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Alexander Bröstl
Šafárik-University Košice, Slovak Republic
abrostl@iol.sk

On Precedents in General and in a Statutory Legal System

O precedensach w ogólności i w systemie prawa stanowionego

SUMMARY

The article touches upon the issue of precedent (in both the codified law and *common law* systems) as a source of law. The author presents concepts of the law philosophers, often contradictory to one another, which refer to the understanding of the very term 'source of law'. The possibility of qualifying judicial rulings, including precedents, as a source of law, is also examined. The author compares the functioning of precedents (quasi-precedents) in legal systems of a number of countries (including the USA, England, Slovakia, Poland, Germany, and Sweden), with special emphasis on Slovakia. It is also emphasised that the rulings of the Constitutional Tribunal of the Slovak Republic have a binding power for courts, provided they are petitioners of the proceedings. The Supreme Court rulings have two kinds of a binding power. The first of them is a cassation power (in a case being the subject of the proceedings), and the second one is a precedential binding power, which is characterised by the lack of obligation of being applied by common courts.

Keywords: precedent; quasi-precedent; source of law

THESAURUS

First of all a few words on distinguishing: *Qui bene distinguit, bene docet*. Who distinguishes well, learns well. Distinguishing (*διακρισις*, *distinctio*) was an assumption of the scholastic method, and it plays a great role in the discussion as well later on as in the doctrine of precedent. *Distinctio modalis* is one of its forms which can be identified either between a thing and the various modes of its subsistence or among the various modes or ways in which a thing exists.

Law or the legal system (*συστημα* as a whole composed of many separate parts) is predominantly (although not exclusively) a matter of rules.

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In the relationship to law I prefer the word "rule" (measure, criterion), rather than the word "norm", although the objection could be raised that they are synonyms (Greek varieties are *κανών*, *γνώμων*; the Latin one is *regula*, that is why also regulation)[1].

The concept of rule is based on the supposition that a rule can be either general or individual. General rules and individual rules are parts, modes, species, forms, elements or varieties of law (legal system). Individual rules also belong to the legal system (in the sense of being law).

Legislatio must not necessarily (exclusively) be linked only with legislation as the creation of general norms, but also with the entire function of creating law. There can be also "judicial legislation". Law is not necessarily linked only with the sense "statute" (as lex); it may represent also a universal name of all the modes of law. However, from the point of view of the doctrine of sources of law legislation appears as the paradigm source of law[2].

Statute law can be defined as any law which is made directly, or in the way of proper legislation. Judiciary law is any law, which is made indirectly, or in the way of judicial or improper legislation.

The principal difference between statute law and judiciary law lies in a difference between the forms in which they are respectively expressed. A statute law is expressed in general or abstract terms or wears the form or shape of a law or rule. A law (or rule of law) made by judicial decisions, exists nowhere in a general or abstract form.

And what about the self-confident opinion of Paulus about the relationship between *regula* and *ius* (sceptical towards subsumption): "*Non regula ius sumatur, sed ex iure, quod est, regula fiat*. Not from the rule (an abstract sentence) law is concluded, but from the accessible law (law at hand, at disposal) the rule is created"[3].

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[1] Here I do not enter into a discussion about rules, norms or principles. Just it is to be mentioned that e.g. Robert Alexy puts rules and principles together under the roof of the concept of norm. See: R. Alexy, *Theorie der Grundrechte*, Baden-Baden 1994, p. 72. Also see, e.g. the definition of "norm" in: E. Pattaro, *The Law and the Right*, [in:] *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 1, Dordrecht 2005, p. 415. The statue of Polykleitos was called *κανών* as a measure acknowledged for the beauty relationships of the human body. Valid principles of rhetoric and grammar have been also called *κανών*.

[2] R.A. Shiner, *Legal Institutions and the Sources of Law*, [in:] *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 3, Dordrecht 2005, p. 7 (Chapter 2: *Legislation*).

[3] Paulus, *Digesta*, 50, 17, 1.

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INTERMEZZO

Aleksander Peczenik is still in good memories: at the time of a round table discussion in the High Tatras in Slovakia in May 1996 there was an exchange of views on the sources of law and on the role of the precedents in the legal systems of Sweden, Poland and Slovakia.

> Let me say that legal reasoning in Sweden has some special properties. Legal problems are in Sweden often viewed as a problem of harmonization of the statutes and other materials often regarded as sources of law; e.g. travaux préparatoires, precedents, standard contracts, collective labour agreement and juristic literature are prominent sources of this kind[4].

