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СУЧАСНА МЕРЕЖА ПРАВОВОЇ СИСТЕМИ І АТИПОВІ ДЖЕРЕЛА ЗАКОНУ

Анотація. *Проблема класифікації джерел права в науковій літературі ще досконало не вивчена. Розподіл джерел права зводиться до вивчення одного з видів права – нормативно-правового. Тому основна мета роботи полягає у вивченні сучасної багатосторонньої юридичної системи і атипових джерел права. Встановлено, що каталог джерел права зростає протягом століть. І практично неможливо уявити повний каталог нетипових джерел права через його динамічні зміни і суперечливий характер деяких з джерел. Автором проаналізовано прецедентне право міжнародних судів, рішення конституційних судів, коригування закону (і коментарі до кодексів), митне і звичайне право, модельні дії, рекомендації (розроблені державними органами та іншими учасниками ринку), стандартні контракти. У роботі визначено, що для управління різними секторами ринків необхідно створювати різні види державних органів, як одних із сучасних правових інструментів, для їхнього захисту.*

Ключові слова: багатоцентрова правова система, система цивільного права, конституціональні трибунали, європейський рівень.

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СОВРЕМЕННАЯ СЕТЬ ПРАВОВОЙ СИСТЕМЫ И АТИПИЧНЫЕ ИСТОЧНИКИ ЗАКОНА

Аннотация. *Проблема классификации источников права еще досконально не изучена в научной литературе. Распределение источников права сводится к изучению одного из видов права – нормативно-правового. Поэтому основная цель работы сводится к современной многосторонней юридической системе и атипических источникох права. Установлено, что каталог источников права растет на протяжении веков. И практически невозможно представить полный каталог нетипичных источников права из-за его динамических изменений и противоречивого характера некоторых из источников. Автором проанализировано прецедентное право международных судов, решения конституционных судов, корректировки закона (и комментарии к кодексам), таможенное и обычное право, модельные действия, рекомендации (разработанные государственными органами и другими участниками рынка), стандартные контракты. В работе определено, что для управления различными секторами рынков создаются различные виды государственных органов как один из современных правовых инструментов для их защиты.*

Ключевые слова: многоцентровая правовая система, система гражданского права, конституциональные трибуналы, европейский уровень.

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MODERN MULTI-SOURCE LEGAL SYSTEM AND ATYPICAL SOURCES OF LAW

Abstract. *The problem of classifying sources of law has not yet been thoroughly studied in the scientific literature. The distribution of law sources is reduced to the study the one of the types of law – regulatory. Therefore, the main purpose of the work is to study the modern multilateral legal system and atypical law sources. It has been established that the catalog of law sources has been growing over the centuries. And it is almost impossible to present a complete catalog of atypical law sources due to its dynamic changes and the contradictory nature of some of the sources. The author have analyzed the case law of international courts, decisions of constitutional courts, amendments to the law (and comments on codes), customs and customary law, model actions, recommendations (issued by government agencies and other market participants), standard contracts. The presented work determined that various types of state bodies are being created to manage various sectors of the markets as one of the modern legal instruments for the protection of weaker ones.*

Keywords: multi-centres legal system, civil law system, Constitutional Tribunals, European level.

INTRODUCTION

One of the fundamental questions in legal science is about sources of law. The accepted catalogue of sources oflaw in each jurisdiction reflects the historical evolution of this jurisdiction. It also helps differentiate one legal system from another. Nowadays the most typically accepted sources of law are similar in the same type of jurisdictions; then these are statutes for civil law countries and case law for common law countries. However, regardless of a type of jurisdiction, with regard to the catalogue of sources of law we can observe two interesting phenomena.

Firstly, the traditional differences between types of sources of law present and popular in particular jurisdictions diminish significantly. It is clearly visible in common law jurisdictions where more and more statutes are passed. Although they are drafted differently than in civil law countries, because they tend to be much more detailed and, in consequences, lengthy, and they serve different purposes than in civil law countries (mainly to fill legal gaps not ruled by precedents or to change the existing precedents), in practice they regulate more and more issues and are becoming more important practically. There also exist jurisdictions that are practically half-common law, half-civil law. It includes not only mixed legal systems (for example:

Scotland, Republic of South Africa, Israel), but also jurisdictions regarded as typical common law ones. For example in Canada private law is definitely common law, but criminal law is partially codified: while some issued are regulated by the code, defences are most part of the common law [1].

