positive, 'treat himself and all others, never as a means, but in every case at the same time as an end in himself'.[7] The core element of the Kantian rational position is the universality requirement: the necessity to move from seeing the world and the interests of others purely from one's own point of view to seeing both one's own and others' interests from a position of impartiality between them.[8]

Is ethics a normative system that uses different sanctions from the law? In Chapters 1 and 2 on the nature of communities and how they are regulated, it was clear that social norms are enforceable outside of legal rules. 'Extra-legal' norms also affect how legal relationships are created and performed. This is evident in areas of law which try to regulate behaviour, like anti-discrimination legislation.[9]

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[6] According to virtue ethicists who ascribe to the social practice school, there is no shared set of moral concepts in society. This means that each of us has to choose both with whom we wish to be morally bound and by what ends, rules, and virtues we wish to be guided. These two choices are linked. In choosing certain ends or virtues over others certain moral relationships are possible and others impossible. Alasdair MacIntyre, *A Short History of Ethics: A History of Moral Philosophy from the Homeric Age to the Twentieth Century*, 2nd edn, University of Notre Dame Press, Notre Dame, Indiana, 1998, p. 268.

[7] Roger J. Sullivan, *An Introduction to Kant's Ethics*, Cambridge University Press, New York, 1994, Chapter 4, and p. 67.

[8] John Charvet, *The Idea of an Ethical Community*, Cornell University Press, Ithaca New York and London, 1995, p. 122.

[9] Simon Fisher, 'Introduction', in *The Law of Commercial and Professional Relationships*, ed. Simon Fisher, F.T. Law & Tax, South Melbourne, 1996, p. 8.

3.1.3 Trust and social relationships

Trust is a social concept essential to social relationships.[10] The notion of trust as an ethical demand in human relationships is the central tenet of Knud Ejler Logstrup. The ethical demand of Logstrup presupposes that all interaction between human beings involves a basic trust. Logstrup places the emphasis on person-to-person relationships, placing ethical relationships into a specific time and space. The demand does not change, while law and social norms are forever changing. For Logstrup trust relationships do not depend on law. One takes care of the life which trust has placed in our hands to serve their interest, so exploiting a person with whom we have a relationship would be unethical. This responsibility is not limited in the way in which the responsibilities assigned to the holder of a particular position or office are limited in archival science. It is not possible to know ahead all the responsibilities. It is not derivable from or founded upon any universal rule or set of rights.[11] It is a one-sided demand, so that we can never be in a position to demand something in return for what we do. In this sense it is not a reciprocal relationship as in the legal and social relationship model, but an alternative view.[12]

In a recordkeeping context the one-sided demand would mean assessing the ethical action for each event and divorcing it from legal requirements. It is difficult to apply to organisations because the ethical demand theory is concerned with individual action only. However the notion of trust is also essential to the reciprocal view of legal and social relationships.

3.2 Legal relationships and the law of obligations

The 'law of obligations' provides an area of common concern to two major legal system types, that is, the common law and the civil law legal systems. This makes it an ideal tool for the online environment which must search for legal and recordkeeping principles that are not tied to a specific legal system. There are however differences in the way that the two legal system

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[10] Trust is considered a 'natural' motive by David Hume, and it is not found in Aristotelian virtues. Roger Crisp and Michael Slote, 'Introduction', in *Virtue Ethics*, eds, Roger Crisp and Michael Slote, Oxford University Press, 1997, p. 24.

[11] Hans Fink and Alasdair MacIntyre, 'Introduction', in Knud Ejler Logstrup, *The Ethical Demand*, University of Notre Dame Press, Notre Dame and London, 1997, p. xxxiv.

[12] Logstrup, *The Ethical Demand*, p. 123.

types have developed an approach to the law of obligations, which significantly affect convergence.

Although the common law recognises a number of commercial and professional relationships, the nature of which determine the rights and obligations of the parties concerned, Simon Fisher argues that it does not provide a systematic treatment of the 'law of obligations', as found in civil law systems.[13] The range of remedial actions in common law has not been reduced to a rational system of legally-regulated relationships.[14] This difference also accounts for a less integrated theory of law with record-keeping theory in common law countries than that found in civil law countries, in particular Italy, where records have been defined in relation to legal acts.

3.2.1 Roman law origin of the law of obligations

Simon Fisher finds the roots of the law of obligations in Roman law.

> One of the central elements of the Roman legal system was its highly systematic and structured approach to private law. As part of this highly systematised approach, Roman private law was divided into a trichotomy of *persons*, *things* and *actions*. In turn, the law of 'things' subdivided further into the law of *property* and the law of *obligations*. So the inspiration for the recognition of 'obligations' as a discrete or stand-alone legal category is the ordering and systemisation which Roman law imprinted on the very concept.[15]

Persons, things (property and obligations) and actions are all elements of legal relationships and components of record creation as defined in diplomatics, as well as entities used in conceptual recordkeeping models (see 3.3.3 below, 'Recordkeeping and the jurisprudential concept of a legal relationship').

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[13] Fisher, 'General Principles of Obligations', p. 17. Fisher's book provides a systematic treatment of commercial and professional relationships by focusing on the law of obligations.

[14] Joshua Getzler, 'Patterns of Fusion', in *Classification of Obligations*, ed. Peter Birks, Clarendon Press, Oxford, 1997, p. 168.

[15] Simon Fisher, 'The Archival Enterprise, Public Archival Institutions and the Impact of Private Law', *Archives and Manuscripts*, vol. 26, no. 2, Nov. 1998, p. 335.

A legal relationship is in fact an obligation.[16] The obligation could be perceived from one side as a right of the 'obligor', and from the other, as a duty of the 'obligee'. Fisher quotes Zimmerman's definition, 'a two-ended relationship which appears from the one end as a personal right to claim and from the other as a duty to render performance.'[17] Legally it is devoid if one person entitled to demand performance from another cannot enforce the claim or gain compensation from its failure. Thus a legal obligation includes a legally recognised right of one person to the performance of a duty by another person, which the law will have a remedy for if a breach of the duty occurs.[18] As correlatives, the right and the duty constitute a legal bond. Morally, an obligation is only enforceable if the community that approves or disapproves the action has a system for its recognition and enforcement.

3.2.2 Origin of the law of obligations in common law

Given the status in common law legal systems of the individual in society, within groups, in the family or in corporations, law and custom derive obligations for the individual, *which are autonomous of his will*, while civil law legal systems attributes the fountain of obligations to contract and to *the will of the individual***.** These differences affect property concepts, agency, and negligence.[19] The restriction in the Italian law of legal

[16] Simon Fisher, 'Preface', in *The Law of Commercial and Professional Relationships*, p. vii. In Roman law the obligation was a relationship between persons, a personal tie, the 'obligatio est iuris vinculum'. Puntschart, a nineteenth century German jurist, draws his ideas from Roman law in which legal norms relate to persons, things, the relations of persons to things and to persons. Persons are tied to persons, and persons to things which create legal bonds. This is the jural bond, 'juris nexus' and the 'juris vinculum' which runs throughout the whole system of Roman law. Kocourek, *Jural Relations*, p. 403. However, according to Simon Fisher the notion of obligations binding persons is also found in common law judicial references. See Fisher, 'The Archival Enterprise', p. 330, footnote 7; 'In Brett v Barr Smith (1919) 26 CLR 87 at 97, Higgins J said "obligation" involves binding'.

