LISBOA SCHOOL OF ECONOMICS & MANAGEMENT

ISEG SINCE 1911

Chapter IV

Sources of Law

Filipe Santos Barata

Chapter IV - Sources of Law

1. Concept of Sources of Law

Sociological and material sense – all social events at the origin of a particular legal rule, are sources of Law (example: the increasing national fleet and the consequent multiplication of road accidents were the determinant sources for the Road Code).

Historical and instrumental sense – diplomas and legislative monuments containing legal rules are sources of Law (example: Code of Hammurabi, Law of the Twelve Tables Ordinances, CRP, CC, CP).

Political and organic sense – the political organs that, in every society, are tasked to issue legal rules, are sources of Law (Parliament - arts.161, 164 and 165, CRP; Government - art.198, CRP; Regional Parliament - art.227, CRP).

Technical and legal sense – the ways of revelation and creation of legal rules, present in the legal system, are sources of Law. The following: law, custom; jurisprudence; doctrine; uses; equity.

Chapter IV - Sources of Law

2. Mediate and Immediate Sources of Law

Direct or immediate sources of Law – those with their own binding power; they are, therefore, true means of production of Law (law, custom and jurisprudence).

Mediate or indirect sources of Law – those not having binding force of their own, are, nevertheless, important for the way they influence the process of formation and disclosure of legal rules (doctrine, uses and equity).

3. Law and Corporate rules

- According to art.1 of the CC, law and corporate rules are immediate sources of Law.
- The notion of law is hardly ascertainable. In art.1, no.2 of the Civil Code, one can read: "All generic provisions, stemmed from competent State organs, are considered laws. "

Chapter IV - Sources of Law

a) law/act – it can be understood as the legal rule that arises from the competent State organs and must be observed by all citizens. The premises of law are as follows:

i. An official authority to whom the CRP confers a legislative competence;

ii. The observance of a predetermined formality for such activity;

iii. Containing one or more legal rules.

b) Corporate rules – those rules imposed by organs representing corporations, in their field of competence. In Portugal there are several corporate organs: the Bar Association, Order of Physicians, Unions, Chartered Accountants.

Chapter IV - Sources of Law

3.1. Law in formal sense and law in material sense

law in formal sense – the legislative action, arising from a organ with legislative powers, whether or not containing a genuine legal rule. E.g.: Constitutional laws; laws of Parliament; Decrees-laws of Government; Regional Legislative Decrees of Regional Parliament.

law in material sense – all legislative action, originated from a competent organ of State, even it not responsible for the legislative function, to the extent it contains one or more legal rules. E.g.: laws; Decrees-laws; Regional Decrees; Regulatory Decrees; Ordinances ("Portaria"); Normative Orders; Autarchic Regulations ("Posturas").

3.2. law in a broad sense and law in a restricted sense

law in a broad sense ("Lato sensu") – all the diplomas, general and imperative, from competent state organs - Parliament, Government, Regional Parliament, Municipality Parliament.

law in a restricted sense ("Stricto sensu") – the law itself, i.e., resulting from organs with legislative power - Parliament, Government, Local Parliament.

Chapter IV - Sources of Law

3.3. Rating of laws, given their solemnity

Solemn:

a) Constitutional laws;

b) Common laws ("Leis Ordinárias") - laws and Decrees-laws;

c) Regional Legislative Decrees ("Decretos Legislativos Regionais").

Non-Solemn:

a) Decree of the Head of State;

b) Regulatory Decree from the Government;

c) Resolution of the Council of Ministers;

d) Ordinance from the Government;

e) Normative Decree ("Despacho Normativo")of the Government;

f) Regulations of the Autonomous Regions;

g) Regulations of Municipalities.

Chapter IV - Sources of Law

3.4. The Hierarchy of laws

The organization of the legal system, the need for some laws to take care of general aspects and others to take care of detailed matters, and the possibility of existing conflicts between laws, justify that they are arranged in a hierarchical pyramidal system.

This hierarchical pyramid system has, in its vertex, the most important law and, in successively lower levels, the less important laws.

The hierarchy of laws depends on the hierarchy of the sources in which they are contained, and must be analyzed, in parallel, with the hierarchy of the corresponding aspects of legislative power.

Chapter IV - Sources of Law

According to a decreasing order of importance:

- International Law (treaties and international conventions);
- EU Law;
- Constitutional law;
- Laws and decrees-laws;
- Regional legislative decrees;
- Regulatory decrees;
- Regional regulatory decrees;
- Resolutions of the Council of Ministers;
- Ordinances;
- Regulations of local authorities;
- Normative decisions (“Despachos Normativos”);
- Instructions;
- Circular;
- Postures.