From the Slovak side, the status of the travaux préparatiores has been discussed as a matter closely related to a source of law (especially explanatory reports in connection with statutes)[5]. The paradigm of Aleksander Peczenik was already that time that a legal system must be presented as a coherent whole.

ON THE SOURCES OF LAW: SHOULD WE PUT PRECEDENTS IN THIS CATEGORY?

John Austin is in his work abot the uses of the study of jurisprudence is making a distinction also between necessary concepts and unnecessary concepts[6]. Is the concept of "sources of law" really a necessary one?

The concept of sources of law is not free from ambiguity and it is interpreted in various ways[7]. John Austin in his *Lectures on Jurisprudence*, when he is dealing with the various sources of law, tries to be very exact:

> In many legal treatises, and especially in treatises which profess to expound the Roman law, that department or division which regards the origin of laws, is frequently entitled *De juris fontibus*. This expression *fontes juris*, or sources of law, is, of course, metaphorical and is used in two meanings. In one of its senses, the sources of a law is its direct or immediate author. […]

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[4] A. Peczenik, *The Ways of Legal Certainty*, [in:] *Rule of Law. Collection of Papers*, ed. A. Bröstl, Košice 1996, pp. 22–27.

[5] See: A. Bröstl, *On Legal Doctrine and Some Rechtsstaat-Principles*, [in:] *Rule of Law…*, pp. 8–13.

[6] J. Austin, *On the Study of Jurisprudence*, [in:] *The Province of Jurisprudence Determined*, Indianopolis–Cambridge 1998, pp. 367–368.

[7] E. Pattaro, *Temi e problemi di filosofia de diritto*, Bolona 1994, p. 24: "The notion of the sources of law is, on the face of it, ambiguous because it assumes what the law is and does not specify the term »source«". H. Kelsen, *Reine Rechtslehre*, Wien 1960 (new-print 2000), p. 238: "The source of law (when he is speaking about the "so-called" sources of law – A.B.) is a metaphorical expression, which has more than one meaning".

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In another acceptation of the term, the fountains or sources of laws are the original or earliest extant monuments or documents by which the existence and purport of the body of law may be known or conjectured[8].

And so, (in regard to the English law) the statutes, the reports of judicial decisions, with the old and authoritative treatises which are equivalent to reports, may be deemed sources (in the sense last mentioned) of English jurisprudence, whilst the treatises on the English law, which merely expound the matter of those statutes and reports, are not sources of English jurisprudence, but are properly a legal literature drawn or derived from the sources[9].

Sources of law are linked with the essence of law, with the essential rules (regulations) or the foundations. Basic of a source of law is the generality of the rule (norm) which is been considered as it.

Maybe the first distinction made within the sources of law is this one concerning sources of law in the material sense and in the formal sense (*fontes iuris oriundi*). Norberto Bobbio distinguishes at least three sources of law: sources for the validity of law, sources of law-making, sources for the cognition of law[10].

Sources of law (*fontes iuris cognoscendi*) are also possibly divided into official and unofficial sources[11]. Official sources include first of all the Collection of Laws (e.g., Dziennik Ustaw, Zbierka zákonov or Gesetzesblatt). Looking for an example it is possible to mention Article 87 Section 1 of the Constitution of the Republic of Poland adopted on April 2, 1997, which stands: "The sources of universally binding law of the Republic of Poland shall be the Constitution, statutes, ratified international agreements (treaties), and regulations"[12].

Act No. 400/2015 Collection of Laws in the Slovak Republic on Creating Legal Regulations and on the Collection of Laws of the Slovak Republic and on the amendment of other legal regulations in its second part points out as official "sources" (although the word is not used here) "legal regulations, other legal acts and acts of international law"[13]. By legal regulations there is meant an abbreviation for the "generally binding legal regulations" which are declared in the § 1

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[8] J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, New York 1875, p. 255.

[9] *Ibidem*.

[10] N. Bobbio, *Consuetudine e fatto normativo*, [in:] *Contributi ad un dizionario guiridico*, Turin 1994. See also: A. Rotolo, *Sources of Law in the Civil Law*, [in:] *A Treatise of Legal Philosophy…*, Vol. 3, DOI: https://doi.org/10.1007/1-4020-3505-5_30, p. 143 ff. A special critical theory concerning solely the problem of the sources of law has been developed by Alf Ross. See: A. Ross, *Theorie der Rechtsquellen. Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen. Kap. XII. Der Begriff der Rechtsquelle*, Aalen 1989, pp. 290–315.