[17] Fisher, 'Introduction', *The Law of Commercial and Professional Relationships*, p. 7.

[18] Fisher, 'General Principles of Obligations', p. 15.

[19] Francesco de Franchis (ed), *Law Dictionary, English-Italian*, vol. 1, Giuffre, Milan, 1984, pp. 65-66. Common law systems did not develop a general theory of obligations. Rather it is a composite of the law of contract and the law of torts. But a peculiar characteristic of the common law arising from its feudal

relations to voluntary actions of the subject is relevant to the notion of the will of the individual as an essential element of the 'legal act' in the diplomatics analysis of what constitutes an archival document (see further discussion below, 3.3 'Recordkeeping theory and legal relationships').

In the common law system the master-servant relationship is the earliest formulation of a legal relationship.[20] The law of torts in the common law system is particularly concerned with legal relations, the law of obligations and consequently with acts, facts and events. In the Anglo-American tradition rights are part of what the relationship is about, the correlatives of rights and duties.[21] An alternative view of the law of obligations in common law is to focus on remedial action or damages rather than the claimant's rights or position centred on the level of judicial intervention that is justified to ensure both parties are protected. Thus the courts consider the remedies first and then conclude the rights of the plaintiff.[22] In diplomatics the nature of the juridical act and its legal effects, the notion of the will to create a record, lead to obligations and/or rights, in which the document stands as testimony of those rights and obligations.

3.2.3 Civil law obligations and its common law counterpart

Fisher has synthesised the Roman law understanding of obligations into the common law recognition of legal relationships. The law of obligations in the civil and the common law system finds its genesis within private law. The civilian notion of obligation unifies bodies of law which the common law has kept distinct despite occasional judicial references to the

origin is the concept of relation, not as a result of the voluntary autonomy of the subject but arising from a legal regime of obligations.

[20] Danuta Mendelson, *Torts*, 3rd edn, Butterworths Casebook Companions, Butterworths, Sydney, 2002, pp. 143-146. The master's legal responsibilities, as head of the household, for his servants' and children's actions provide the origin of the employer's vicarious liability for employees' actions during the course of employment.

[21] Kocourek, *Jural Relations*, p. 41.

[22] Getzler, 'Patterns of Fusion', p. 168. 'To tie' in the Roman law of obligations is 'ligare'. By contrast to Fisher, Getzler argues that in English law to have an obligation can only mean to owe a duty to another. The classification of law by remedies is espoused by Stapleton, 'A New "Seascape" for Obligations', pp. 193-231. She recommends that every type of obligation should have one type of remedy.

notion of obligation.[23] Roman law makes property an obligation, and an obligation is a composite 'right-and-duty thing'.[24] Property in common law refers to a 'thing in action' or a 'chose in action' as an assignable right that is intangible.[25] Thus ownership is an intangible thing which arises from the relationship between two persons, a concept that has applicability to ownership of records, not as objects but as right-duty things (see Fig. 2, Law of Obligations: Comparison of Roman and Common Law). The jural bond is central to the Roman legal method, to Fisher's legal model and to archival science as formulated from diplomatics. The jural act ties the parties in the action. The right of ownership is 'the sum of legal powers which spring from the ownership bond to use a thing for all the purposes of the person which can availably be realized'.[26] Rather than the view of ownership as a right or a bundle of rights, it is a legal bond between a person and a thing as relationship. Rights are derivative from this bond.

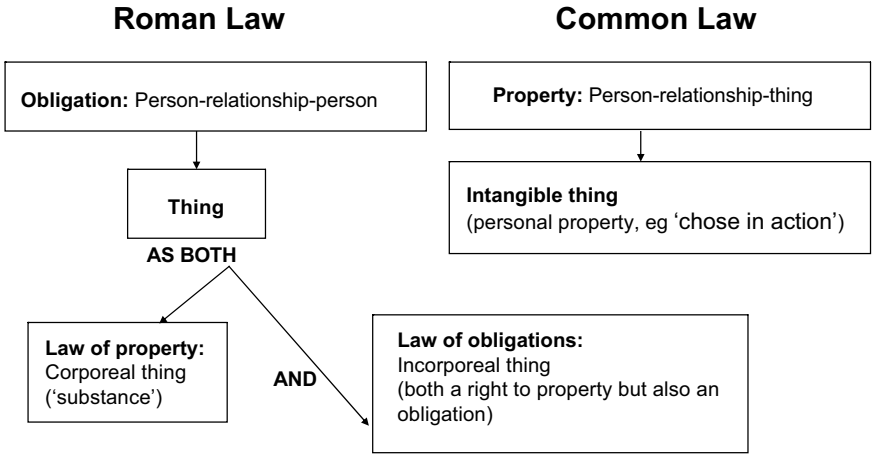

Fig. 2 Property Law and the Law of Obligations: Comparison of Roman and Common Law

[23] Fisher, 'General Principles of Obligations', pp. 16-18. Roman law divided obligations into four subsets; contract, quasi-contract, delict and quasi-delict. In modern civil codes there are conceptual linkages to the Roman law divisions.
[24] Fisher, 'The Archival Enterprise', p. 336.
[25] See 'chose in action' in Chapter 5.
[26] Puntschart's analysis as interpreted by Kocourek, *Jural Relations*, p. 43.

Property is not the only source of obligations. In the Roman taxonomy, contract and tort are also sources of obligations as is the distinction between voluntary and involuntary obligations. The effects of obligations in Fisher's analysis of common law can be divided into primary consequences, which place the obligee under a duty to perform or discharge an obligation, that is the substantive obligation, and the secondary consequences which arise when the obligation is not performed. This is the remedial obligation. For example, if a contract is not discharged, the substantive obligation may lead to civil action for damages as a remedial action. A tort obligation may involve a duty of care and a remedial action may include damages awarded for negligent behaviour.[27] Sanctions apply to legal relations based on legal rules.[28]

Fisher demonstrates how the law of obligations can also transcend the private-public law divide. Although essentially grounded in private law because of its origin in the Roman law of obligations, Fisher believes it applies equally to public law.[29] Given that social activity is now largely regulated outside of government, a legal model that does not depend on the private-public dichotomy also recognises a fundamental change to many political and legal systems that are market-driven. Another major advantage to the law of obligations is that it cuts across the subject classification of the common law, which has obscured the interrelationship of legal categories and limited the ability to identify a variety of remedies.[30] Of particular significance is its importance to online transactions where the legal notions of property as obligation can replace the notion of property as a tangible physical object. (This is further developed in Chapter 7.)

Conceptually the theory of legal relations has the important function of liberating the juridical law from the restrictions of territorial theories. For example, the fact that no state other than the one in which an offence was committed recognises it, does not affect the existence of the legal relation.

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[27] The extent to which common law lawyers agree on the nature and origin of contract and tort has been much debated, see Fisher, 'General Principles of Obligations', pp. 19-21.

[28] A sanction has been defined as 'inflicting a specific evil upon a specific person in consequence of a specific act or omission.' Kocourek, *Jural Relations*, quoting Terry, p. 343.

[29] Fisher, 'General Principles of Obligations', p. 16.

[30] Peter Birks, 'Editor's Preface', in *The Classification of Obligations*, argues the need to constantly revise the taxonomy of law. See also Ernest J. Weinrib, 'The Juridical Classification of Obligations', in *The Classification of Obligations*, pp. 37-55.

