

Chapter 1. The Concept of Law and Legal Systems

1.1 What is law?

Law is a system of rules regulating the behaviour of the members of the society and the observance of which is enforced by the state. Law is basically all around us, every one of us deals with law on daily basis – if you go to the shop, to the canteen for a lunch, borrow books in the library, use public transport, follow the road traffic rules when driving, etc.

The characteristics of any legal rule are that these are (i) foreseen by law, i.e. a rule relates to social relationships which are regulated by law (not all social relationships are dealt with by law such as how to raise a child, how to spend one's salary, how to celebrate Christmas, how to dress to the theater etc.), and (ii) enforceable by the means foreseen by law (typically before the competent court and a subsequent execution). Rules which lack the above characteristics are not legal rules. Those are, for example traditions, moral rules, ordinary customs, rules of sport, rules of the game, religious rules or non-legal agreements between friends and family (invitation for a cup of coffee). These rules are neither foreseen by law, nor are they enforceable. You cannot successfully sue somebody who cheated while playing cards or somebody who does not follow Christian traditions during Christmas etc. On the contrary, you can successfully sue somebody who borrowed money from you and is overdue since loan agreement is regulated by law and is enforceable by means foreseen by law.

1.2 Functions of law

The main function of law is to set and maintain order in society and achieve justice. Imagine, how the world would look like without any legal rules. Nobody would be really keen to enter into contracts without being sure that there is an independent court protecting his/her rights in case of a dispute, there would be a chaos on the roads without any traffic rules, etc. The function of law is also to define the limits of acceptable behaviour (the constitutional principle of what is not prohibited, is permitted) as well as defining the consequences of certain behaviour (sanctions for breaching legal rules). Law also prescribes procedures for the use of law and its enforcement (for details see the chapter Litigation). Another function of law is to give authority to agents of the state to take actions against citizens – for example police has a legal right to use force against citizens breaching law or the executors have a right to enter the property of the debtors.

1.3 The concept of law

In order for the rules to be qualified as legal, they must satisfy three criteria:

- a) a general application to society;
- b) developed by a legitimate authority of the society;
- c) accompanied with sanctions supporting their implementation and enforcement.

A general application to society means that legal rules relate to all who satisfy criteria set by the hypothesis (legal rules of purchase contract relate to everybody entering into purchase contracts, employment law relates to all employers and employees etc.) rather than to only some specific groups (e.g. an internal rule in a firm prescribing dress code relates only to the

employee of such firm not to all employees and thus it does not satisfy the criteria of general application).

Also, a legal rule must be developed by a legitimate authority of the society which is in the Czech Republic a parliament (as opposed to e.g. non-legal internal rules set by a firm prescribing a dress code).

And third, the legal rules are accompanied with sanctions for their breach. Only the threat of sanctions which may be enforced, supports the adherence of legal rules by society.

1.4 Law and legal systems

Law is implemented through legal systems. There are five basic legal systems used around the world. Which legal system is used in each country depends on the tradition, history and inclination to specific legal culture. The five legal systems are the civil law systems, common law systems, customary law systems, religious legal systems and the mixed legal systems. On the map of the world below you can see which part of the world uses which legal system.



Legal systems in the world¹

Civil law systems are used in all Europe except for the UK which is based on common law tradition, South America and vast majority of Asian countries. Civil law systems follow the Roman Law tradition developed in the Roman empire. Of course, national legal orders of civil legal systems differ widely from one another, they, however, have some common characteristics which differentiate them from the other legal systems. Firstly, nations of civil law traditions are based on codified statutes which are the dominant source of law (Civil Code, Commercial Code, Criminal Code etc.). Usually, these nations also have a written constitution which is the highest legal norm of a state. Since the legal statutes have to be passed by bodies

¹ Picture taken over from the web page Guide to International and Foreign Law Research, available online: <https://guides.law.sc.edu/c.php?g=315476&p=2108388>; last accessed on 5 February 2018.

of parliament, the civil law systems is more rigid (compared to common law tradition) but also more stable because it is not that easy to change them (there must be enough social and political support for such change). Courts, on the other hand, are the bodies which only interpret and apply rather than create law. Case law is thus not the official source of law, however, case law of the higher courts has a strong persuasive power.

Common law systems are used in the UK, North America and Australia. The dominant source of law are precedents (judge-made law) with the principle of *stare decisis* (principle of following the rules established by previous judicial decision if the facts of the case are comparable). Precedents allow for flexibility because case law can be easily changed without a need to look for wider political support. Common Law countries of course have also written statutes but they are not a dominant source of law. These countries can but do not have to have a written constitution (the UK does not have a written constitution whilst the USA do).

Customary law systems are built on customs accepted and maintained by the whole society. Such rules are handed down from generation to generation and are usually unwritten. These legal systems do not exist in their clear form anymore but rather they can be found as a mixture of civil or common law with these customs.

Religious legal systems are based on religious tradition. A typical example is Islamic law which is based on Quran.

Mixed legal systems combine two or more legal system stated above.

Apart from the above national legal systems, there is also the **international legal system** with the international law regulating relations between states or international organizations (UN, NATO etc.) and the **supranational legal systems** such as EU law which is superior to national laws of the member states.

To demonstrate how the legal system looks like, the picture below shows the Czech Legal System which belongs to the civil law traditions (national law is based on codified statutes and written constitution), the Czech Republic is a member of the EU and thus EU law is binding for us (with superiority over the national law) and also Czech Republic is a signatory to many international treaties.