Chapter IV - Sources of Law

3.5. Types of Legislative Acts

Under art.112, no.1 (CRP), the following are legislative acts: the laws of Parliament (arts.161. §c), art.164 and 165, CRP); Decree-laws of the Government (art.198, no.1 and 2, CRP); and Regional Legislative Decrees of the Regional Parliament (arts.227, no.1, and 232, no.1, CRP).

3.5.1. Types of laws

Constitutional laws – those that contain original constitutional rules, or those resulting from a process of constitutional review (arts.161, §a, and art.166, no.1, CRP), and are at the top of the hierarchy of internal laws.

Common laws ("Leis Ordinárias") – those that are related with the exercise of regular legislative powers of Parliament (art.166, no.3, CRP). These can be subdivided in:

Chapter IV - Sources of Law

(Common Laws):

1. Reinforced Ordinary laws ("Leis Ordinárias Reforçadas") of general reach – lying immediately below constitutional laws, not serving the same purpose; its preparation process is easier, but it has to respect constitutional rules, otherwise it can be deemed unconstitutional. These may be:

   i. Statutory laws – laws of Parliament which approve the political and administrative statute of each Autonomous Region (art.161, §b, CRP). These statutes have a different process of drafting from the other laws of the Parliament (art.228, CRP). The initiative lies with the Regional Parliaments, which should send the draft to the Parliament for discussion and approval.

Chapter IV - Sources of Law

ii. Organic laws ("Leis Orgânicas") – are considered as structuring principles of a democratic State Law (art.112, no.3, CRP). According to art.166, no.2, CRP, these are laws of Parliament which deal with matters contained in art.164 §a to §f, §h, §j, the first part of §l, §q e §t, and art.255 of the CRP, i.e., within the exclusive competence of absolute reservation of Parliament, such as:

- Election of the holders of sovereign organs;
- Regimes of referendas;
- Matters relating to the organization, operation and process of the Constitutional Court;
- Organization and discipline of the Armed Forces;
- Regime of martial law and state of emergency.

Chapter IV - Sources of Law

Organic laws have some specificities on their constitution process. Such as:

a. Specific approval must be made by the Plenary of Parliament (art.168, no.4, CRP);

b. Final global approval must be made by an absolute majority of Members of Parliament on active duty (art.168, no.5, CRP);

c. In the case of political veto of the Head of State, the Parliament must reapprove the organic law by a majority of two thirds of the members present, provided that they are higher than the absolute majority of MPs in office (art.136, no.3, CRP);

d. The preventive review of the constitutionality of an organic law can be requested to the Constitutional Court, not only by the Head of State, but as well as by the Prime Minister and 1/5 of the deputies (art.278, no.4, CRP).

Chapter IV - Sources of Law

2. Reinforced ordinary laws ("Leis Ordinárias Reforçadas") with limited scope - laws of the Parliament which have supra legislative nature, but only in relation to certain legislative acts, which are:

   i. Laws of Bases ("Leis de Bases") – laws of Parliament setting forth only the general principles of the legal regime of a particular matter (art.112, no.2, and art.198, no.1, §c, CRP). These are hierarchically superior to the development decrees-laws ("Decretos-Lei de desenvolvimento") and the regional development decrees ("decretos legislativos regionais de desenvolvimento") (art.198, no.1, §c, and art.227, no.1, §c, CRP).

   ii. Laws of legislative authorization ("Leis de autorização legislativa") – they arise when the Parliament, through a law, allows the Government the permission to legislate on matters within its exclusive legislative powers of relative reserve (art.161, §d, and art.165, CRP); or when the Parliament, through law, grants to a Regional Parliament an authorisation, so that it can also legislate in matters defined in art.165 of the CRP (art.161, §e, and art.227, no.1, §b, CRP).

Chapter IV - Sources of Law

iii. Framework laws ("Leis_Quadro") – laws which legally frame or regulate the production regime of state acts, including legislative acts. The CRP establishes the reinforced value ("valor reforçado") of the following framing laws:

a) The law of the State Budget has to subordinate itself to the respective framework-law (art.106, no.1 and 2, CRP);

b) A law that establishes, specifically, an administrative region (art.256, CRP), must subordinate itself to the framework-law that shall create the administrative regions (art.255, CRP);

c) A law which approves the options of the annual plan ("grandes opções do plano annual") – a law by which the Parliament must approve the options corresponding to each plan (art.90, CRP).

Chapter IV - Sources of Law

3.5.2. Types of Decrees-laws

a) Competitive Decree-laws – approved in competitive matters, under art.198, no.1, §a, CRP, concerning matters that are not allocated to competence legislative reserve of organs with power to legislate. They relate to matters for which they are competent, both the Parliament and the Government, keeping the principle that (i) the later law revokes the previous law, and that (ii) law and decree-law can be mutually revoked, because they have equal value or hierarchical parity (art.112, no.2, CRP);

b) Authorized or Delegated Decree-laws – approved under the delegated or authorized legislative powers, imposed on matters of art.165 of the CRP (art.198, no.1, §b, CRP);

c) Development Decree-laws – approved under a complementary legislative competence or of development of principles or basic principles of the legal regimes contained in laws of bases ("Leis de Bases") (art.198, no.1, §c, CRP);

d) Decree-laws relating to the exclusive reservation of the Government - governing the organization and functioning of the executive (art.198, no.2, CRP).