Similar sanctionable legal relations will exist in other jurisdictions; only the remedies may differ.[31]

3.2.4 Characteristics of a legal relationship

If an event or act that triggers a transaction or a series of transactions gives rise to a legal relationship in which the transacting parties have rights and obligations, it is important to recognise the elements of the relationship.

For both Kocourek and Fisher the characteristics of a legal relationship are:

- two legal persons, and
- an act or event (that is facts), and
- a definite legal effect following the act.

For example, a visit to the doctor is an event in which two legal persons, the patient and the doctor, are legally bound by the occurrence. The act requires a 'meeting of minds', and an intentional decision to have the event occur.

Definitions of acts, facts, persons and things

The capability to claim an act from another is called a 'right' (in the strict sense). The capability to act against another is called a 'power'. In Kocourek's model a claim is the preferred term for a right; a capability to claim acts from others or the power to act against others requires *persons* and *acts* (see Fig. 3, Kocourek's Model of Jural Relations).[32]

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[31] Kocourek, *Jural Relations*, pp. 234-237.

[32] Terms used in Figure 3 include: *nexal line*: one way only in a legal relationship; *acts*: legal result of the relationship; *claim*: a legal capability to require a positive or negative act of another person; *immunity*: a legal capability (that is, a legal advantage) to prevent a positive act or negative act of another, for example immunity from arrest is a claim not to be arrested; *privilege*: legal capability to decline an act toward another; *power*: a capability to act with legal effect toward another; *right* is often used for a privilege as the term for the side with the legal advantage in all types of jural relations and *ligation* or tie is the servient side of the relationship. A *duty* as a claim corresponds to a right. There can be no right without a duty, but there can be a duty without a right.

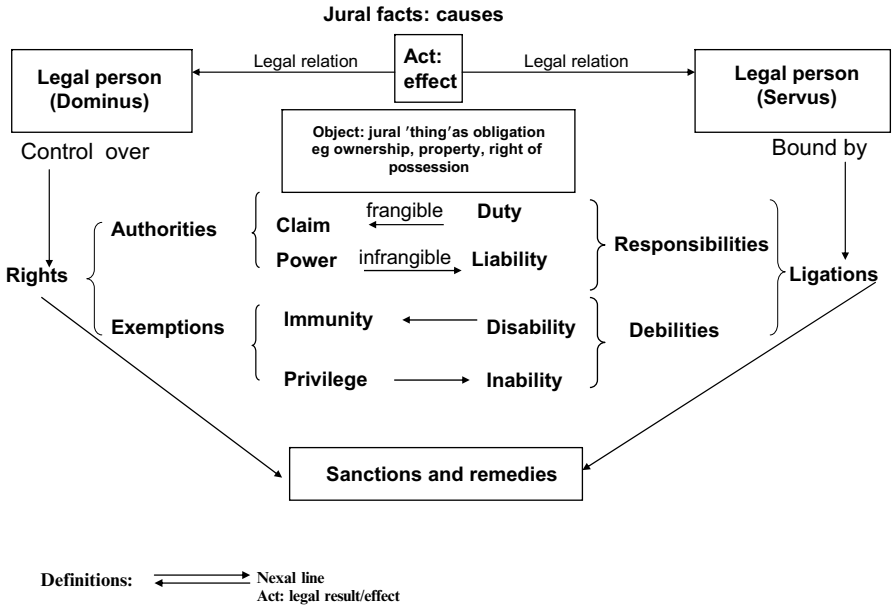

Fig. 3 Kocourek's Model of Jural Relations

Based on Albert Kocourek, *Jural Relations,* 2nd edn, The Bobbs-Merrill Company, Indianapolis, 1928, p. 21, Table 1.

Figure 3 represents Kocourek's model of a legal relationship which divides rights and ligations into specific sub-types. The model consists of a *dominus* (holder of the relation), who has the active right, and a *servus* (bearer) of the relation, who has a passive claim. Complex jural relationships, for example one debtor with two creditors, result in two relationships.

For Fisher, the two persons or parties are referred to as the obligor and the obligee. He defines an obligation as both a right and a duty which creates a legal bond, that is the legally recognised right of one person and the duty to be performed by another (Fig. 4, Fisher's Model of a Legal Relationship). For example, a doctor has a duty to provide a medical service to the best of his/her ability; the patient has a right to the service remaining confidential. *Acts*, together with *events*, bring jural relations into existence, modify or extinguish them.

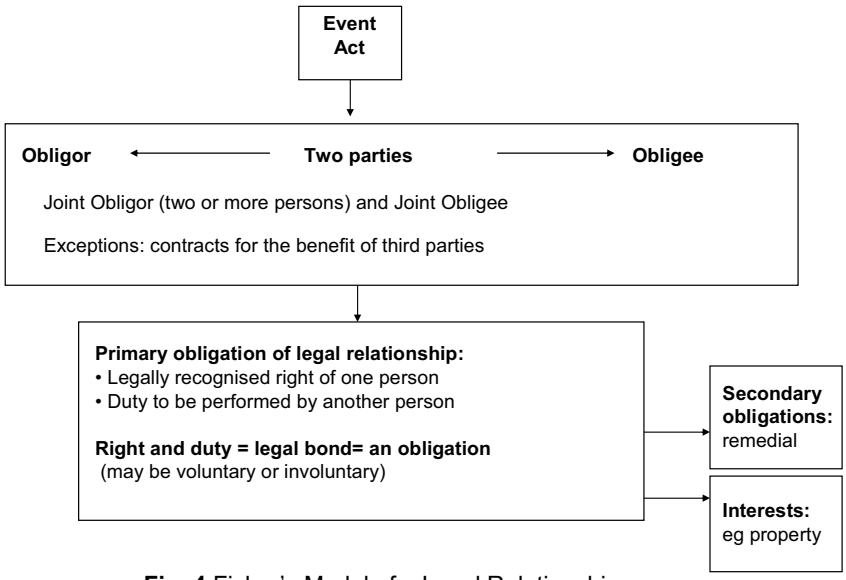

Fig. 4 Fisher's Model of a Legal Relationship

According to Fisher 'a legal person is "an entity on which a legal system confers rights and imposes duties". That is, this definition of "legal person" positively connects the idea of legal personality to whether or not the supposed legal person is capable of assuming obligations (that is, a composite right-and-duty thing)'.[33] 'Legal personality' is the sum total of the legal relations of a person, which includes the sum total of the legal rights (claims and powers) and ligations (duties and liabilities). Human beings and legal persons (personae) can be separate entities. Legal persons may antedate and post-date the life of human beings.[34] Examples of a legal

[33] Fisher, 'The Archival Enterprise', p. 330, quoting from *Butterworths Concise Australian Legal Dictionary*, Butterworths, Sydney, 1997, 'legal person'.

