INTRODUCTION TO LAW

Lesson 11

CODIFICATION OF LAW; LEGAL RELATIONSHIP

Dr. Heliona Miço

The topics

Sources in different legal systems

- Court decisions as a source of law
- Custom as a source of law
- Agreement as a source of law

Codification of law

Legal relationships

Court decisions (judicial decisions) as a source of law

- Judicial bodies, during the analyses of the case and the decision that issue, are obliged to respect the legal norms in force.
- However, courts often face situations that do not have the legal base to adjudicate on the issues that arise.
- In case of legal emptiness **the judges should turn to the legal conscience and the main principles of law.**

Judicial precedent

- If the norms of law elaborated by the court for a concrete case are accepted in the future as obligatory for deciding on similar cases, then the obligatory judicial precedent is created, as a source of law.

  (Judges follow previously decided cases where the facts are of sufficient similarity.)

- Judicial precedent is mandatory for the courts of the countries which belong to the **Anglo-American system**.
- While in some other systems, although not mandatory for the court, it can be used as a model by the court that established that precedent, by turning it into case law.

The precedent and the custom

The precedent is distinguished from the custom.

- 1. The custom is a **continuous repetition** of the same solution of similar cases while the precedent is a **one-time solution** of a particular case that serves as a model for resolving other similar cases. The precedent is the **one-time solution of an issue of a particular case that serves as a model** for the subsequent solution of analogous cases.
- 2. The custom is spontaneously formulated, people are not meant to create it. Whereas the precedent arises as a result of people's predetermined attitude towards their actions.

The precedent in Albanian Legislation

- The precedent is mainly processed by the higher court instances and thus becomes binding on the lower court instances.
- **It is a concretization of the norms of law**, containing various provisions and principles that are important for resolving disputes.
- In Albania, courts' decisions **are not considered** as a new norm of law, or mandatory norms of law for resolving analogue cases.

Custom as a source of law

- Custom **is called a rule of conduct that is established by its implementation over a continuous period of time**.
- The same solution of analogous cases for a long time creates the need for a binding behavior.
- Custom is considered obligatory **because everyone has acted in this way for a long time, parents, grandparents**, etc.

Custom as a source of law

- Customs acquired legal importance at the time of the birth of the state. In primitive communities, there were customs but not customary law.
- **This right arises with the creation of the state and state coercion**.
- In the old forms of law, custom was quite important as a source of law.
- Observance of customs was ensured by the coercive force of the state.

Customs as norms of social coexistence

- But **not all customs in society have the importance of norms of law.**
- Some customs are not assured by state coercion, they extend to mutual aid, family and social relations, etc.
- These customs represent the norms of social coexistence.

The difference between the custom and a general rule of conduct

How does the custom differ from a general rule of conduct (rregull sjelljeje)?

- 1. **Firstly**, it requires the relatively long and uninterrupted implementation of a certain behavior in society or a part of it.
- 2. **Secondly**, it is necessary to define the custom, i.e. to determine its content.
- 3. **Thirdly**, an essential condition is the recognition of the legal importance of the custom by the state. The law exists only because of the state and only the state gives the binding force to the norms of the law.

The customary law nowadays

- **The court may sanction customary law rules only if the application of the custom is permitted by law and the custom is not contrary to the legislation in force.**
- However, sanctioning of custom in most countries is not recognized by legal science representatives.
- Today, the custom has **an insignificant place as the source of law**. The custom acts as a source of law only as an exception.

Agreement as a source of law

- **The agreement is as well a source of law.**
- The agreement plays an important role in the field of international relations.
- We can mention various important agreements in the constitutional and human rights field.
- Example: ***cooperation between United Nations and regional human rights mechanisms***

The agreement as a source of law

- Thus, **international treaties represent legal acts that establish or annul the rights of different states**.
- In some cases, they contain general provisions of law, rules issued by states for the future, in the form of legal norms.
- **The states in these agreements serve as factors that create the law**, as they create new norms of law through these agreements.

For this reason, agreements can not only be considered legal actions, **but sources of law**.

Cases of agreements as sources of law

Some examples of international agreements as a source of law are:

- 1. **Geneva Convention of 1864** on the sick and wounded people of war;
- 2. **The Hague Conventions on the Right to War**
- 3. The **States' Agreement on the Organization of the United Nations**.
- In this context we can also mention **the agreement between Russia and several countries that joined the Soviet Union**.

Albania's position on international agreements is expressed in **Articles 116 and 122** of the Constitution.

Article 116 of the Albanian Constitution

- **Article 116**
- 1. Normative acts that are effective in the entire territory of the Republic of Albania are:
- a) the Constitution;
- b) ratified international agreements;
- c) the laws;
- ç) normative acts of the Council of Ministers.

Article 122 of the Albanian Constitution

- **Article 122**
- 1. Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. The amendment, supplementation and repeal of laws approved by the majority of all members of the Assembly, for the effect of ratifying an international agreement, is done with the same majority.
- 2. An international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it.
- 3. The norms issued by an international organization have superiority, in case of conflict, on the laws of the country, when the agreement ratified by the Republic of Albania for its participation in this organization, expressly provide for the direct applicability of the norms issued by this organization.