Chapter IV - Sources of Law

Differences between Decrees-laws and Regulations ("Regulamentos"):

Decree-laws – they merely state the principles, institutes and essential legal rules, about the regulation of a given life situation (as it happens with laws).

Regulations – they allow the application or enforcement of decree-laws (or laws), and are designed to itemize their rules and formulate additional or instrumental rules.

e) Government Regulations (result from its administrative normative competence, art.199, §c, CRP):

- Regulatory Decrees – the diplomas that are issued by the Government and promulgated by the Head of State (art. 134, §b, CRP). They must be approved by the Government or concerned Ministers (art. 140 and art.197, no.1, CRP), published in the official Gazette (119, § h) CRP) – art. 112 no. 7 CRP;

Chapter IV - Sources of Law

- Resolutions of the Council of Ministers – they arise, as the name itself suggests, from the Council of Ministers, and they do not have to be promulgated by the President (art.200, no.1, §c, CRP), but must be published in the Official Gazette (art.119§h, CRP);
- Ordinances ("Portarias") – these are Government orders, given by one or more Ministers, not needing to be promulgated by the President, but must be published in the Official Gazette (art.119§h, CRP);
- Normative or ministerial orders ("Despachos Normativos ou Ministeriais") – diplomas which are addressed to the subordinates of the Minister or signatory Ministers, applying only within the respective Ministry, are published in the Official Gazette (art.119§h, CRP);
- Instructions ("Instruções") – these are mere internal regulations, containing orders given by Ministers to their employees, or establishing guidelines for a best application of regulatory diplomas;
- Circular ("Circular") – this is the name given to the instructions when these are directed to different services.

Chapter IV - Sources of Law

Notes on Government Regulations:

Note 1: Postures ("Posturas") are autonomous local regulations, local, of police, issued by relevant administrative organs. E.g.: Posture of a Municipality that governs the fairs that take place in the Circumscription ("Concelho").

Note 2: Local municipalities stand out in the local exercise of regulatory power – Local Municipalities' Regulations (art.241, CRP).

3.5.3. Types of Regional Legislative Decrees

a) Regional legislative decrees "stricto sensu"– they cover matters of particular interest to the Autonomous Regions, which are usually defined in each of the Political and Administrative Statutes, and which are not reserved for sovereign organs (art.227, no.1, §a, CRP);

b) Authorized or Delegated Regional legislative decrees – they have the same characteristics of an authorized or delegated decree-law, they require a law of legislative authorization of Parliament, which delegate these powers in the Regional Parliament, in competitive matters or of relative reserve of its legislative powers, which will exercise those delegated powers through a Regional Decree-law (art.227, no.1, §b, CRP);

c) Regional development legislative decrees - those which comprise, *mutatis mutandis*, the same characteristics of decree-laws of development, but with the specificity that the Autonomous Regions are allowed, through an act of the Regional Parliament, to develop, depending on their specific interest, those laws of bases, which means that development can be differentiated to the extent we are on the continent, in RAA or RAM (art.227, no.1, §c, CRP).

Chapter IV - Sources of Law

3.6. Development process of Legislative Diplomas

Parliament is considered the legislative organ *par excellence* and laws are enacted by it (art.161, no.1, §c, CRP), both in terms of absolute reserve of the legislative competence conferred upon it (art.164, CRP), as in terms of relative reserve of the legislative competence also assigned to it (art.165, CRP).

The Government, in exercise of its legislative functions, issues decrees-laws. The legislative functions of the government result:

- From its competitive legislative competence ("competência legislativas concorrentes"), along with Parliament (art.198, no.1, §a, CRP);
- From its competitive legislative competence, dependent from Parliament (art.198, no.1, §b, and art.165, no.1 to 5, CRP);
- From its exclusive jurisdiction in matters relating to its own organization and functioning (art.198, no.2, CRP).

Chapter IV - Sources of Law

3.6.1. Process of creation of a law

a) Phase of legislative initiative – attributed to:

- Members of Parliament – project of law ("projecto de lei") (art.167, no.1, and art.156, §b, CRP);
- Parliamentary groups - project of law (art.167, no.1, and art.180, no.1, §g, CRP);
- Groups of voters – project of law (art.167, no.1, CRP and Law no.17/2003, 4th June);
- Government - project of law (art.167, no.1, and art.197, no.1, §d, CRP);
- Regional Parliaments – project of law (art.167, no.1, art.227, no.1, §f).