[11] L. Morawski, *Wstęp do prawoznawstwa*, Toruń 1998, p. 106 ff.

[12] M. Dąbrowski, *Źródła prawa powszechnie obowiązującego w Konstytucji z 1997 r. – katalog zamknięty czy otwarty?*, „Studia Prawnoustrojowe" 2004, nr 3, p. 91 ff.

[13] In this paper I do not deal with "acts of international law" in this sense with international treaties.

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Constitution of the Slovak Republic (henceforth as Constitution), constitutional acts, statutes (acts), ordinances of the Government of the Slovak Republic, and measures of the ministries, other central authorities of state administration, other authorities of state administration and the National Bank of the Slovak Republic.

As sources of law in a formal sense are usually considered the statutory law and the customary law[14]. The position that the court used law and the judge-made-law have no autonomous authority, comparable with those of the customary law, was dominating in the period of the origin of the Civil Code in Germany (*Bürgerliches Gesetzbuch*). The fathers of this Code have referred to Bernhard Windscheid, but at the same time they have announced that they consider the customary law as "a product of the further-creating activity (*fortbildende Tätigkeit*) of a judge".

What are the constituent elements of a legal system? Does it consist exclusively of the rules of law (legal rules) which have found expression in statutes and in precedents and which provide more or less clearly how particular questions are to be decided?[15]

How important and valuable is the concept of "sources of law?" Is it just able to bring confusions? Hans Kelsen also states that "legislation and customary law are often designated as the two »sources« of law"[16], whereupon under "law" only general norms (rules) of the state law are understood. "But", to continue in the argumentation of Hans Kelsen by the part which I am sharing too, "individual legal norms (rules) also belong to the law, they are part of the legal order (system) together with the general norms (rules), on the basis of which they were created"[17].

CONTINUATION ON PRECEDENTS AND THEIR BINDING FORCE

So, what about precedents? Thomas Hobbes was particularly sceptical about the value of precedent. To rely on the authority of precedent cases in his view would make justice depend on the decisions of a few learned or ignorant men.

Justice Benjamin Cardozo in his *The Nature of the Judicial Process* is providing us by his understanding of the role of a precedent (in creating legal certainty): "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles"[18].

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[14] H. Hübner, *Allgemeiner Teil des Bürgerlichen Gesetzbuches*, Berlin–New York 1996, p. 14.

[15] A. Grabowski, *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Nonpositivism*, Heidelberg–Berlin 2013, DOI: https://doi.org/10.1007/978-3-642-27688-0, p. 1.

[16] Similarly e.g. H. Hübner, *op. cit.*, p. 14: "As sources of law in the formal sense statutory law and customary law are considered".

[17] H. Kelsen, *op. cit.*, pp. 238–239.

[18] B.N. Cardozo, *The Nature of the Judicial Process*, New Haven–London 1921, p. 33.

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Justice William O. Douglas also attributed faithfulness to precedent as a matter of equality of justice, when he stated: "There will be no justice under law if a negligence rule is applied in the morning but not in the afternoon"[19].

Ronald Dworkin distinguishes in the line with the British and American lawyers when they speak about the doctrine of precedent between the "strict doctrine of precedent" (it obliges the judges to follow the earlier decisions of certain courts, even if they believe those decisions to be wrong) and the "relaxed doctrine" (just to give some weight to past decisions on the same issue)[20].

Taking into consideration the American law/legal system Frederick Schauer notes[21] that the pure acknowledgement of the "binding authority" in no way justifies an absolute duty to follow, but merely implicates the existence of "authoritative reasons", which could be overlaid by reasons of the same range or by reasons of a different nature. Joseph Raz points out to the conceptional strong binding force of the precedents in English law, but he also notices that judges in common law have a surprising flexibility at the application of the precedents[22]. Within the common law, the principle *stare decisis* is used distinctly strict. The main connecting-point Joseph Raz sees not in the determination of *ratio decidendi*, but in the technique of distinguishing.

In his large work published in 2017[23] and concerning precedents Mehrdad Payandeh concludes of the "norm-accesority" of the precedents, praising them as a "contribution to the content of the legal norms".

The judicial decision does not become a source of law in the sense of "binding normative validity", but it becomes a comparative measure of the later juristic (legal) reasoning[24].

When speaking about precedents in the continental legal system (with focusing on Slovakia), there are two possibilities to speak about them (precedents or quasi--precedents): decisions of the two "highest courts" are concerned.