Similarly in civil law system, although precedents are not accepted as biding and case law is not regarded as a source of law, the importance of case law is growing. M. Shapiro even correctly noted that in any jurisdiction judges make law however they deny that they do it – he calls it a paradox [2]. The access to judgments of the highest courts is faster and easier thanks to technological development and as a consequence the awareness of their existence is much higher. As a result, although possible, it is very unlikely that the lower courts would not follow the interpretation of law given in a judgment of Supreme Court [3]. One could say that in civil law jurisdictions case law is practically a source of law because of the authority of the highest courts, not because of the rule of law, as it is in common law [4].

Secondly, the catalogue of sources of law is constantly growing over the centuries. As the world is becoming more developed, the instruments we use are more sophisticated: it includes financial and legal instruments. We also have more and more sources of law and laws generally. However, the legal nature of many sources of law and their binding force are frequently unclear. Some of them are even named soft law [5], while a crucial feature of a legal norm is its binding force, so by nature it cannot be soft. Moreover, as a result of more complicated nature of a legal system, the art of judicial interpretation is more visible and important. As a consequence it seems that the awareness of the influence of personalities of judges on the way of their interpretation of law and as a result on the content of law is also rising [6; 7]. The growing number of sources of law means that next to traditional sources we have more and more sources that are atypical ones.

1. MATERIALS AND METHODS

The phenomenon of atypical sources of law will be dealt with more thoroughly in this paper, because their existence turns every legal system into multi-source and multi-level legal system. Multi-level legal system is described as "multicentryczność" in Polish legal language. It means that there exist many "centres" which have power (competence) to produce legal norms and the centres are not in a hierarchical order. The theory was developed by E. Łętowska [8–9].

In this paper wewill try to point out some atypical sources to illustrate problems with analysing their legal nature. Our thesis (which fits within the theory of legal pluralism [10]) is that nowadays we have a broad catalogue of diverse sources of law and every modern legal system must be seen as a multiple-sourcesystem. Surprisingly, it seems that a phenomenon of multi-source legal system is not a new one, because always, to some degree, there were more than one accepted, formally or practically, source of law. However, currently this feature of a legal system is much

more important and the role of atypical sources of law in practice is unprecedented [11]. The expansion of atypical sources of law is a result of losing the exclusivity of law making by the states: as we have increasing number of law makers, we also have increasing number of sources of law [12–14].

We believe that it is almost impossible to present a full catalogue of atypical sources of law because of its dynamic changes and controversial nature of some of the sources (it is not clear if they could be called sources of law). The atypical sources of law are a product of practice of law: some of them could be regarded as such sources of law only as long as they are regarded as such in practice. However, to prove the thesis on multi-source character of every legal system and the existence of atypical sources of law, at least some of such sources must be dealt with. To point them out in this paper, an inductive reasoning is applied: an existing in practice phenomena are assessed against their normative function (if they "operate" and are respected as sources of law). As a result of necessary selection, the paper briefly deals with the following sources of law:

– case law of international courts and domestic constitutional courts;
– restatements of the law;
– customs and customary law;
– model acts;
– recommendations of public authorities and other bodies;
– standard contracts.

2. RESULTS AND DISCUSSION

2.1. Case law of international courts

Although the formal legal status of case law of domestic courts as a source of law is different in common law and civil law jurisdictions, the difference disappears with regard to judgments of international courts: particularly in European context Court of Justice in Luxembourg and European Court of Human Rights in Strasbourg. Their judgments are binding for the states: EU member states and the parties to the European Convention on Human Rights respectively. The judgments either directly provide the individuals with legal protection or require (force) the states to amend their laws. As an example, a famous case Leitner [15] could be pointed out where the Court of Justice decided that everybody may ask for damages in case of loss of enjoyment. As a result of this case law in Member States either had to change or the already existing law is interpreted in a way allowing for compensating non material loss. For example Polish Supreme Court resolution of 19.11.2010, III CZP 79/10 where Polish law was interpreted in accordance with European law as applied in Leitner case to find legal grounds to pay damages for loss of enjoyment (because of problems with holidays) [16].