Chapter IV - Sources of Law

b) Constitutive Phase (**discussion and approval**)

- The project or proposal of law is delivered to the Parliament and admitted by the Parliament's President, and subsequently published in the Journal of Parliament. Once accepted, the project or proposal is included on the agenda of the day of the Parliament, existing after a presentation to the plenary, where deputies can present proposals of changes proposals (alteration, substitution, addition or deletion);

- The project or proposal of law, once admitted, are sent to standing specialists committees ("Comissões permanentes especializadas"), which will prepare a reasoned opinion, and may also suggest another text for the proposed project on proposal of law.

Chapter IV - Sources of Law

Both discussion and the vote encompass:

The Generality – the discussion rests with the plenary, and it focuses on the principles and system of each project or proposal, and the voting process lies on each presented diploma - art.168, no.1 and 2, CRP.

The Specialty – the discussion is made, almost always, in the specialized committees and not in the plenary (matters relating to art.168, no.4, of the CRP and those relating to the Statute of the Autonomous Regions can not be voted on these committees). The discussion deals with each item and the voting process lies on each of the articles, numbers or paragraphs - art.168, no.1 and 2, CRP.

The final and global vote – it occurs in Plenary and it must always exist, concentrating on the text agreed in the speciality process, making a final judgment on the proposed project or proposal of law subject to discussion (art.168, no.2, CRP).

The text thus approved (art.116;no.5 and 6, CRP) is sent to the Head of State (PR), under the form of Decree (“Decretos”).

Chapter IV - Sources of Law

c) Control Phase – **Promulgation/Enactment**

- This phase is intended to permit the evaluation of merit and constitutional conformity of the legislative act. Enactment is the solemn act by which the PR converts a Decree in Law, drawn up by a constitutionally competent organ, in this case, the Parliament.
- The Enactment is an essential formality of the legislative process, being a proper act of the PR, which gives order for the Law to be enforced (art.134. §b and art.136, CRP).
- The PR, through the Enactment, exercises the formal legal and material control of those acts performed in the exercise of legislative power, as this is bound to observe and defend the CRP. As such, when legislation acts are sent for promulgation, the PR must, on the one hand, control the regularity of the formal legislative process and, secondly, must determine whether those acts are in accordance with the precepts of Constitution.

Chapter IV - Sources of Law

- Enactment is connected with the right to veto of the Head of State (PR), through which he controls the merit of legislation acts (art.136, no.1 and 5, CPR). There are two types of presidential veto:
  a) Political Veto – free and discretionary power of the PR, which highlights the political opportunities and convenience reasons (art.136, no.1, CRP);
  b) Legal Veto or by unconstitutionality – it is exercised under a bound power of the PR, for objective reasons of legality and constitutionality, by virtue of the judgment of the Constitutional Court (TC) (arts.278, 279 and 136, no.5, CRP).
- It is therefore, at this phase of the promulgation process, that the PR can request the TC for the preventive review of the constitutionality of provisions of laws of Parliament (art.134, §g, CRP).
- In case of exercising the veto power, the PR must request a new review of the diploma, by means of a grounded message (art.136, no.1, CRP). If the Parliament confirms its vote by an absolute majority of MPs in office, the PR shall promulgate the diploma within 8 days from the date he receives it for promulgation (art.136, no.2, CRP).

Chapter IV - Sources of Law

- There are matters that require a qualified majority of 2/3 of Members present, so there is a promulgation of the PR (art.136, no.3, CRP) - external relations, boundaries between public, private, cooperative and social sector, and election acts regulatory process.
- The lack of promulgation by PR determines the legal inexistence of the act (art.137 of CRP).

Chapter IV - Sources of Law

d) Control Phase – **Ministerial Referenda**

- Act of complex nature, which consists in affixing the signature of the Prime Minister (PM) as a general rule, along with the signature of the Head of State (PR) (art.140, no.1, CRP).
- The Government exerts, through a ministerial referenda, a certificate control, although different from the PR's control. The ministerial referenda is a co-responsibility of the Government, respecting certain acts of the PR.
- The lack of referenda of the Government carries the legal inexistence of the act (art.140, no.2, CRP).

Chapter IV - Sources of Law

e) Effectiveness Integration Phase – **Publication**

- It is a means of bringing the law to the general knowledge of its recipients, and thereafter, the law has legal existence. Publication is the essential act to empower law.
- Pursuant to the requirements established in art.5, no.1, of the CC, the law only becomes mandatory after publication in the official gazette.
- Laws are published in the Official Gazette (art.119, no.1, §c, CRP), in *Diário da República* - Series I (www.dre.pt).
- After publication, art.6 of CC establishes that the ignorance of the law is legally irrelevant.
- The lack of publication implies the legal inefficiency of the law (art.119, no.2, CRP).