There is an old refrain: the institutional power of the highest courts is derived from their competence to decide upon remedies or other procedural means raised against decisions of lower courts. It applies at least theoretically that non-respecting of a constantly and consistently defended legal opinion of a higher court by a lower court is running the risk that its decision may be overruled/abolished later on.

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[19] Search in: M.I. Urofsky, *William O. Douglas a Common Law Judge*, "Duke Law Journal" 1991, Vol. 41, DOI: https://doi.org/10.2307/1372702, p. 133 ff.

[20] R. Dworkin, *Law's Empire*, Cambridge 1986, pp. 24–25 ff.

[21] F. Schauer, *Authority and Authorities*, "Virginia Law Review" 2008, No. 94, p. 1991.

[22] J. Raz, *The Authority of Law*, Oxford 1998, pp. 183–184.

[23] M. Payandeh, *Judikative Rechtserzeugung: Theorie, Dogmatik und Methodik der Wirkungen der Präjudizen*, Tübingen 2017, p. 136 ff.

[24] K. Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin 1991, DOI: https://doi.org/10.1007/978-3-662-08711-4, p. 432.

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Precedents are established this way, by the decision-making of the highest courts. The mission of the continental courts is still understood more/rather in the level of a guarantee of constitutionality and legality of the application of law by lower courts than in the level of an autonomous law-making activity. This is indirectly confirmed by the fact that the *ratio decidendi* of a decision becomes legally binding only after its repeated confirmation by the competent highest court in its decision-making activity. The role of a continental court is first of all to apply law (statutes)[25].

In the relationship to the decisions of the Supreme Court of the Slovak Republic and to their binding force and their impact on the decision-making of "lower" courts (before the establishment of the Constitutional Court in spring 1993)[26], there is not possible to speak about precedents in the real sense of the word. The best distinction and introduction in this respect has been made in the decision of the Regional Court from 14 May 2014, which is worth to be quoted:

> Legal theory and judicial practice are distinguishing between two basic types of binding force of the Supreme Court decisions – the cassation (instance, e.g. in the same matter) binding force, and the precedential (judicatory) binding force. Since in the first case of the so-called cassation-binding force the lower court is always obliged in unchanged real and legal circumstances of the matter accept the legal opinion of the Supreme Court declared in the decision, in the case of the so-called precedential binding force there exists a possibility for the general court of any degree (instance) to reflect/not reflect the legal conclusions of the Supreme Court in the way, that the respective court will in good fight its concurring considerations and it will begin a kind of reasonable legal dialogue with the concrete decision of the Supreme Court[27].

Act No. 400/2015 Collection of Laws in the Slovak Republic on Creating Legal Regulations and on the Collection of Laws of the Slovak Republic and on the amendment of other legal regulations.

Other (legal) acts published (promulgated) *via* Collection of Laws (Journal of Laws) are mentioned – among them § 13 letter a) of the Act No. 400/2015 Collection of Laws: the decisions of the Constitutional Court of the Slovak Republic as a special judicial body of protection of the Constitution.

The binding force of these decisions (decisions on the compliance of a statute/Act with the Constitution) according to the respective Act No. 385/2000 Collection of Laws on Judges and Assessors is in relationship to the judges defined in § 2 Section 3 as it follows:

> A judge is in the exercise of its function independent, in decision-making bound only by the Constitution of the Slovak Republic, by a Constitutional Act, by an international treaty pursue to

[25] R. Procházka, M. Káčer, *Teória práva*, Bratislava 2013, p. 235.

[26] P. Toth-Vaňo, *On the Precedential Binding Force of the Judicial Decision (Also According to the Civil Dispute Order). O precedentnej záväznosti súdneho rozhodnutia (aj podľa Civilného sporového poriadku)*, „Justičná revue" 2016, No. 68, pp. 603–621.

[27] Resolution of the Regional Court in Banská Bystrica, No. 17 Co 410/2014 /of 14 May 2014.

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Article 7 Section 2 and 5 of the Constitution, and by a Statute. The legal opinion of the Constitutional Court of the Slovak Republic included into the content of its decision issued in the proceedings according to Article 125 Section 1 of the Constitution initiated on the proposal of a court has for the court a binding force.

According to Article 125 Section 6 of the Constitution valid decisions of the Constitutional Court issued within the proceedings on compliance legal regulations with the Constitution are generally binding. A judge cannot reject his/her binding by the finding of the Constitutional Court with reference to Article 144 Section 1 of the Constitution (Judges are independent…)[28].