Codification of law

- **Written law consists of a series of laws and other bylaws published at different times.**
- Legal acts and bylaws are published in different time periods and in different publications without any chronological relation to each other.
- But having broad areas of action, different norms within the same area are subject to systematization.
- In this way, the norms of law which are related to a specific field, are easily identifiable about their legal value.

Incorporation and codification

- Two types of systems are distinguished: **incorporation and codification.**
- **Incorporation** is called such elaboration of laws and other acts in which their content is not changed but all material is merged and placed in a systematically determined order.
- The method of making one legal document, part of another separate document helps to consider the former as a part of the latter.

Codification

- Codification is called law making that is not limited to external processing but forms a set of laws described by **internal unity**, and **based on some general principles**.
- So, both in content and form, the Code is a new legislative act that replaces all norms that were previously in force for that particular area.
- An example of **incorporation** is Justinian Code (including the systematization of imperial decrees)
- An example of **codification** is Napoleon I's Civil Law Code 1804.

The concept of legal relations

The regulation of social relations through law is accomplished by **establishing legal norms**, and rules of conduct for people, and implementing them.

- The relationship between the people where they participate as holders of rights and obligations, as defined and guaranteed by the legal norm, is called **legal relation**.
- Legal relations have different natures, they can be **property relations** between institutions, **public or private enterprises**, **administrative relations between state bodies and citizens,** etc.

The elements of legal relations

- 1. Legal relations are social relations which have an ideological character. But unlike other social relations, **these relationships are governed by legal norms, giving them legal aspects**.
- 2. Legal relations may also express an economic point of view, but they are **ideologically distinct from economic relations.**
- 3. Legal relationships differ from other types of social relationships as they exist **because of the legal norm**.
- 4. A particular element that is mentioned in legal relations is the fact that **these relations are voluntary**.

Voluntary character of legal relations

- a) The voluntary character is expressed in the fact that **these relations are social relations regulated by legal norms, the issuance of which requires the state will.**
- b) Many legal relationships arise **due to the will of individuals** (property legal relationships, contractual relationships, etc.).
- c) There are cases where the legal relationship does not arise from the expression of the will of the individual but **it can be realized only after an act of will expressed by one party**. (administrative relations, legal relations caused by damage).

Elements of legal relationship

- The legal relationship consists of several elements:

1. The subject of the right;
2. The object of law;
3. The rights;
4. The obligations.

Elements of legal relationship (The subject)

- **The subject of the right is called the person who participates or can participate in legal relationship.**
- The number of subjects in a legal relationship may be different but **they cannot be less than two**, as otherwise we would not have a relationship.

Elements of legal relationship (The subject)

- Even the **legal position of the subjects of law** is different in a legal relationship.
- There are entities that can exercise rights, there are others that perform obligations, but **generally the subjects of law have rights and assume obligations at the same time**.
- So, the subjects of law are persons who acquire rights and assume obligations.

Elements of legal relationship (The subject)

- The individual is the subject of the law in the legal relationship, where he realizes his rights and performs actions before the state and citizens.
- The citizens as subjects of law have **legal capacity** and **capacity to act** (zotësi juridike dhe zotësi për të vepruar).

Legal capacity

- **Legal capacity is the ability of an individual to have rights and obligations**. (zotesia juridike)
- **The capacity to act** is the ability of the individual **to exercise his or her rights and to assume obligations. (zotesia per te vepruar)**

Legal capacity

- Legal capacity, can be described as a legal subject's ability to bear rights and duties.
- It is therefore essentially the same as **legal subjectivity, because it is acquired through being a person.**
- In other words, all legal subjects have legal capacity simply because they are recognized by the law as "**persons with rights and duties".**

Legal capacity

- Citizens' legal capacity covers a wide range of fields, including property relations, the right to work, education, and so on.
- For example: **all citizens have civil legal capacity**, while legal capacity in other areas may vary depending on legal restrictions.
- **Citizens thus gain the right to vote after reaching the age of 18 years old.**

Capacity to act

- Unlike legal capacity, **the capacity to act does not belong to every individual**.
- The capacity to act refers to the ability of the legal subject to perform legal acts.

Capacity to act

- **The legal acts create, amend and terminate rights and duties.**
- Examples of legal acts are the conclusion of a contract, the making of a will, the bond of a marriage etc.
- Contrary to the concept of legal capacity (where all legal subjects share the same capacity), **not all legal subjects have the same capacity to act.**
- It depends on factors such **as a person's age, mental health, financial state etc.,**

Capacity to act

- The citizen has the capacity to act when he has been granted the right to exercise his rights and to assume obligations under the law.
- **Children under the age of 14 do not have the capacity to act.**
- As they reach this age, **they have limited capacity to act**, they can only perform legal action with the consent of their parents and guardians, they can join various social organizations, they can dispose of their own income, etc.