Then it is impossible to say that nowadays case law of some international courts is not a binding source of law. However, the binding force of case law of interna-

tional courts may be explained differently. For example case law of Court of Justice of EU could be regarded as internal law of the international organisation (namely EU) to which Poland is a member [17].

2.2. Judgments of constitutional courts

The constitutional review became nowadays a standard in modern democracies. It may be conducted by Supreme Courts (like in U. S.) or specially formed Constitutional Tribunals (like in Germany). In both cases, the aim of the courts is to control statutes passed by parliaments against the constitutional standards. As no constitution is exhaustive, the key result of constitutional review is to identify and develop legal principles hidden within constitutional rules. Then such principles have strong influence on interpretation and application of law by every court.

Formally, in the case of constitutional review we are dealing with traditional source of law – a constitution itself. The mentioned principles are included in the constitution and only "found" by the constitutional courts. However, it looks this way only theoretically. Practically, it is not clear which principles are included in the constitution and those "findings" frequently are controversial and based on vague and unclear constitutional rules. Then, undoubtedly, constitutional courts develop the content of constitutions through their case law. As a result such case law is definitely a modern source of law. In some countries its legal status is even strengthen: for example in Poland judgments of Constitutional Tribunal are published in the same way as statutes of parliament and it is said straight forward that they are commonly binding (according to the art. 190 of Polish constitution [18]).

2.3. Restatements of the law (and commentaries to codes)

The Restatements of the law are known in U. S. They are not statutes passed by legislator, but they resemble a piece of legislative work. They are prepared and published by American Law Institute. They are a collection of laws in force regulating given part of law (e.g. "Restatement of the Law. Contracts" [19]). They may be called "codified" (or better "collected") rules of law coming from case law. Though the restatements are not source of law, because such status have cases cited in them, but by the mere collection of chosen and published cases the restatements make them more popular and frequently cited. Then indirectly the restatements influence the content of applied law and as a result could be called atypical source of law. The effect of the restatements is strengthened by their structure. They are not only a collection of some excerpts from the cases, but the authors formulate rules of law out of the cases and write them down. It is like bottom – up codification of law, contrary to typical for civil law jurisdiction top – down approach.

Although the restatements are unique for U. S., because of their prestige resulting from the position of American Law Institute and traditional practical importance, they resemble commentaries to codes known in civil law countries. The commentaries

usually start with a rule of law from a code and then present cases where the rule was applied and provide with its in-depth interpretation. The restatements are similar as to the structure: they give a rule of law and then offer cases where it came from and where it was adopted and add commentary and examples. Obviously, the commentaries to codes in civil law jurisdictions are not sources of law even in the sense of the restatements, their authority is much less powerful, however undoubtedly they also influence the content of the applied law [3]. They are the source of knowledge about the law and then, judges educated by them, may be more eager to understand and apply the law as it is stated in a commentary. Then in this very indirect way the commentaries could be regarded as sources of law.

2.4. Customs and customary law

It is generally accepted that sources of public international law are listed in the art. 38 of the Statute of the International Court of Justice [20]. The Statute inter alia points out "international custom, as evidence of a general practice accepted as law". Although customs are commonly accepted as sources of public international law, it is not the case with, for example, private law. Nevertheless, it is becoming more and more obvious that customs are also sources of private law. It can be observe in two distinct contexts.

Firstly, with regard to international trade and international contracts. Sellers and buyers frequently use INCOTERMS [21] to regulate costs of shipping, insurance, and accidental destruction of the sold items. The precise INCOTERMS are included in a contract and as a consequence they are binding for the parties of the contract as part of the contract. But the content of the INCOTERMS is not drafted by the parties themselves as the rest of their contract, but INCOTERMS are prepared and published by International Chamber of Commerce in Paris. Then their meaning and interpretation given by the Chamber are standard and, indirectly, binding. They could be regarded as "codified" customary law. It's worth noticing that INCOTERMS are not exceptional. For example with regard to international building and engineering works to conclude contracts for construction FIDIC principles [22; 23] are used and, when adopted to the particular contract by its parties, have similar legal status as INCOTERMS.

Secondly, customs are sometimes directly referred to by the rules of law to help apply the rules in practice. In this context customs are not autonomous sources of law, because the scope of their application is limited by the statute, however they do influence the content of the law. The article 56 of Polish Civil Code is a very good example of this usage of customs. According to this rule a juridical act (an act in law, a legal act) shall have not only the effects expressed in it but also those which follow from statutory law, the principles of community life, and the established customs. Then in this context "the established customs" may even decide about the effects of juridical actsin the same way as statutory law does.