Expressed in another language the decisions (findings if we exactly follow the texture of the legal regulations in this respect) of the plenary of the Constitutional Court are important because of its elements of generality and binding force. Beside the decision (finding) of the Constitutional Court in the proceedings on the compliance of statutes with the Constitution it concerns also another type of plenary decision (before, until 2001 a decision of a Senate) of the Constitutional Court issued in the proceedings on the interpretation of the Constitution of the Slovak Republic or a Constitutional Act (in case if there is a dispute between two authorities) pursue to Article 128 of the Constitution.

These two types of decisions of the Constitutional Court "are binding *erga omnes* and *pro futuro*"[29], until the Constitutional Court does not change them by itself or if there will be a change (amendment) of the Constitution. The decisions of the Constitutional Court are "abstract precedents *de iure*, because they are generally binding *ex constitutione*"[30].

DO JUDGES MAKE-LAW? DO THEY APPLY LAW? WHAT ARE THEY DOING?

Is it possible to defend the thesis that judges are making law regardless to the type of legal culture they are part of?

Classical Athens had no notion of binding precedent, but litigants in the surviving court speeches frequently referred to past court verdicts in making their arguments.

William Blackstone in this respect assumes that the judge is not empowered to make (to create) new law, his task is to observe (maintain, uphold) and to interpret

[28] J. Drgonec, *Súdna tvorba práva ako prostriedok uplatnenia zákona, zabezpečenia spravodlivosti a právnej istoty (Judicial Law-Making as a Means of Application of a Statute, Securing Justice, and Legal Security)*, „Justičná revue" 2008, Vol. 60, pp. 711–727.

[29] T. Ľalík, *O sudcovskej tvorbe práva (On the Judge Law-Making)*, „Justičná revue" 2014, No. 1, p. 16.

[30] *Ibidem*.

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the old law (as a maximum: to clean the old law from wrong interpretations). John Austin in his criticism of Bentham's position toward judge-made law, among others delivers this explanation: "I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated […]". He goes even further in his conclusion: "That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislative"[31].

The office of the judge is older than the modern theory of separation of power: it is into this doctrine only in a manner, as it was mentioned by Rudolf Smend in 1962: "The Judiciary is only found by the separation of power and badly and ordered into its scope". Christoph Schönberger continues in this sense:

> This lies in the paradox of the bindingness of the judge by the law. The judge is bound by the law, but he is deciding on the basis of his/her independence on what shall be understood by the binding law he is bound by. This paradox became especially clear in relationship to the highest courts, to the *Grenzgerichte*, as the Austrians say[32].

The whole problem is traditionally nipped in continental Europe. Since the transition to a modern constitutional state, there has been a kind of reasoning here dealing with a contradiction-pair of law-making and law-applying. Law-making is linked with and located at the first power and in a limited scope also at the second power; the third one – the judicial power – shall only be occupied by the application of law. This view has been very consequently followed in the constitutional law of the French Revolution. That time Maximilien de Robespierre was even very eager to take out the word "jurisprudence" in the sense the judge-law-making from the use of the language. It is looking like the radicality of The Incorruptible is in the same cold-up form still partially well-present in our out-dated doctrine of the "sources of law"[33].

According to Jerzy Wróblewski, an increased use of general clauses in legislation has denoted a more or less open delegation of norm-creating power from the legislator to the courts of justice[34].

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[31] J. Austin, *The Province of Jurisprudence*..., p. 191.

[32] Ch. Schönberger, *Höchstrichterliche Rechtsfindung und Auslegung gerichtlicher Entscheidungen*, „Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer" 2012, Bd. 71, pp. 298–299.

[33] *Ibidem*. M. Robespierre: "Ce mot de jurisprudence des tribunaux, dans l'acception qu'il avait dans notre ancien régime, ne signifie plus rien dans le nouveau ; il doit etre effacé de notre langue. Dans un État qui a une Constitution, une législation, la jurisprudence des tribunaux nést autre chose que le loi : alors il y toujours identité de jurisprudence".

[34] Wróblewski enumerates the following sources of law acknowledged with his ideology of free decision-making: legal practice, social rules, social facts and social regularities, evaluation of facts connected with law. See: J. Wróblewski, *The Judicial Application of Law*, Dordrecht–Boston 1992, DOI: https://doi.org/10.1007/978-94-015-8050-2, pp. 270, 273–314.