[34] Kocourek, *Jural Relations*, p, 227, footnote 1. There is an issue as to whether jurists consider a human being as representing a legal person. In European codes a human being is a legal person. In Anglo-American law legal persons can antedate and post-date legal relations. Generally in Anglo-American law legal personateness requires a human being, a group, a succession of human beings or an anticipated or retrospective human being. A corporation for example can be immortal. In Roman law, complexes of objects and legal relations can be legally personified. In common law some material things are personified. Kocourek defines physical personateness as a social fact, while legal personateness is a legal fact.

person include a human being (living, dead, or unborn), corporation, and an agency. Basically different kinds of legal persons have different capacities for legal relationships. A legal person (persona) is any entity to which the law attributes a capacity for legal relations. It is these different capacities and roles that link the legal concept of a legal person to the recordkeeping concept of the 'author' in archival science and the 'juridical person' in diplomatics, and the 'actor', 'organisational units', 'organisation' and 'institution' in the records continuum model. The notion of different roles, professional, personal and corporate, have also been drawn from virtue ethics, and support the need for specific legal and human person identification metadata (and other identity metadata on time and place) for individual transactions in order to attribute responsibility for an action.[35]

'Thing' is the object over which one person exercises a right and to which another person lies under a duty.[36] The object is not the same as the interest, the legal recognition for which jural relations are created. For the purpose of law 'interests' are extra-jural. One's interest may be more extensive than the legal recognition of it. The object (thing) itself is a kind of legal relation.

The act is the dynamic element of the legal relationship which is also necessary for record creation. There are various analyses of the nature of an act which are central to attributing responsibility for the act. The physical act alone requires an exertion of the will, for example attending a clinic in order to be examined. In Kant, the will and the action are one, that is, if one wills an action one finds the means to carry it out. In addition, an accompanying state of consciousness that one is carrying out an act is needed. In relation to categories of liability, even particular kinds of consciousness are categorised as intentional and unintentional acts. Intentional acts can be malicious or intentional without malice. Non-intentional acts also have categories. Criminal law also attempts to classify states of mind. A doctor unintentionally omits particular procedures which harm the patient; evidence of the unintentional action may be relevant to a liability claim.

The consequences that follow an act also work as motives or drivers for further acts. Kocourek does not believe that attempting to define intention

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[35] See Chapter 4 and the analysis of the Monash Recordkeeping Metadata Schema, which introduces the term 'agent' to encompass the four terms of Upwards records continuum model, that is, person/actor, organisational unit/workgroup, organisation/corporate body, and social institution.

[36] Kocourek, *Jural Relations*, quoting Holland, p. 305. Things are further explored in Chapter 5.

is useful and instead concentrates on outcomes. This contrasts with Kant and the virtue ethicists, for whom motive rather than outcome is central to action. Intention and motive are important to ethical and legal responsibility, and to whether parties intended to create a record.[37] The notion of will is also found in diplomatics. Recordkeeping metadata which identifies the legal author who has permission from the socio-legal system to create the record is also likely to be a more reliable one. For example, the doctor's professional qualifications and standing will affect both the intention and motives of his acts; acts (as events which are willed) are necessary for record creation.

The manifestation of the will is through some outward expression of the act, which in most cases has been the record. Accountability is provided by the evidence of the relationship of the actor to the event, and the application of a standard to measure this objective relation. The primary issue for courts is what is done and the secondary issue is the cause.[38] Business transactions as the outcome of events triggered by actions of consenting persons are therefore relevant to providing evidence of both primary and secondary aspects of legal liability. For example, the doctor's act may have resulted in the patient being harmed, even if unintended; the motive may have been to help the patient, and the cause of the harm may have been due to an untried medical procedure.

The qualities of legal relations are relevant to bringing many kinds of records into existence. A fact triggers an event which involves initially at least two parties. The record has no continuing legal significance if the legal persons cease to exist. Conceptually the qualities of a legal relation are not tied to a specific legal system. Records as 'things' create, modify or destroy rights and obligations of parties in transactions.

The act and liability

Legal consequences of legal relations are evidenced in business transactions. The act, for purposes of liability, is the legal concept of a result. There are two kinds of liability: the occurrence of an objective harm or no harm, for example a breach of a contract is actionable without proof of a harm. Acts may be positive or negative: acts of commission and acts

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[37] Intention and motive in record creation are further developed in Chapter 4.

[38] Kocourek, *Jural Relations*, p. 266. There are three types of theory on the nature of an act. The act as a muscular contraction (or a series of such contractions); the act as consisting of muscular contractions, surrounding circumstances, and the consequences; and the act as a legal concept the result of either a bodily movement or attributable to its absence (the latter is Kocourek's view).

of omission, for example not warning of a danger is an act of omission common in medical negligence. The act as liability has application to all jural consequences that are attributable to legal persons through the activities of human beings.[39] The record will provide circumstantial evidence of the consequences of action.

It has always been difficult to base any sort of responsibility on a particular state of mind. In the area of strict liability for an act, the irrelevance of motive is apparent and it is one of the most notable differences from the ethical point of view of responsibility, in particular the Kantian view of motive and act. Rights, powers, claims and duties are used as a means of ascertaining legal liabilities, and are also put forward in ethical systems. Ethical duties may be self-imposed or imposed by others, and ethical rights can be defined by referring to the duties that moral agents do and do not have towards themselves and others. The 'other-regarding' duties underlie both negative and positive rights, which can be owed either by particular individuals or groups (*in personam* rights) or by moral agents in general (*in rem* rights). In legal contexts the *in personam* rights are positive (the positive action of someone to repay a debt), and the *in rem* rights are negative (general duty not to steal). Generally legal rights that are linked to duties of positive assistance are restricted to particular individuals.[40]

The system of rights and duties which a legal and/or ethical system has adopted is relevant to identifying rights and obligations of recordkeeping participants in relation to specific legal relationships.[41] In addition, legal relations deal with things as rights, so although property is an object, it is equally a legal relationship. This supports the view that records are right-duty things that create, modify or destroy the rights and obligations of parties in transactions.

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[39] Ibid., pp. 268-269; p. 276.

[40] Matti Häyry, *Liberal Utilitarianism and Applied Ethics*, Routledge, London, New York, 1994, pp. 135-145. Moral rights include a licence or permission to choose a course of action only if there is a negative duty not to choose. The absence of duty to refrain from courses of action is also called a privilege or liberty in philosophic-legal literature, but a licence applies to anyone. Häyry defines 'claim rights' as negative and positive claim rights.

[41] See Chapter 6.

3.3 Recordkeeping theory and legal relationships

3.3.1 Diplomatics and archival science: the document as witness to social relationships

The Roman law concept of legal relationships is central to diplomatics. Diplomatics has been defined by Pratesi in terms of a science that has as its objective the critical study of the document.[42] It is the study of single documents, mainly their formal aspects, to understand their juridical significance, both in relation to their creation and their legal effects.[43] Legal relations are concerned with the creation of legal obligations and their effects. Archival science includes the wider study of the institutional context of documents because there is often deviation between the law and its practice, that is, the legal apparatus and society.[44] Diplomatics, even more than archival science, explicitly includes the identification of the juridical person involved in the creation of the record, notions of volition in recordmaking, acts, and facts.

In diplomatics, social relationships which are witnessed by the document are provided with legal certainty because they are recorded in a particular form that is recognisable to all the participants in the social system in which they live.[45] The record participates in the legal relationship between persons, facts and effects, as grounded in the jurisprudential discourse of the law of obligations.