Chapter IV - Sources of Law

f) Effectiveness Integration Phase – **Entry into force**

- According to art.5, no.2, CC, there will be a period of time between publication and entry into force. This period is called "*vacatio legis*".
- Thus, the publication is not enough for the law to enter into force (to become effective). There are three possibilities:
  i. The law contains a provision that states: "This law comes into force immediately. "In this case, the effective date of the law occurs at zero hour of the day following the publication of the law in the Electronic Official Gazette, and can not, in any event, take force on the same day of publication (art.2, no.1, Law no.74/98, 11 November);
  ii. The law contains a provision fixing the date of entry in force, or the time after which it will enter into force – date of *vacatio legis* (art. 2, no.1, of Law 74/98, 11th November);
  iii. The law says nothing about its entry into force: in this case, in the silence of the law, the suppletive *vacatio legis* is applied (art.2, no.2, Law no. 74/98, 11th November), counting 5 days from its publication in national and foreign territory.

Note: currently, the Official Gazette is electronic, being distributed on the day of its publication; but, in the past, when the Official Gazette (DR) was on paper, there were several times when it was not distributed on the day of its publication. In this case, the period of *vacatio legis* was counted from the day of distribution.

3.6.2. Formation process of a Decree-law

a) Governmental initiative phase

- Unless facing a matter of exclusive jurisdiction of the Government (art.198, 2, CRP), the Government with regard to matters of art.165, 1, CRP, needs to ask for a legislative authorization of Parliament, so it can legislate.
- After obtaining the relevant authorization, the Government can only legislate within the defined limits, and within the time period that is established on such authorization. However, the latter can be extended (art.165, no. 2 to 5, CRP).
- The project (draft) decree-law is developed by the Government and submitted for discussion and approval by the Council of Ministers (art.200, no.1, §d, CRP), and then sent, under the form of a decree, for enactment of the PR.

Chapter IV - Sources of Law

b) Phase Control – Promulgation

- The PR, after receive the diploma, can promulgate it, exercise the right of veto or apply to the Constitutional Court for the preventive review of its constitutionality (art.136, no.4, CRP).
- After enactment, the decree sent by the Government assumes the designation of Decree-law.
- If the PR exercises his right of veto, he should return the diploma to the Government and shall inform him, in writing, of the reasons of his veto. The Government can then archive, reformulate or send it to Parliament, in the form of a Proposal of law.
- The lack of enactment implies inexistence of the act (art.137, CRP).

Chapter IV - Sources of Law

c) Control Phase – Ministerial referenda

After promulgation, the Decree-law is subject to ministerial referenda, as set forth in art.140, no.1, of the CRP. The lack of referenda entails the inexistence of the act (art. 140, no.2, CRP)

d) Effectiveness Integration Phase – Publication

Decrees-laws, such as the laws of Parliament, must be published in Series I of the Official Gazette (arts.119, no.1, §c of CRP and art.5, no.1, of CC). The lack of legal publication implies the legal ineffectiveness of the Decree-law (art.119, no.2, CRP).

e) Effectiveness Integration Phase – Entry into force

The process of entry into force of the decrees-laws is similar to the laws' process.

Chapter IV - Sources of Law

f) Phase of Parliamentary appraisal of decree-laws

- Once published, the decree-laws that do not have been approved, in the exercise of exclusive legislative powers of Government, may be subject to assessment by the Parliament, for refusal of ratification, or for the purpose of amending the text, at the request of 10 members of the parliament, within 30 days as from the publication, not counting the periods of suspension of operation of Parliament (art.169, no.1, CRP).
- Requested such assessment, and in the case that changes are proposed, the Parliament may suspend, in whole or in part, the effectiveness ("vigência") of the Decree-law. Such suspension will last until the publication of the law that will amend the Decree-law, or until the rejection of the proposals (art.169, no.2, CRP).
- The suspension terminates if, after 10 plenary meetings, the Parliament does not mention the ratification (art.169, no.3, CRP).

Chapter IV - Sources of Law

3.8. Control of Constitutionality and Legality

a) Means of control

i. Constitutional Court - arts221 to 224 of CRP

ii. Administrative Courts - art.212 and 268 of CRP

iii. Prosecutor ("Ministério Público") - art.219 and 220 of CRP

iv. Ombudsman ("Provedor da Justiça") - art.23 and 281, no.2 §d) of CRP

v. Audit Court - art.214 of CRP

vi. Head of State (PR) – art 134 and 136 of CRP

vii. Right of appeal and complaint of citizens - art.52 of CRP.

b) Unconstitutionality

It consists in the non compliance of the CRP, by action or omission, on the part of organs of political power. The unconstitutionality, whilst inconsistency of an act of political power in relation to the CRP, is a corollary of the principle of hierarchy of legal rules.

c) Types of unconstitutionality

- Unconstitutionality by action or positive – it consists in the creation, by the political power, of a rule that breaches the CRP, i.e., contrary to the rules and constitutional rules (art.277, CRP).
- Unconstitutionality by omission or negative – it consists in the breach of the CRP due to the lack of a legal rule, i.e., it derives from the silence or inaction of a political organ, that does not practice a particular act, required by the CRP, for a certain period of time (art.283 of the CRP).