2.5 Model acts

Model acts by definition are not binding sources of law. They exist in both common law and civil law jurisdictions.

Model acts are particularly known in U. S. They are mostly prepared by Uniform Law Commission specially established in 1892 "to provide the states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law" [24]. The most successful are Uniform Commercial Code (UCC, first published in 1952) [25] and Uniform Probate Code (UPC, first published in 1969) [26]. Their aim is to give the states the opportunity to adopt such acts (with or without amendments) as their internal law. It is particularly necessary and valuable with regard to private law that, according to American constitution, mostly remains within the power (competences) of the states, not at federal level, and not all the states have enough resources to conduct the drafting process entirely. Moreover, similar law in most states is important for inter-states commerce and mobility of people.

Although model acts play particularlyimportant role in U. S., they exist also in other common law jurisdictions.For example in Canada model acts are drafted under the auspices of Uniform Law Conference of Canada [27].

In civil law jurisdictions the model acts are less popular. It is due to obvious reasons in countries that are much smaller than U. S. However, in case of bigger federal states like Germany, the regulation of private law matters is usually federal law issue, so the law is exactly the same in the entire country.For example German Civil Code (BGB – Bürgerliches Gesetzbuch) is in force in the entire Germany [28]. However, the idea of model acts developed together with strengthening ties between EU Member States and growing role of EU and European law. The same reasons that caused development of model acts in U. S., mostly concerning ease of cross border commerce, encouraged to undertake similar attempts to draft such model acts in Europe. These tasks were mostly carried out by academics. The efforts are particularly advanced with regard to contract law where, first, Principles of European Contract Law were released [29], and later Draft Common Frame of Reference [30]. The work almost ended by enacting EU-wide regulation on Common European Sales Law, but this initiative was blocked, and finally the proposal for European regulation was withdrawn [31]. Nevertheless, the results of this academic work is still useful for drafting EU law in the sphere of private law and the model acts are even sometimes used in practice with regard to national laws (as evidence of common European standard) [32–34].

There exist even model acts addressed to both common law and civil law jurisdictions worldwide. One of the most known example is UNIDROIT Principles of International Commercial Contracts [35]. Their preamble clearly says that they may serve as a model for national and international legislators. Moreover, they may be adopted by the parties as the law governing the contract they are concluding.

The model acts are commonly correctly regarded as soft law. They are not binding, but definitely they may influence "hard law". The model acts may be used by traditional legislators (national or supranational) to draft statutes or other typical sources of law. Moreover, they may influence the interpretation of existing laws, both international and domestic. In some cases, for example with the above mentioned sets of principles of contract law, they might even have been directly applied in practice if they had been chosen by the parties of the particular contract as the law governing the contract. Then, with the proper reservations, such model acts could be regarded as atypical source of law.

2.6. Recommendations (released by public authorities and other market players)

Different kinds of public authorities are established to control different sectors of markets as one of the modern legal tools to protect the weaker. For example quite frequently such authorities are supposed to control banks or capital markets. They are often provided with the power to issue different types of recommendations. They are expected to be obeyed by those who are controlled by the authorities. But with regard to the issue of sources of law, the legal status of such recommendations is very unclear and controversial. As they are not passed by legislative bodies, definitely they are not pieces of statutory law. And, because of their nature, they are not also "codifications" of customs or case law. More interestingly, they are binding to those to whom they are addressed to only. Either they have to comply with them to be able to be present on the market or at least the rule "comply or explain" applies according to which not following the recommendations has to be publicly disclosed, explained and justified. As the recommendations bind external autonomous subjects of law, mainly, if not exclusively, legal persons, in practice they operate like statutes.

The recommendations are issued not only by public authorities according to the competence given them by a statute. It happens that similar documents, but less formal, are produced by other market players. As an example the so called "Best Practices" released by Stock Exchange Companies could be pointed out [36]. All companies listed at a given stock exchange have to comply with them or publicly disclose with which rules they do not comply. Then the binding nature of such "Best Practices" in practice is clear.

Moreover, the stock exchange companies also regulate to some degree requirements that have to be met by other companies which want to have their shares traded on the given stock exchange. Although such regulations are obviously not binding commonly, practically they are binding for the interested corporations that would like to be traded on the stock exchange.

