7 SOURCES OF LAW

The legal theory distinguishes between sources of law in two basic meanings:

1. sources of law in material sense – the so-called material sources of law,
2. sources of law in formal sense – the so-called formal sources of law.

Material sources of law are the sources of the content of law, sources affecting the content of legal standards. They include all social, political, economic, natural, technological, demographic, international politics related, moral and other conditions that are important with regard to social dynamics and create request to react by respective law-making bodies.

The term of sources of law is used more often in its formal sense, i.e. in the sense of **formal sources of law** or simply forms of law. The distinguishing criterion of individual sources in this case is, on the one hand, the ***method*** *how was the legal standard created* (which varies according to subject that created it) *and how was it communicated to its recipients* (in authoritative and binding form).

Traditionally, it is distinguished between four types of sources of law on the basis of the method of creation and the binding form in which they are expressed:

1. legal regulations,
2. legal precedents,
3. normative agreements,
4. legal customs.[94]

7.1 Legal Regulations

[94] The first to come with this classification was probably GRAY, J. Ch.: *The nature and sources of law.* New York : The Columbia University Press, 1909, p. 145 et seq.

2

Basic formal sources of all legal system in the (European) continental family of law are the legal regulations. **Legal regulation** can be defined in the most general way as a material holder of immaterial legal standard, i.e. as a material medium through which is the legal standard communicated to its recipients. That means that the legal regulation is an official and formal document, declaring (at least) one legal standard as generally binding rule of behaviour.[95]

The legal regulation is a **normative legal act** in its form, but that does not mean that both terms are interchangeable. The term normative legal act is broader than the term legal regulation; it describes all outcomes of law-making process, regardless of their content. Therefore, only such normative legal acts that contain legal standards are legal regulations. For example, any **statute** is a normative legal act. In case the statute contains legal standards (the absolute majority of law does) we can refer to it as a **legal regulation** and a source of law. However, if the statute contains only a *political proclamation* or *individual order*, it is not a case of legal regulation and it cannot be considered as a source of law.[96]

As a specific example for normative legal acts that **are not** legal regulations, the so-called "statutes on merits" can be stated.[97] None of them can be considered a legal regulation because they do not contain legal standards as generally binding rules of behaviour, breach of which is sanctioned by the state authority. Statutes on merits usually contain in the first part only a statement that certain historic figure has extraordinary merit (e.g. *"Alexander Dubček has earned extraordinary merit for democracy, freedom of the Slovak nation and for human rights."*). They are not written in a general way and lack sanction (e.g. they contain an individual order to establish a commemorative plaque and bust for a particular person, but should the obligation be not fulfilled, it would not lead to immediate legal consequences).[98]

Legal regulation is a general term, in individual states it then has specific form determined by the state, of:

- **constitution** *(Verfassung, constitution, constitución)*
- **statute** *(Gesetz, loi, ley)*,
- **delegated legislature** *(Verordnung, législative déléguée)*,
- **decree**, etc.

---

95 See KNAPP, V. a kol.: *Tvorba práva a její současné problémy.* Praha : Linde, 1998, pp. 20-21.

96 HARVÁNEK, J. a kol.: *Teorie práva.* Plzeň : Aleš Čeněk, 2008, p. 252.

97 In case of the Slovak Republic it concerns these statutes: Act No. 117/1990 Coll., on merits of M. R. Štefánik; Act No. 402/2000 Coll., on merits of Milan Rastislav Štefánik for the Slovak Republic; Act No. 531/2007 Coll., on merits of Andrej Hlinka for state-building Slovak nation and for the Slovak Republic; Act No. 432/2008 Coll., on merits of Alexander Dubček.

98 For details see ŠMIHULA, D.: České a slovenské „zákony o zásluhách" ako teoretickoprávny problém. In: Právny obzor, 2011, issue no. 3, pp. 290-304.

As an universal and generally binding legal regulation, it applies to indefinite number of subjects of the same kind (e.g. employees, soldiers, road users) and to indefinite number of situations of the same kind (although different case-by-case).