Chapter IV - Sources of Law

d) Types of unconstitutionality by action (or positive)

i. Material Unconstitutionality – when there is a contradiction between the content of the act of political power and one of the constitutional rules

ii. Formal unconstitutionality – it occurs when an act of political power is practiced without having been followed all procedures provided in the CRP for the creation of legal rules.

iii. Organic unconstitutionality - when the act of political power is emanating from a organ that has no competence for its practice, according to the constitutional rules.

Chapter IV - Sources of Law

e) Sorts of material, formal and organic unconstitutionality:

i. Total – if it covers the entire legislative act;

ii. Partial - if it only covers a part of the normative act, and/or some articles.

Generally, the material unconstitutional is partial, while the organic and formal unconstitutionality are total.

Chapter IV - Sources of Law

f) Judicial review of the unconstitutionality

The declaration of unconstitutionality of any legal rules belongs, exclusively, to the Constitutional Court (art.281, no.1, §a), CRP).

The review, as for the timing of the impeachment of the unconstitutionality, may be:

- Preventive – it is made before the legal rule is published in the Official Gazette, where the rule is sent for enactment by the PR, or to be signed by the Representative of the Republic;
- Successive – it is held after the publication of the legal rule in the Official Gazette, whether it has already entered into force or not .

Chapter IV - Sources of Law

The review of constitutionality is set forth on the CRP, as follows:

- Preventive review of constitutionality – it consists in controlling, requested by certain entities (PR) to the Constitutional Court, before the enactment, ratification or signing of any diploma (art.278, CRP).
- Concrete successive review of constitutionality – it refers to the appeals addressed to the Constitutional Court, related to Courts' decisions that refuse the application of a certain legal rule, with grounds on unconstitutionality or illegality, or that apply that rule when the unconstitutionality or illegality have been raised during the procedure (art.280, CRP).
- Abstract Successive review of constitutionality – it consists in the assessment by the Constitutional Court, at the request of a group of entities (Head of State, President of Parliament, Prime Minister, "Provedor de Justiça", Attorney General of the Republic), on the unconstitutionality or illegality of legal rules already in force, having its declaration a general binding strength (art.281, CRP).

g) Legal effects of unconstitutionality

1. Legal inexistence ("inexistência") – when a law carries a flaw so severe that it implies not producing any legal effects, regardless of the declaration of any organ. Examples:
   i. The lack of promulgation by the Head of State or Government Referenda - art.137 and 140, no.2, of the CRP;
   ii. The usurpation of the legislative function by an organ that can not exercise it - a law passed by a Court;
   iii. If the apparent law violates the essential content of fundamental rights enshrined in the Constitution.

Chapter IV - Sources of Law

2. Invalidity ("invalidade") – it occurs whenever a rule on legal production is disrespected. Theoretically, in Portuguese Law one can distinguish, within the validity, the nullity ("nulidade") and the annulment ("anulabilidade").

3. Nullity ("Nulidade"):

   i. The null law is inapplicable for itself;

   ii. The null act is as such, by principle, from the moment of its practice;

   iii. The nullity shall be declared by Courts;

   iv. The declaration of nullity eliminates the null act and its legal effects, from the moment of its practice, i.e., from the moment of verification of the invalidity;

   v. Any person may request the declaration of nullity. This request can be made at any time without a deadline;

   vi. Courts may, "ex officio", i.e., regardless of the existence of a request, declare its nullity;

   vii. See articles 282, no.1, 2,3 and 4 of the CRP.

Chapter IV - Sources of Law

4. Annulment ("Anulabilidade"):

   i. The law will apply, whilst the competent organs do nt take the initiative of its annulment;

   ii. The voidable act, as opposed to the null one, is valid until its annulment, producing effects until such annulment occurs;

   iii. The annulment is of the competence of the Courts, which may determine that the annulled act ceases to have effect only for the future, keeping safeguarded the effects already produced in the past;

   iv. Only some people, with a particular interest in the annulment, can request it in Court;

   v. There is a time limit within which the annulment may be requested, following which the act subsists as valid and untouched.

Chapter IV - Sources of Law

5. Legal ineffectiveness ("Ineficiência Jurídica") – it is occurs by defect or unconformity of the law, that paralyzes or obviates the production of its effects. The inefficiency can be original or supervening. It is original if the act or fact is contemporary to the making of law. It is supervening if it comes later.

   Examples:

   - It is ineffective the law not published in the Official Gazette (art.119, no.2, CRP);
   - It is ineffective the law that does not enter immediately into force. Having, between publication and entry into force of law, an interval period - *vacatio legis*.