2.7. Standard contracts

Although it is theoretically apparent that a contract is not a source of law [37; 38], because it is binding only for its parties which willingly agreed to conclude the contract [39] (the third party effect of contracts is very limited [40]), the article 1103

of the French civil codeproves,how blur is the border between sources of law and contracts (It reads: "Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits"; means that contracts create duties for the parties equal to statutory duties and the parties have to obey the contract they concluded in the same way as they are obliged to obey the law). Despite the wording of the mentioned article of the French civil code that treats contractual duties as equal to statutory duties, the real issue in the context of the catalogue of sources of law concerns standard contracts [41]. They are produced by big providers of different services, like electricity, water supply or even mobile phone services. Obviously, theoretically, such standard contracts are not sources of law, as every contract, because they do not automatically bind anybody – they bind only those who accepted them. However, practically, for most people they are like law: the customers do not have enough bargaining power to negotiate their terms, so they only may accept or reject them. Taking into account type of certain services, like water supply for example, it is almost rationally impossible not to conclude such a contract. Then, for most such standard contracts, at least in practice, resemble operation of the law. It is even correctly noted by public authorities and legislators which pass rules to provide with special means to control the fair usage of such standard terms. One of the most effective instruments with this regard is the regulation of so-called abusive clauses. The regulation applies to both: typical contracts and contracts adopting standard terms. In EU this instrument is regulated at European level by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [42].

CONCLUSIONS

The analysis of only a few atypical sources of law presented in this paper, while there exist more in practice, proves that nowadays every legal system is a multiple source system. It is a fact that nobody can deny.

Then, it seems necessary and interesting at least to try to address the question of the reasons of growing number of atypical sources of law as it could help understand better if it is an ongoing process that will lead to constant development of new sources of law and if multi-source character of a legal system is a temporary or permanent feature.

Firstly, the more complicated structure of the states. Naturally, in case of federal states, we have federal sources of law and state (provincial) sources of law (the system of two levels sources of law). However, in European Union, which is not a traditional type of federal state yet, but rather a supranational organisation,now we have very particular category of European sources of law that prevail over national sources of law (this the consequence of accession to the EU and the case law of Court of Justice of EU). Then even traditional "state made law" is not as it was before: now it comes from different levels of government: domestic and supranational.

Secondly, "multi-centred"nature of legal systems. A hierarchical order of powers within the states is diminishing and the same may be said about an order of sources of law. For example in some countries it is even impossible to point out the highest court in the country and judgments released by the highest courts may even be contrary to one another. The same applies to power of national (domestic) governments that must give way to the power of supranational government. As a consequence nowadays a legal system does not have a "one centre", but many "centres" which all are the highest and equal to each other.A multi-centres legal system by definition requires multiple sources of law: each "centre" produces to some degree its own sources of law.

Thirdly, the result of globalization and technological development. The advancement of globalization and technology resulted in easier and more frequent international relations for people and for cross border business, also with regard to legal sphere. It must have led to increasing number and importance both: traditional public international law sources (particularly international law regulations of cross-border activities like customary trade law) and standards published by renowned international organizations to be applied in international contracts (for example FIDIC standard contracts).

Fourthly, the growing power of multinational corporations. They tend to avoid national courts to deal with their litigations. As a result, they not only insist on adding arbitration clauses to contracts that they conclude, but also more often decide not to choose law governing the contract, but rather in case of disputes let arbitrators to decide *ex aequo et bono*. As a consequence, judgments of important international arbitrations highly influence practice and serve as a source of law of non-state origin.

Fifthly, the increasing research and interest in comparative law. It results in frequent attempts to propose the unified sets of rules regulating different important issues. Such proposals, though not binding, have influence on interpretation of law in force and sometimes may even be adopted by the parties as part of a contract.

All the above mentioned causes result in creating multiple sources of law in almost every state. The sources differ significantly from one another: their legal nature and their binding force are not the same. As the mentioned causes are not temporary, it is predictable that the number of atypical sources of law will be still growing: the new sources will be probably even more complicated and the application of law will become even more difficult. As an ultimate reason, it all may lead to the necessity to modify the traditional meaning of sources of law to include the atypical sources of law to this meaning without reservations.

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