Legal regulations are classified according to the criterion of **legal force**, which stems from the hierarchic position and jurisdiction of authorities that issue them. The highest legal force and also the highest level of universality and general binding effect is possessed by legal regulations issued by the supreme public authority. In today's situations of separation of powers it means usually the parliament. With regard to that the parliament in democratic systems is constituted in elections and thus it derives its position (in terms of the sovereignty of the people principle) from the people as the source of power in the state, its law-making authority lies in issuing legal regulations with the highest legal force. Specifically, it issues the following original **(primary) legal regulations** (arranged according to the level of legal force): *the constitution and constitutional laws, organic laws* (e.g. in France), *laws.*

Constitution is a legal regulation of the supreme legal force, consists of systematically arranged set of legal norms with the predominant purpose to define the values of the state and the society and to regulate fundamental social relations, mainly the principles of relations between the state and individuals as well as relations towards other states and international community, and also the foundations of organization and operation of public authority, form and territorial division of the state (including relations between the state as a whole and its territorial parts). Constitution is the foundation of law of every modern state and enjoys particular legal protection.[99]

The most common form of primary regulation in the continental legal culture is a ***statute***.[100] The parliament can regulate any social relations through statutes that are expedient to be regulated by law.[101] But statutes must be (with regard to their legal force) in compliance with the constitution and constitutional laws, as well as with international treaties that have priority to laws in terms of national law.

Apart from the above forms, there are also **derived (secondary) legal regulations**. These usually contain more detail legal regulation of relations that are essentially regulated by original (primary) legal regulations, mainly statutes. Derived legal regulations shall not be inconsistent with primary legal regulations, they are issued to execute them, within the limits of express authorization contained in the primary regulation (*secundum et intra legem*).

Derived legal regulations of the Slovak Republic are issued mainly by these authorities:

- the Government of the Slovak Republic (***government orders***)
- ministries and other central public authorities (***decrees, ordinances and measures***).

4

7.2 Legal Precedents

Precedent is a legal rule or principle included in a court decision (court precedent, judicial act) that binds courts (of the same or lower level) in terms of arguments in taking future decisions.

Court precedents are considered an important group of sources of law (the so-called *judge-made law*), mainly in the Anglo-American legal culture. On the other hand, court precedents can be found also in the legal systems of the continental European states. Nevertheless, it is necessary to keep in mind that the Anglo-American precedent and the precedent in the European continent are different.[102]

Slovak courts use the so-called constant **judicature** in their decision making, consisting of selected and published court decisions. In practice it means that primarily the decisions of the Supreme Court of the Slovak Republic (which should consolidate the decision making of courts) serve as the source of (understanding of) the law, mainly for lower courts.[103]

According to J. Svák, the Slovak judicial system is based on the traditional civilian notion of the precedent that is derived from the position of the judge to the law. As a rule, the judge does not seek to resolve the case outside the legal rule and his primary task in creating the precedent is to construe ambiguous or incomplete provisions of the legal rule. In doing so, the judge has to tune in on the mentality of creation of the legal rule. This interesting fact has created the concept of the so-called **clauses of the decision** or **case law**.

These clauses or case law become precedents in Slovak conditions. Although they are based on a specific judgment, the very fact that the author (exceptionally also the publisher) has 1) singled out these clauses, 2) shaped them into a separate normative text and 3) formally separated from the reasoning (as a rule, before the actual judgment), means that the precedent, in the form of a clause or case law, becomes legal rule, similar to law. The judge, similarly to the legislator and following his example, tries to make general rules from the specific case, thus judicial precedent creation takes the form of a legislative process rather than administration of justice.

In administering justice, judges approach these clauses as legislative enactment, a general rule, which is separate from the original judgment and the specific facts of the case which enabled these clauses or case law to arise. These clauses or case law are applied as valid legal rules without allowing to exercise discretion in their application which, in fact, means that in the Slovak legal system (but also in the majority of countries of Continental Europe) judicial precedents have greater actual influence and importance than in the common law systems.[104]

For comparison, let's have a look now at the Anglo-American judicial system, in which the judicial decision making is based on **the obligation to adjudicated cases in compliance with previous precedent** (the so-called ***stare decisis*** principle). Specifically it means that the judge must be aware of precedents that are relevant for his case and take them into account when deciding a case.[105]

On the other hand, the court is not obliged to apply the precedents in all circumstances. The first fact that plays a role in this is the question of mutual relation between the given court and the court that issued certain precedent. In general, it can be said that **binding precedents** are created within one judicial system only by appellate courts. The court is, in principle, obliged to follow the precedents, if a binding precedent exists.

However, there are also **non-binding precedents** apart from binding precedents. They are mainly precedents that are not part of the same judicial system (e.g. case is tried by the court in Washington and one of the parties is referring to a Californian precedents) and therefore can only be effective by the force of their persuasiveness (*persuasive precedents*).