'The document is defined as "evidence"' because the document is retrospectively analysed as a source for proving facts'.[46] The subtle shift from evidence to testimony in the nineteenth century occurred when diplomatics began to be considered an auxiliary science of history, and archival science widened the role of records to include their social function.[47] It illuminates Paola Carucci's definition of a document as testimony and witness of events, which unlike evidence of a legal fact, is

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[42] 'La scienza che ha per oggetto lo studio critico del documento'. A. Pratesi as quoted in Maria Guercio, *Archivistica Informatica: I Documenti in Ambiente Digitale*, Carocci, Rome, 2002, p. 19.

[43] Paola Carucci, *Il Documento Contemporaneo, Diplomatica e Criteri di Edizione*, Carocci, Rome 1998 (1987), p. 28.

[44] Ibid., p. 31.

[45] See Chapter 2 on documentary form.

[46] Luciana Duranti, 'Introduction', in *Diplomatics: New Uses for an Old Science*, The Society of American Archivists and Association of Canadian Archivists in association with The Scarecrow Press, Maryland and London, 1998, pp. 5-6.

[47] Luciana Duranti, 'The Archival Bond', *Archives and Museum Informatics*, vol. 11, 1997, p. 214, footnote 15.

inclusive of memory of social events that can serve a number of purposes.[48] Carucci emphasises that even when the juridical effects have gone, records are important for historical research, as well as having continuing probative value. Thus Italian archival science is concerned as much with the social dimension of records as their legal context.[49]

3.3.2 The juridical act as a legal relationship in diplomatics

A juridical system in Italian diplomatics only attaches juridical significance to the acts and facts that have a legal consequence. This accords with the legal theory on legal relations as expounded by Kocourek. The legal status of acts and facts can vary over time and space, or within a legal system, or in different legal systems. Carucci speaks of a plurality of legal rules historically determined.[50]

Both Carucci and Duranti support the institutional conception of law, in that the legal phenomenon does not consist of just rules of conduct, but is embedded in an institution, that is a social body set up around communal needs, and with power to achieve these needs. These rules give certainty to legal relations but they operate in a social context which recognises those rules and which at the same time has an organisational principle from which the norms derive, that is the capacity to confer 'juridicalness' to the rules. The juridical act ('l'atto giuridico') is an act of the will directed to produce a specific juridical effect.[51] To have legal effect the will of a legal

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[48] Paola Carucci, *Le Fonti Archivistiche: Ordinamento e Conservazione*, Carocci, Rome, 1998 (1983), p. 25.

[49] Carucci, *Il Documento Contemporaneo*, p. 66.

[50] Ibid., p. 38.

[51] Ibid., p. 40. In a legal definition in Francesco de Franchis (ed), *Law Dictionary, English-Italian*, Giuffre, Milan, 1984, vol. 2, p. 410, 'atto/i', the act or action and the document are synonymous, which does not accord with Carucci's differentiation between the act and the document. 'Atto' is translated as 'act', 'action', 'remedy', 'measure', and also as the document itself, instrument, deed, paper, proceedings, record or certificate. Reference is made to different kinds of acts including administrative acts for which there is no direct equivalent in the common law, except for 'judicial review of administrative action'. A public act in Italian law is also the document. The closest common law equivalent to an act is the instrument which is a formal document of any kind, such as an agreement, deed, charter, or record, that is drawn up and executed in technical form (see *Azevedo v Secretary, Department of Primary Industries and Energy* (1992) 35 FCR 284 at 299-300). See also various Australian state Instruments Acts. The function of a record or a document, in common law legal discourse, has meant primarily the instrument as a record of a legally significant or legally

person has to be communicated to the recipient(s) of the act. Thus there is an immediate legal relationship between two persons. The procedures required to give legal effect to the act depend on the type of act (or acts) and dictate the content and form of the documents.

The juridical act is a concept found in Italian private law. When a public act is involved it may fall under public or private law. What distinguishes the juridical act from the fact is the human element, which is in line with the Kantian notion of human will. Italian jurists have classified legal acts in a number of ways. Of particular relevance is the classification by relationships, which include relationships between states, between states and public entities, and between states and private entities, which can be extended to the legal rights and responsibilities of recordkeeping participants.[52]

The elements required for the act to have legal effect are the will, the content, and the purpose that have to be intentional, as distinct from the motives of the parties. Unlike common law systems, the Italian law of legal relations is restricted to the voluntary actions of the subject.[53] Communication or declaration to the person who is the recipient of the action and the publication to the general public, for example in an official gazette, makes it efficacious in front of third parties.[54] This is an example of the legal relationship of the ordinary citizen with the government or state, which is captured by the record.

In Italian legal language the word 'act' indicates both the behaviour of the legal persons, that is the manifestation of the will that produces the legal effects, and the document, which is the written testimony in which the will takes form and is manifested externally.[55] Each act has to be externalised, that is, perceptible to the subjects to whom it is directed. The law will often stipulate how this should be done, for example it must be in

recognised transaction, for example a will or a contract. Thus it has been less pervasive than in the civil law system. It has not had the transformation to other legally significant documents as in diplomatics; see the categories of dispositive and probative records as outlined in this chapter.

[52] Carucci, *Il Documento Contemporaneo*, p. 43.

[53] *Law Dictionary, English-Italian*, vol. 1, 1984, pp. 65-66.

[54] In discretional acts the motive which determined the will of the party to act must appear on the document or be referenced by other acts. Carucci, *Il Documento Contemporaneo*, pp. 40-41.

[55] Ibid., p. 65. Although the act ('atto') is the documentation of the act ('documentazione del fatto'), Carucci distinguishes the juridical act ('atto giurdico') that creates, modifies or extinguishes juridical situations from the document that transmits the memory of the act and its juridical effects.

written form.[56] The document and the act do not have to coincide. This is due to the fact that not all juridical acts require a written form to be effective.[57] When the act requires a written form to put the act into effect, it is said to be *ad substantiam,* or dispositive, for example a contract, and the document coincides with the act. As in evidence law, its proximity to the act increases its probative value. If the act precedes its documentation and requires a written form as proof that the act took place, it is *ad probationem* (probative, for example a death certificate).[58]

Dispositive and probative records are therefore required by the juridical system, that is, they relate to an act that is lawful in that system, which is a juridical act. Duranti classifies other types of records as those that support a potential legal fact but are not required by the juridical system, and may be used in litigation, that is, narrative (may only relate to informal workings) and supporting records (exist as records only in relation to a business activity). Some facts are considered juridically relevant, others are juridically irrelevant, that is, they are recognised as either binding or not binding within a given legal system.[59] In diplomatics, as in law, the only socially relevant acts are juridical ones.

Despite the Italian legal context, it is possible to extract some general recordkeeping principles from types of juridical acts, if they are analysed in terms of their function. For example the 'administrative act' is similar to an administrative activity that any entity, public or private, must undertake to achieve its goals.[60]

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[56] Carucci, *Le Fonti Archivistiche*, p. 19 and p. 26; Carucci, *Il Documento Contemporaneo*, Chapters 2 and 5. In Italian law and diplomatics the technical definition of what constitutes a document includes a 'written form'. In common law in Australia there are similar legal requirements for legal processes that must be 'in writing' to meet probative tests in evidence and procedural law. In Australian law written form has been caught up with the document as paper. The shift to 'any record of information' to ensure that any carrier or medium is a document is found in the *Evidence Act* 1995 (Cth), s 3, Dictionary, Clause 8, Part 2.

[57] Carucci, *Il Documento Contemporaneo*, p. 42.