3.9. Cessation of validity of law

As a way of termination of the law, art.7 of the Civil Code provides only the forfeiture ("caducidade") and revocation ("revogação").

However, the termination of the law can take place in 4 different situations:

a) Disuse – it is the situation in which the law no longer applies, because no one applies it, because it falls into general oblivion, or because a *contra legem* custom has been formed, which took and replaced a law of opposite content.

b) Suspension of the law – a law can be suspended by another law, or by a hierarchical superior source. In this case, it will expire while suspended. If suspended for a specified period, the law shall automatically recover its application after that period.

Chapter IV - Sources of Law

c) Expiry ("caducidade") – it is expressed in term of extinction and effectiveness of the effects of an act, because of the supervenience of a fact (art.7, no.1, CC). We can talk about expiry of a law when:

- A temporary law sets the date it ceases to be in force, i.e., when it mentions, expressly, the period of its validity (after the expiry limit set by law, it expires);
- A law does not set any time limit for its term, expiring when the situations that it regulates cease to exist (a war, a public calamity, an epidemic, Euro2004).

Chapter IV - Sources of Law

d) Revocation – It is the expiry of the law, by the effect of entry into force of the new law, of equal or higher hierarchical value, which regulates the same subject (art.7, no.2, 3 and 4, CC).

d1) Types of revocation:

As regarding to its form:

- Express Revocation – when the law identifies the law which intends to revoke. And it can do it by identifying such law or the revoked provisions of a certain law.
- Tacit Revocation – if the content to be revoked is not clear in the law, deriving, instead, of its interpretation and allowing to consider the existence of a mismatch between the new provisions and the preceding rules (art.7, no.2, CC). The implied revocation may be:
  - Global Tacit Revocation- when the new law revokes all previous legal regulations, but without expressly stating it;
  - Partial Tacit Revocation - when the new law revokes only a part of the material contained in the old rules, because of a mismatch of some new provisions with old legal rules.

Chapter IV - Sources of Law

Regarding its extension:

- Total Revocation or Abrogation ("abrogação") – if the previous law ceases its efficacy completely, i.e., when all provisions of a law are revoked.
- Partial Revocation – when only a few provisions of the old law are revoked by the new law.

d2) Revocation and special relationship between laws:

In principle, any law can revoke another law according to the following rule: a new law revokes an old law. However, there are two exceptions which limit this principle:

- The existence of a gap of hierarchical nature, in such a way that an inferior law can not revoke a higher law;
- The general law does not revoke the special law, except if that is the unequivocal intention of the lawmaker (art.7, no.3, CC). A special law is the one which forecast is included in another law - general law - as a particular case, to the establishment of a different regime.

Chapter IV - Sources of Law

d3) Revocation and reinstatement:

- Reinstated Law – when a revoked law is again in force.

When the lawmaker revokes a revoking law of a previous one, the reinstatement does not usually occur, i.e., the rebirth of the law that had previously been revoked (art.7, no.4, CC).

Despite art.7, no.4, of Civil Code being clear on the exclusion of the reinstatement effect (principle of non- reinstatement), it suffers two exceptions:

a) If the revoking law is declared unconstitutional, with general obligatory force (art.282, no.1, CRP);
b) If the lawmaker has the unequivocal intention of replacing into effect a law that had been revoked.

3.10. Codification

Codification is the process of combining on a text – Code – according to certain systematic and scientific criteria, a set of rules of a particular branch of Law, or of part of it. One can distinguish:

i. Loose laws ("Leis avulsas") – those that are not part of a Code;

ii. Codified laws – those that are inserted in a given Code.

In Portugal, the first coding, though as simple compilation of laws, are the *Afonsine Ordinances* (fifteenth century). The *Manueline Ordinances* (sixteenth century) and the *Filipine* Ordinances (seventeenth century) are already systematized, including rules that are applicable to certain practical cases.

The first Codes appear on the second half of the nineteenth century: Criminal Code (1852), Civil Code (1867) and Commercial Code (1888).

Chapter IV - Sources of Law

Advantages of coding:

i. It allows an easy understanding of Law, making it more certain and precise, thus contributing to provide legal security.

ii. It imposes a unitary regulation on matters to which it relates, avoiding contradictions between the various laws, and showing the main principles governing the covered issues.

iii. It allows, by means of the scientific of the various provisions, to place the rules more easily in its systematic context, and detect possible regulation lacunae.

Disadvantages of coding:

i. It interferes with the evolution of Law, leading to its crystallization, because of the tendency of lawyers to cling to current Codes and resist, sometimes even unconsciously, to innovations.

ii. It formalizes and makes Law tougher, relieving hit of the malleability and adaptability to social evolution.

Chapter IV - Sources of Law

4. The Costume

It is a way of creation of legal rules, which consist on the repeated and usual practice of a certain conduct, when it is considered mandatory by the generality of members.

Legal rules created by costume are called customary. The Civil Code refers, particularly in art.348, to the customary Law.