A complex question is, which part of the precedent should be considered binding. By far it is not true that each and every court's deliberation in its decision can serve as a binding rule for later cases. Strictly speaking, the binding part (called ***ratio decidendi***)

- must be a legal rule of certain level of universality,
- must be a rule that was decisive for the sentence of the decision and
- at the same time does not exceed the definition of merits of given case.

All other parts of the decision (called ***obiter dicta***) are not binding.[106]

The application of a precedent looks as follows: First, the judge must ascertain whether the merit circumstances in relevant aspects of the actual and the precedent case are similar in principle. In case he reached a conclusion within his discretionary powers that such similarity exists, he would apply a rule and issue a decision.

If the relevant facts of the precedent and actual cases are different, according to judicial discretions, he must state these differences in the decision (the so-called ***distinguishing***). In case of appellate proceeding, the appellate court will then examine the precedent and the actual case and if he admits there are such differences, he can create a new precedent by his decision (it is called overruling; judge of a lower court may not issue a decision that will be in contradiction with a binding precedent).

7.3 Normative Agreements

Normative agreements are similar to normative legal acts in their essence. They are **written**, **normative** and they **bindingly regulate** a whole group of relations of the same kind and indefinite amount. Unlike normative legal acts, they are not created by authoritative decision (i.e. unilaterally) but on the grounds of consensus of two or more parties (contracting parties).

Normative agreement is thus a mutually affirmative expression of the will of several subjects, which does not regulate specific rights and obligations of actual subjects but defines them in general for the whole group of cases of the same kind.[107] Expressed in negative, they are not relatively binding agreements of private-legal nature (e.g.

purchase contract, contract for work, etc.).

Normative agreements can be divided into two groups to agreements:

- international,
- national.

International agreements are concluded between subjects of international public law, i.e. mainly states and intergovernmental international organisations.[108] These can be regarded in terms of national or international law. In terms of national law, not every international agreement can be understood as a normative agreement. Such description is used only for those containing also generally binding legal regulations, besides relative obligations of parties. Other international agreements, i.e. those regulating only mutual obligations of parties are not considered normative agreements and therefore they are not sources of law in terms of national law.[109]

Normative provisions can be found also in agreements of pure **national** nature. This category contains provisions of so-called *collective agreements*, concluded between the representatives of employees and the employers; furthermore it can be the provisions of so-called *public-legal agreements*, i.e. agreements concluded between individual state bodies (or bodies of self-government).

7.4 Legal Customs

Legal customs are historically the oldest, original sources of law. They present a transition of sorts from original customs, from social self-regulation of the society to regulation by law.[110]

For a certain custom to be considered legally binding, it shall meet the following conditions:

---

[108] See JANKUV, J. – LANTAJOVÁ, D. a kol.: *Medzinárodné zmluvné právo a jeho interakcia s právnym poriadkom Slovenskej republiky.* Plzeň : Aleš Čeněk, 2011.

[109] HARVÁNEK, J. a kol.: *Teorie práva.* Plzeň : Aleš Čeněk, 2008, pp. 255-256.

[110] For details see BEDERMAN, D. J.: *Custom as a source of law.* Cambridge : Cambridge University Press, 2010; SHINER, R. A.: *Legal institutions and the sources of law.* Dordrecht : Springer, 2005, pp. 63-84.

- it shall be **repeatedly used in the long term** (*frequentia actum*);
- is shall be **generally recognized, actually observed** in given community/society/state (*opinio necessitatis*);
- their content shall be **certain and consistent** to indicate which rule of behaviour it establishes.

Legal custom can thus be defined as a rule of behaviour which became a part of awareness and behaviour of people due to long-term repeated use and is generally accepted and actually observed in given community, society or state.

The general conviction about the legal custom's binding force shows on one hand in the fact it is really observed by the members of given community/society/state and through being confirmed in the application activity of respective authorities and sanctioning its non-observance.

Legal customs were the basic source of law in our territory from the period of late Middle Ages until the first half of the 20th century.[111] The first work dedicated in our country to customary law and which is also its listing is the *Tripartitum* by lawyer Štefan Werböczy (its first issue published in 1517).[112]

Nowadays, in our country the customary law is used as source of law to minimum extent (however, more research must be done in this regard). This situation is similar also in other legal systems of the (European) continental family of law. Certain residues of customary law remain at present in Great Britain, in the form of constitutional customs (however, these are classified also as binding non-legal customs) and customs at local level.[113] Customs are sources of law in Islamic law[114] and in traditional legal systems of Asia and Africa.[115]