[58] Ibid., p. 28. Duranti uses the terms 'dispositive' and 'probative' respectively in her translation of *ad substantiam* and *ad probationem*.

[59] Duranti, 'The Archival Bond', p. 214, footnote 15.

[60] 'Administrative acts' are classified by procedure. The cessation of an act is distinguished from the cessation of its legal effects. Some effects of the act may continue much longer and its probative value may arise unrelated to the original aim of the act. In civil law systems the public entity is superior to the private one. Carucci, *Il Documento Contemporaneo*, p. 46; pp. 53-58.

3.3.3 Recordkeeping and the jurisprudential concept of a legal relationship

From the above analysis it can be seen that Italian diplomatics and archival science are imbedded in the civil law system.[61] However, it appears from the view of legal theorists such as Fisher that the generality of concepts as adopted in the civil law system are not in conflict with the common law, which has underlying principles and concepts founded in Roman law, a sub-stratum of the civil law system.[62] In fact, according to Fisher, the law of obligations is 'enjoying a modern renaissance, including within the common law legal system and its proponents are going back to its Roman legal roots for inspiration and exegesis of the taxonomy of the law of obligations even in common law legal systems'.[63] The law of obligations has its basis in private law, as does the legal act as manifested in the document in diplomatics.

In the common law system, apart from the narrow definition of an act as a legal instrument, the 'act', as in the civil law system, is an element of a legal relationship (contractual, professional, fiduciary) which legally binds persons as result of the act, and has a definite legal effect, that is, an act is a relationship between persons.[64] The record can be conceived as an outcome of a process arising from the legal relationship, and consists of an interrelationship of the act, the persons, and the legal and social effects. The act in diplomatics is always part of a procedure. It may be easier to focus on the procedure, which involves a series of activities or processes to achieve an end, such as the provision of a social service (which is the act). If an act is understood as the trigger to a procedure, which is built on legal and business requirements that creates a relationship between persons, and thus reciprocal rights and duties, it is applicable to recordkeeping in any legal system.

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[61] Other civil law jurisdictions have not been analysed in this chapter, in particular the Dutch and German legal systems that have been pivotal to archival theory.

[62] Some substantive rules, and more importantly concepts and ways of reasoning, developed by continental legal scientists, based on the Roman legal tradition, influenced the English legal system. Saarland University, Institute of Law and Informatics, *The Roman Law Branch of the Law-related Internet Project,* 2005.

[63] Fisher, 'The Archival Enterprise', p. 335. The law of obligations facilitates the cross-border flow of legal information and concepts as lawyers strive to speak a common lexicon or at least draw upon terms familiar to readers in foreign legal systems.

[64] See also footnote 51 in this chapter on an act as a legal instrument in common law. Not many common law lawyers adopt legal relationships as a taxonomy of law. Two proponents are Albert Kocourek and Simon Fisher.

Archival science as developed in the European romance countries incorporated diplomatics. However, definitions in diplomatics of 'juridical persons', 'fact', 'act', 'will' and 'effects' within a juridical system, are concepts found in ethics and the jurisprudential discourse of both the common and civil law system, and in particular in the notion of a legal relationship, which is manifested in the juridical document.

The diplomatics terms of particular relevance to legal and social relationships are:

- *Juridical person* is the author of the action.
- *Legal facts* (natural or social facts) are facts or events of life which give rise to legal consequences in human and corporate relationships, for example a birth (natural fact), or an agreement for sale (social fact). For example, the death of a person leads to property inheritance.
- Legal facts or events, in which human activity or the *will* is relevant, are both *human acts* and *legal acts*.[65] *An act is a fact* originated by a will to produce the effect or desired consequence; that is the act is a type of fact. For example, I want to arrive early to my destination (the will) and I drive into another car and the car is damaged (fact). The legal effect/consequence is that I am sued (action is speeding/reckless driving).
- A *legal transaction* is a specific type of act, that is, it is directed to a defined effect, for example the execution of a will.

The distinction between voluntary and involuntary obligations, the latter being duties imposed by law whether one intended a particular outcome or not, found in the common law notion of obligation, provides for a more expansive interpretation of legal relations as obligations, and consequently its application to a greater range of relationships and recordkeeping contexts.[66] So rather than diplomatics being irrelevant to the common law or other legal systems, it needs to be adapted to each legal system.

The 'legal bond', another characteristic of a legal relationship, is transposed in archival science to the 'archival bond', the documentation of

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[65] In diplomatics and in Italian civil law, human acts are distinguished from natural facts. In juridical acts, the human act is distinguished from a fact, because there is an intention that legal consequences take place. Carucci, *Il Documento Contemporaneo*, pp. 37-38 elaborates on facts ('fatti') and juridical acts ('atti giuridici').

[66] 'Will' theory and voluntary and involuntary obligations are further explored in Chapters 4 and 6.

an entity made manifest in classification and registration codes.[67] The 'archival bond' is the logical connection between documents arising from the same activity. Maria Guercio has described the purpose of the 'archival bond' in terms of the document that has meaning only in relationship with other previous or subsequent documents that take part in a business process.[68] It is through the archival bond that the 'recordness' of the document emerges. Archival science, unlike legal systems and diplomatics, moves away from individual documents to linking documents on the same matter or activity. It takes 'records' and assesses their functions in terms of their relationships.[69] Thus in archival science the representation of legal relationships moves beyond those recorded in the individual document, to aggregations of related documents.

3.3.4 'Business' transaction as a legal relationship

There are a number of definitions of transaction in archival science and recordkeeping theory. Luciana Duranti defines a transaction from the diplomatics point of view in the following way:

> According to diplomatics, a transaction is a special type of act (i.e., an exercise of the will aiming to create, change, maintain, or extinguish a situation) that aims to change the relationships between two or more parties. Diplomatically, transactions are embodied in dispositive records (whose written form is required ad substantiam) and attested to in probative records (whose written form is required ad probationem), but they may only incidentally relate to supporting and narrative records.[70]

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[67] Carucci, *Le Fonti Archivistiche*, p. 19. The 'archival bond' ('vincolo archivistico'), is also defined in the glossary of *Le Fonti Archivistiche*, p. 230 and in, Paola Carucci and Marina Messina, *Manuale di Archivistica per L'impresa*, Carocci, Rome, 1998, pp. 45-46.

[68] Maria Guercio, 'Definitions of Electronic Records, the European Perspective', *Archives and Museums Informatics*, vol. 11, 1997, p. 222; *Archivistica Informatica*, pp. 37-45; Duranti, 'The Archival Bond', p. 217. Duranti describes the archival bond as 'the expression of the development of the activity in which the document participates'.

[69] 'Archival science examines records as aggregations, rather than as individual entities, and studies them in terms of their documentary and functional relationships and the ways in which they are controlled and communicated'. Duranti, 'The Archival Bond', p. 213, footnote 3.

[70] Ibid., p. 216, footnote 9.

Thus, in diplomatics, a transaction is 'an act capable of changing the relationships between two or more persons',[71] essentially the legal definition of a legal relationship, expressed in Anglo-American terms as 'an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered'[72] while the Australian legal definition focuses on a commercial view as: 'carrying out negotiations, dealings or affairs usually in the context of business'.[73] Thus according to most legal (and diplomatics) definitions, a transaction changes the legal relationship of the parties concerned. This supports the need to capture the transactions that document the changed state of the parties to an action.