The costume results of three essential elements:

i. Use-*corpus*: it is a repeated social practice, i.e., a repeated and usual practice of a certain and determined conduct.

ii. The conviction of obligatoriness – *animus:* there is a obligatoriness in such practice.

iii. Duration: Law of Good Reason (Marquês de Pombal): 100 years were required for a costume to be accepted as a source of Law. Nowadays, this requirement of 100 years was replaced by the notion of "immemorial“ practice.

Chapter IV - Sources of Law

Given the relation between costumes and law, one speaks of:

a) *Secundum legem* Costume – when there is a coincidence of regulation content between customary rule and legal rule.

b) *Praecter legem* Costume – when a customary rule does not conflict with the legal rule of origin, but it goes beyond the regulatory scope regulatory of the law (integrative costume).

c) *Contra legem* Costume – when there is contradiction or opposition between the rule revealed by the costume and the rule established by law.

Chapter IV - Sources of Law

Is the costume, or is it not, an immediate source of Law?

- Statesman theory - the custom has been, historically, a primary source of Law, but today it is not. The only primary source is the law.
- Sociological theory - the custom is still, though in a lesser extent than before, the primary source of Law. Reasons for it:

    i. The law does not hold, in itself, a self social power to prohibit the costume: whenever a costume is imposed for itself, it will be a source of Law;

    ii. The Civil Code itself recognizes that the costume, which is called as "costumary law", can be applied by State Courts and, therefore, it should be seen as primary source of Law (art.348, no.1, CC);

There are, actually, numerous costumes in force, working as primary sources of Law. Examples: bullfighting in Barrancos; barrels of Port wine of 550 liters, when an Ordinance of 03/07/76 changes it to 500 liters.

Chapter IV - Sources of Law

5. Jurisprudence

Three ways to define jurisprudence:

1) Synonymous of “Sciences of law";
2) Performance of Courts in the resolution of real cases submitted to them for trial - court decisions. These can take the form of:
    1) Sentences (“Sentenças”) - when they are issued by a singular Court;
    2) Judgments (“Acórdão”) - when they are issued by a collective Court;
3) Set of guidelines that result from the action of Courts on how to solve similar cases.

Chapter IV - Sources of Law

Only in the mentioned third sense may jurisprudence be considered, eventually, as an immediate source of Law. Is it jurisprudence a direct source of Law?

- Classical theory – jurisprudence is not a source of Law. Only law and costume are sources of Law. Courts have a secondary function: to apply Law, not to create it.

❑ *Critique* – in many situations the Court will go further than just pronouncing the words of the law. Example: number of years that a criminal goes to jail. The law says between 3 to 10 years, and the judge is the one that decides.

- Theory of the American Realist School – Courts are the ones that create Law. Laws alone, do not say anything. It the Courts that decide how to interpret laws and what meaning should they take.

❑ *Critique* – laws are not mere predictions. The have their own value. They are mandatory for themselves, whether they get to be interpreted and applied by Courts or not.

Chapter IV - Sources of Law

- Moderate Realistic Theory - in most cases the primary source of Law is the law or the costume. However, in situations where Courts intervene, these can create Law. This can happen in the following cases:

  a) Extensive or restrictive interpretation;

  b) Recourse to analogy;

  c) Delivering the undetermined or vague concepts.

In these cases, the Court changes the meaning and scope of the legal rule, or it creates an hitherto nonexistent rule, and judges according with it.

When the specific case is not decided by law or costume, but instead through an ad-hoc legal rule, of jurisprudential creation, jurisprudence should be understood as an immediate source of Law.

Uniformity of jurisprudence – it can occur when a Court or more often apply the same ad-hoc rule; or when there is a divergence in the application of this type of rules by the Courts.

Chapter IV - Sources of Law

6. The Doctrine

The Doctrine is the theoretical study of Law, by means of a process of revelation of the legal rules.

It is the scientific study of Law, to which lawyers dedicate to, in order to obtain a precise knowledge of the rules in force in each moment.

The doctrinal production influences the understanding that is made, in every moment, of the applicable legal rules, particularly by force of the scientific authority of the most reputable authors and teachers of Law.

Chapter IV - Sources of Law

7. Uses

- The Portuguese Civil Code, in its art.3, qualifies Uses as mediate sources of Law.
- Uses are sources of Law, because through them legal rules of imperative nature may be revealed.
- These are social repeated practices, consolidated in the social environment. It corresponds only to the Use's *corpus*.

Example – art.885, no.2, Civil Code, 218, 234, 236, 239, 1039, no. of the CC.

8. Equity

- Art.4 of the Civil Code accepts equity, expressly, as a true mediate source of Law.
- The term "equity", at Law, refers to a notion of justice of the specific case.
- Those who believe that it is by equity that the case is solved, understand, as consequence, that equity is a source of Law.