1.5 The Czech Legal System



1.6 Sources of law

Formal and material sources of law

Formal sources of law are the outer forms of legal norms (legal norms are included in statutes, international treaties, case-law, normative agreements etc. which are the formal sources of law). These forms give the norms their legal force and validity (we know that there is a speed limit in the towns of 50 km per hour (legal norm) and it is binding because it is written in the law no. 361/2000 Coll., on road traffic, as amended (formal source of law). In order to find out the legal norms from their formal sources, interpretation of such sources is needed. Formal sources are either written (statutes approved by the Parliament, administrative rules, executive orders, normative agreements, case-law) or unwritten (oral or implied such as recognized principles, accepted customs).

Material sources of law are the source of substance for law – the state of society, technological development, economic and cultural level, traditions. It is an answer to the question, why do we need a specific legal regulation? E.g. the speed limit in the towns and villages was introduced because it is dangerous to drive fast in places with high occurrence of people; the technical level of the society is now so developed that the new law establishing the possibility to vote in elections electronically is considered, etc.

Sources of law within the Continental tradition v. the Common law tradition

Continental tradition has as its dominant source of law legislative texts (written Constitution, codes, statutes) which are passed by a formal procedure in the Parliament and thus there must always be political will to pass such law. The main branches of law are moreover embodied in the written codes (Civil Code includes codification of all civil law, Criminal Code a codification of criminal law, Business Corporations Act a codification of business corporations, Labor Code a codification of labor law etc.). In the civil law systems, case-law is, on the other hand, only the complementary source of law which has rather interpretative function.

Common law tradition is based on plurality of sources with the precedents dominating over statutes (in the UK this has partly changed with their membership in the EU since EU law (directives) needs implementation into the national law through the statutes). Common law countries also may but often do not have a written constitution while civil law countries are typical for their written constitution. The role of the courts is dominant because they create law (instead of the mere interpretation as in the civil law systems).

Formal sources of Czech law

As was stated above, the Czech law belongs to the civil law tradition with its characteristics. The Czech Constitution and the Bill of the fundamental rights and freedoms (both written) are on the top of the hierarchy of the sources of law which means that all other legal acts must be in compliance with them and the Constitution and Bill of rights are always superior. The other source of law are the international treaties which also have superiority over the statutes (not over the Constitution or Bill of rights) in case such international treaties are directly applicable. Next in the hierarchy are statutes passed by the Czech Parliament and the lowest in the hierarchy of the sources of law is a so called derived legislation (regulations and decrees adopted by the government, ministries and other authorities of state administration, and legislative acts of territorial self-governing units) which must be in compliance with the statutes.

1.7 Classification of law

Law can be classified based on several criteria. First is the classification into the national, international and supranational law depending on which relations (domestic or international) it regulates. The other classifications relate to the substantive and procedural law and lastly to private and public law.

National law relates to a particular nation and governs relations within national territory, national citizens, residents etc.

International law governs relations between states or parties from different states.

Supranational law is a legal systems sui-generis standing above the national laws (EU law).

Substantive law says what the law is, i.e. it defines, describes, regulates and creates legal rights and duties (civil law, commercial law, criminal law etc.).

Procedural law says how to enforce the substantive law, i.e. it defines the rules for the enforcement of substantive law and establishes the methods of enforcing the rights generated by the substantive law (civil procedural law, criminal procedural law etc.). For details of procedural law, see the chapter Litigation.

Public law regulates relationships between one public party which is in superior position over the other party with the power to impose duties or grant rights on the private party. The position of the two parties is thus unequal and the private party must comply with the will of the public party. There is always a public interest on one side and a private interest on the other (Constitutional law, Administrative law, Criminal law).

Private law regulates relationships between the parties with equal position where the rights and duties are the result of their mutual cooperation (rather than the power of one party to impose duties or rights on the other party). Private law deals with the rights and duties of individuals, families, business corporations etc. and there is no public interest in the field of private law (civil law, family law, commercial law, most part of labor law).

1.8 Summary

This chapter was introductory and dealt with the concept of law, legal systems, the sources of law and the classification of law. Law can be defined as the set of rules that are foreseen by law and enforceable by the means foreseen by law. Any legal rule has a general application to society, is developed by a legitimate authority of the society and is accompanied with sanctions supporting their implementation and enforcement. There are five legal systems in the world - the civil law systems (characterized by written constitution, statutes as dominant source of law), common law systems (with precedents as dominant source of law), customary law systems, religious legal systems and the mixed legal systems. Legal rules can be found in the formal source of law (in the continental law tradition typically the statutes) whilst material sources of law are the source of substance for law. Law can be classified into the national, international

and supranational law, further into the substantive and procedural law and lastly to the public and private law.

1.9 Self-assessment questions

1. What are the characteristics of legal rules?
2. Why do not rules of the games belong to legal rules?
3. What legal systems do you know?
4. Describe the main differences between the common law systems and the civil law systems.
5. What is the difference between the material and formal sources of law?
6. Describe the main difference between the public and private law.
7. What is procedural law for?

1.10 Further reading/listening

A brief video on the concept of law recorded by an American professor of law:
<https://www.youtube.com/watch?v=2ds-NIFhU9s>

BOBEK, Michal. An Introduction to the Czech Legal System and Legal Resources. [online]. Available at: http://www.nyulawglobal.org/globalex/Czech_Republic.html