In 1990 in defining an electronic record for ease of comprehension and control, David Bearman suggested that transaction should be synonymous with record. A record-transaction is 'information, communicated to other people in the course of business, via a store of information available to them'.[74] Unlike diplomatics and law it does not include the notion of a change in the relationship of persons involved in the transaction.

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[71] University of British Columbia, School of Library, Archival and Information Studies, 'The Preservation of the Integrity of Electronic Records', 1994-1997, Template 1. See also Certoma, *The Italian Legal System*, p. 31.

[72] Henry Campbell Black, contributing authors, Joseph R. Nolan and M.J. Connolly, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 5th edn, West Pub. Co., St. Paul, 1979, 'transaction'.

[73] *Butterworths Business and Law Dictionary*, Butterworths, Sydney, 1997, p. 446.

[74] 'Glossary', in *Management of Electronic Records: Issues and Guidelines*, United Nations ACCIS, New York, 1990, p. 185. See also Chapter 2, 'Electronic Records Management Guidelines: A Manual for Policy Development and Implementation', in United Nations Advisory Committee for Coordination of Information Systems, *Management of Electronic Records: Issues and Guidelines*, United Nations ACCIS, New York, 1990, pp. 17-70, in particular 'record-transaction' defined on p. 35. Sections A, B, and C of Chapter 2, pp. 17-34 are reprinted in a shortened form as David Bearman, 'Electronic Records Guidelines: A Manual for Development and Implementation', in *Electronic Evidence: Strategies for Managing Records in Contemporary Organizations*, Archives and Museum Informatics, Pittsburgh, 1994, pp. 72-116. In this article Bearman restates his definition of a record-transaction: 'Records are recorded transactions. Recorded transactions are information communicated to other people in the course of business via a store of information available to them. While this definition is more explicit than the one archivists have traditionally used with paper records, it is consistent with the concept that a record is created by an official action of receiving or sending

The 'atomic' nature of transactions in diplomatics fits within the definition of jural relations outlined in Kocourek's legal model, which is much narrower than Fisher's application. It excludes other social, political, economic and organisational contexts in which a record operates. In archival science 'context shifts the analysis away from the record itself to the broader structural, procedural, and documentary framework in which the record is created and managed'.[75]

Transactionality as adopted in the record continuum model is defined in terms of the many types of social interaction from individual communications to corporate transactions, to social and business activities and relationships that are documented in records at all levels of aggregation. Thus the strictly 'legal' transaction is only one kind of transaction. The ethical dimension of social relationships which are inclusive of legal relationships, and the communities of common interest that operate across society, provide for a broader reading of the record, in tandem with the transactional one.

Clearly, then, 'business' transactions that form the basis of a dynamic relationship between the parties involved in a business or social activity are essential to the *creatibility,* the facts that bring legal relations into existence; the *alterability,* the changes to a claim or to an enforceable right; and the *destructibility,* the cessation of legal persons destroys legal relations.

It is the act as a relationship between persons that is at the heart of the relevance of the application of legal relationships to recordkeeping processes. Legal and recordkeeping concerns coalesce in identifying the legal person responsible for the act, the intention of the participants, the event, and its consequences.

3.3.5 The records continuum and the jurisprudential concept of a legal relationship

The emphasis in diplomatics on the formal elements of the document has obscured the dynamic nature of the legal relationship represented in the juridical act. Within the records continuum model legal relationships exist as the initial transactions of actors and acts. The transaction is not the same

information', p. 94. For a discussion of the evolution of Bearman's view of records as communicated transactions see, Sue McKemmish, 'Constantly Evolving, Ever Mutating': An Australian Contribution to the Archival Metatext, PhD Thesis, Monash University, 2001, Chapter 1.

[75] InterPARES 1 Project, Authenticity Task Force, *Final Report*, 28 October 2001, University of British Columbia, Vancouver, 2001, p. 8.

as a legal transaction used in diplomatics and law, but is defined to encompass social and organisational activity. However, Frank Upward's model broadens the business transaction from its legal context in which it is created and captured (the first dimension), its characteristics (second dimension), to specific legal requirements which may be satisfied by recordkeeping system functionality or other approaches (third dimension). These link to who can control, own, and regulate recordkeeping and how records are pluralised via legal and social mandates (fourth dimension).[76] It provides a rich context to the initial transaction, that protects rights and obligations of business participants by ensuring that systems and organisations retain sufficient evidence of the event.

Peter Scott's notion of relationships amongst records and between records, and their contexts of creation and use, has been articulated by Sue McKemmish within the Australian records continuum thinking.

> The object of Scott's own quest was a system that could reconstruct recordkeeping systems in their legal, functional and organisational contexts at any given point in time, a system that was capable of generating for users multiple views 'on paper' or 'on the screen' of a complex reality that has always been conceptual rather than physical.[77]

It must be remembered, however, that recognisable form has provided legal certainty, which the electronic world is searching for. The juridical act, inextricably linked with procedure, and the document as its representation, could translate into current computer object-oriented technology, in which a record as a digital object encapsulates related procedures and workflow. The process of arriving at a contract, for example, as well as the contract itself, can be captured as record.

Both Italian archival science and the records continuum model go beyond the legal notion of a legal relationship, to embrace social relationships, and their contexts of creation. However, the focus on the transaction which requires authentic representation of dynamic relationships, supports recordkeeping developments in which records need to have layers of metadata to indicate what the record represents and how it is to be re-represented.

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[76] See Livia Iacovino, 'Recordkeeping and Juridical Governance', in *Archives: Recordkeeping in Society*, eds Sue McKemmish et al., Centre for Information Studies, Charles Sturt University, Wagga Wagga, NSW, 2005, pp. 262-266.

[77] Sue McKemmish, 'Are Records Ever Actual?', in *The Records Continuum: Ian Maclean and Australian Archives First Fifty Years*, eds Sue McKemmish and Michael Piggott, Ancora Press in association with Australian Archives, Clayton, 1994, p. 187.

Records and their metadata capture both business and recordkeeping processes.[78] The business process can be derived from implicit metadata in the records, that is, the implementation of rules, responsibilities, and the workflow in a business procedure. Is this different from the procedure captured in a document's structure in the paper world? In diplomatics the document participates in an action, which forms part of a procedure. In electronic systems individual documents often lack a link to their procedural context. Carucci argues that documentary and administrative procedures or workflow must be captured by electronic systems.[79] The relevance of procedural context provides an important bridge between diplomatics-archival science and the records continuum approach to metadata and record context.

The records continuum model, and the research projects which adopt its framework, include high-level societal contexts, as well as group identity, in which individual rights and obligations, compete with the 'public interest', a theme taken up in the following chapters.

3.4 Legal and social relationships and current recordkeeping concepts

Legal and social relationships are dynamic processes in which records actively participate as evidence of the relationships. Entities and documenting relationships provide the core of the records continuum approach to documenting recordkeeping, as 'complex relationships

[78] 'Metadata, which can be generically defined as "structured data about data", is simply a new term for the type of information that has existed in records and archives systems throughout time - indeed records managers and archivists have always been metadata experts. Traditional archival finding aids, index cards, file covers, file registers, the headers and footers on paper documents, and all of their computerised counterparts are rich in metadata that helps recordkeepers to identify, describe, authenticate, manage and provide access to records. More recently, specific sets of records and archives metadata have been standardised, such as the records management metadata specified in the US Department of Defense Design Criteria Standard for Electronic Records Management Software Applications'. Sue McKemmish, Glenda Acland, Nigel Ward and Barbara Reed, 'Describing Records in Context in the Continuum: the Australian Recordkeeping Metadata Schema', *Archivaria*, vol. 48, Fall 1999, p. 4.