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In the legal system of the Federal Republic of Germany (which is considered to be strongly statute-oriented) the concept of precedent is defined broadly, in the sense of any prior court decision or decisions which may have bearing on a later case, which decisive emphasis is still laid on the justificatory reasons given in support of the prior decision. Precedents are frequently cited by the higher courts, and they are usually followed by the lower courts. However, if a court deviates from a precedent it will usually identify the prior decision in question and openly set out its reason for departing from it[35].

The precedent-connected term *Richterrecht* (judge-made-law) is in Germany also used ambiguously. It concerns all decision-rules (value measures), which are impossible to be "taken out" from the statute without any valuable, command-creating acts of a judge. Usually, judgements made by the last instance courts are meant here[36]. According to the majority opinion the judge-made-law is denied to have the source of law "quality". This position is based on the view concerning the theory of the division of power: for this theory, the law-making (creating) acts of the judiciary are alien to the system of law.

According to the probably prevailing view in Germany, there are only two sources of law of domestic law: legislation and customary law (traditional authors like Enneccerus, Karl Larenz). The position that the court used law and the judge--made-law have no autonomous authority, comparable with those of the customary law, was dominating in the period of the preparation and adoption of the Civil Code.

Later on, more and more the self-standing importance of the judiciary law (judge-made-law) has been acknowledged, partially it was also politically welcomed. Even supporters faithful to statutes belonging to the school of *Interessenjurisprudenz* did not close up themselves before this doctrine.

As Karl Engisch points out:

> […] in the course of our searching became in many places clear that statutes can be applied, interpreted and if necessary amended and set forth on the basis of evaluations which are belonging to the "greater cosmos" of law, in which the statutes are integrated. Once again it should be commemorated that the subsumption (e.g. of a truck under the concept of a "enclosed space") is not anymore unambiguously flowing out from the statute and from its ratio readable evaluative equalization/identification of the case to be decided with the cases doubtless concerned, that further the application of the principle "cessante ratione…" is asking for an evaluation which is reaching far out of the statute[37].

Coming back again, the aim of the doctrine of the sources of law is to determine the criteria for establishing what the law is: "In this way, the mentioned doctrine is

[35] See more detailed characteristics in: R. Siltala, *A Theory of Precedent: From Analytical Positivism to a Post-Analytical Philosophy of Law*, Oxford–Portland 2000, pp. 123–127.

[36] B. Rüthers, *Rechtstheorie*, München 2011, p. 149.

[37] K. Engisch, *Einführung in das juristische Denken*, Stuttgart–Berlin–Köln 1989, p. 192.

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connected with the concept of law, because a source of law can become only this what has been before acknowledged as law"[38].

Finally, in responding to the question about the modes, species or forms of law (instead of insisting upon the question about the determination and identification of sources of law and non-sources of law), the question of the nature of the precedent and its binding force probably such a structured answer can be offered (and further discussed, of course) as Eugenio Bulygin is going for:

a) judicial decisions are complex entities that contain both individual rules/norms and general rules/norms,
b) in an important sense of "creating" is that judges do not create individual rules/norms; instead, they create, at least in some instances general rules/norms,
c) while the general rules/norms created by judges are not binding, they can come into force, and when they do, they become a part of the legal order,
d) an important contribution to the creation of law is the formulation of definitions of legal concepts by judges,
e) case law is the set of general rules/norms in force that are created by judges and the definitions in force that are formulated by judges[39].

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STRESZCZENIE

W artykule poruszono problematykę precedensu (w systemie *common law* i systemie prawa stanowionego) jako źródła prawa. Autor przedstawia koncepcje filozofów prawa, często przeciwstawne, dotyczące rozumienia samego terminu „źródło prawa". Ponadto analizuje możliwość kwalifikacji orzeczeń sądowych (w tym precedensowych) jako źródła prawa oraz dokonuje porównania funkcjonowania precedensu (quasi-precedensu) w systemach prawnych kilku państw (m.in. Stanów Zjednoczonych, Anglii, Słowacji, Polski, Niemiec i Szwecji), z położeniem nacisku na Słowację. Autor podaje, iż orzeczenia Trybunału Konstytucyjnego Republiki Słowackiej mają moc wiążącą dla sądów, jeżeli były one wnioskodawcą postępowania. Orzeczenia Sądu Najwyższego posiadają dwa rodzaje mocy wiążącej. Pierwsza to moc kasacyjna (w sprawie będącej przedmiotem rozpatrzenia), druga zaś – precedensowa moc wiążąca, charakteryzuje się brakiem obowiązku zastosowania przez sądy powszechne.

Słowa kluczowe: precedens; quasi-precedens; źródło prawa

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