[79] Carucci and Messina, *Manuale di Archivistica per L'impresa*, pp. 43-44 and p. 80.

between records and context'.[80] However, a record does not have to be conceived as an entity with attributes and relationships. It may in fact be a set of relationships. These relationships not only evidence one set of legal rights and obligations but in fact evidence the ever-changing legal relation between the parties involved.

3.4.1 Record as object, process and as a right-duty 'thing' relationship

Recordkeeping is concerned with the routines and processes involved in keeping records. The records are the outcomes of the recordkeeping and the business processes. They can be conceived as objects or things that represent actions and transactions. Recordkeeping is itself the 'business of recordkeeping': what to create, capture and keep and not to keep.

The word 'object' has been defined in archival science, ethics, law, recordkeeping, information management, and computer science. In archival science a document is 'any material object held in an archive'.[81] The subject includes the creator of the object, which is the record. In ethics, the relationship of subject (the moral agent) and object (external world) are also central to many ethical viewpoints. However, postmodernist readings see the record as the subject and mover of the action, rather than a passive object to be managed.[82]

The common law legal system, like the civil law, has been concerned with documents at a 'micro' level.[83] As a legal 'object' documents have a capacity to evidence transactions, to be 'probative', that is to have the capacity to prove or disprove the existence of a transaction or event. The 'probative value' of evidence means the extent to which the evidence could rationally affect the assessment of the probability for the existence of a fact in issue. The legal system provides the rules of recognition to enable transactions to take place. However, the definition of probative in diplomatics is tied to requirements of form and proximity to action.

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[80] Chris Hurley, 'The Making and Keeping of Records: (1) What Are Finding Aids For?', *Archives and Manuscripts*, vol. 26, no. 1, May 1998, p. 74.

[81] Carucci, *Le Fonti Archivistiche*, p. 25.

[82] In Frank Upward's reading of the records continuum model, the record is not an object but a subject or participant in society. In some ethical theories the subject is a physical person who relates with an external world of objects (known as Cartesian duality). For ethicists like Logstrup the subject as a person does not stand outside the external world.

[83] See Guercio, *Archivistica Informatica*, p. 19.

In law, documents and records have been defined as legal objects or things, and this has made the translation of the function of the record in law to an electronic environment all the more difficult. However, the importance of systems and controls over record processes in the laws of evidence of a number of countries, have to some extent moved away from the document as a material object.

In computer science, 'object' is a key concept in object-oriented technology, in which it is a set of software bundles of data and related methods. The record, using object-oriented programming, has been defined as an encapsulated object, or 'digital object,' which carries with it its entire recordkeeping context.[84] At the same time, it is the product of process. Thus it can be conceived as object and as process. Within records continuum thinking, records as described by Barbara Reed, are both 'agents of action in business processes', as well as 'contextualised data' and 'objects'.[85]

The technology definition of object captures the essence of a record as an object that encapsulates its processes, and gives a renewed meaning to the record as object. Jeff Rothenberg calls it a 'digital informational entity', which he describes as a single composite bitstream that includes the core content of the entity, including all structural information required to constitute the entity from its components, its contextual information that is meaningful, and a perpetually executable interpreter that renders the core content of the entity from its bitstream in the manner intended.[86] However if a record is a set of relationships, it is the relationships that have to be preserved, unless the record entity captures the outcome of a

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[84] Victorian Electronic Records Strategy, *Final Report*, Public Record Office Victoria, 1998.

[85] Barbara Reed, 'Metadata: Core Record or Core Business?', *Archives and Manuscripts*, vol. 25, no. 2, Nov. 1997, pp. 221-222. The Monash Recordkeeping Metadata Schema defines a record object as the smallest unit of recorded information controlled by a records system. A record object may be a whole record or a component of a record. McKemmish, Acland, Ward and Reed, 'Describing Records in Context in the Continuum', pp. 14-15.

[86] In actual practice there are no effective mechanisms for preserving digital entities. 'There is as yet no viable long-term strategy to ensure that digital information will be readable in the future. Digital documents are vulnerable to loss via the decay and obsolescence of the media on which they are stored, and they become inaccessible and unreadable when the software needed to interpret them, or the hardware on which that software runs, becomes obsolete and is lost'. Jeff Rothenberg, 'Preserving Authentic Digital Information', in *Authenticity in a Digital Environment*, Council on Library and Information Resources, Washington D.C., 2000, p. 54.

relationship (like a document in diplomatics that documented an entire action, its procedure and its participants). There are a number of conceptual approaches as to how a record is represented that significantly affect how computer systems preserve an authentic record. There is as yet no viable long-term strategy to ensure that digital information will be readable in the future.[87]

If an obligation can be defined as incorporeal, and fundamentally a legal and social relationship between two persons, that is as a composite right-duty, then the record, as an outcome of a process of interaction between legal persons, is a 'thing as a relationship', as well as encapsulating the process. A contract is a good example. It is not the 'contract' alone that evidences its validity or the rights and duties of the contracting parties. It is the process of arriving at an agreement, when it was made, and under what conditions. The record is evidence of the ever-changing legal relation between the recordkeeping participants.

In this chapter the record is conceived as an outcome of a process arising from a legal relationship, which also has an ethical dimension, and consists of an interrelationship of the act, the persons, their intentions, and the legal and social effects of the act. This view is supported by the analysis from jurisprudence, ethics and diplomatics, in which the act is always a relationship between persons that changes their relationship. In diplomatics the document takes part in a procedure as successive phases of an action. Procedure is a series of acts that fulfils a final action or goal of the organisation. The procedure affects the content and form of the record,

[87] Persistent object preservation which involves preserving digital objects outside of their software environment by encapsulating the document and metadata into a form that can be viewed indefinitely, is technically feasible and has been recommended in some recordkeeping research projects on the long term preservation of electronic records but has not been extensively tested, and is a highly complex area of computer science. For example University of Pittsburgh, *Reference Model for Business Acceptable Communications* (BAC Model), 1996, defined records as dynamic, self-managing metadata encapsulated objects. Monash University, School of Information Management Systems, *Recordkeeping Metadata Standards for Managing and Accessing Information Resources in Networked Environments Over Time for Government, Social and Cultural Purposes* has been informed by Pittsburgh and other recordkeeping projects in which metadata elements are embedded in, and encapsulated or persistently linked to, information objects so that records function as evidence of action. The Victorian Electronic Records Strategy (VERS) is a scaled down version of Pittsburgh's BAC model. The VERS prototype is an XML document type; all components of the record are encapsulated in one object and are software independent.

and procedural controls contribute to the reliability of the record. The act, as the trigger to a procedure, built on legal and business requirements that create a relationship between persons, including reciprocal rights and duties, is applicable to recordkeeping in any legal system. In the records continuum model, the act, the persons and the effects gain layers of context which convert a document into a record. Essentially legal and social relationships are conceptual tools for analysing legal and ethical rights and obligations of recordkeeping participants, which as we will see in the following chapter may not necessarily be represented in formal metadata schema.