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Case Law and its Binding Effect in the System of Formal Sources of Law

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The author proposes changes to the traditional concept of formal sources of law. This concept originates in the 18th century, but it fails in adapting to the development of the law, especially in relation to principles of legal certainty and predictability of legal decisions. The definition of formal sources of law is also vague and unclear and it brings more problems than it offers solutions and insight. To replace it, the author offers a new distinction – based on the criterion of autonomy of the sources of law.

To support his arguments, the author compares the status of court decisions in common law and civil law systems, but also focuses on the difference between individual countries belonging to the civil law system. The comparative criteria are mainly focusing on nature and strength of the binding effect of the case law for the lower courts, but also on institutional aspects within the court hierarchy, e.g. if a judge can be liable in any way for ignoring a source of law.

Keywords: binding effect of judicial decisions, principle of legal certainty, predictability of judicial decisions, formal sources of law, case law, autonomy of sources of law, precedential binding effect, legal state, rule of law.

Content

Introduction

The goal of this paper is to sum up a current debate in legal theory in the Czech Republic concerning the binding effect of judicial decisions. I will also try to provide some insights into our thinking about formal sources of law in *civil law* (continental, Romano-Germanic) system, while also comparing these concepts to the *common law* (Anglo-American) system.

The best way to introduce the problem is to summarize concepts presented to students in faculties of law when they begin studying legal theory. In general, sources of law can be divided into formal sources of law and material sources of law. Material sources of law are reasons why the law is what it is, i.e. why the law has been enacted to regulate certain area.[1] Formal sources of law are the law itself. Formal sources of law contain normative rules of behavior, and it is possible to say that in general there are four types of formal sources of law.[2]

The first and the most important of them is legislation, i.e. legal acts in any form, whether they are statutes or other forms of legislation issued by lower entities than by national parliaments (e.g. municipal legislation). Then we have normative treaties. Treaties with applicability even on subjects that are not parties to the treaty itself. Even then normative treaties provide rights and obligations to those subjects. And again – we can see normative treaties with various normative powers. There are international treaties that some countries in some circumstances even consider more normatively powerful than their own statutes.[3] On the other hand, we can see collective treaties in labor law amending rights and obligations between employees and the employer. Their status is exactly opposite, since their normative power is lower than the normative power of statutes and even a lot of legislation of under-statutory level (e.g. orders and regulations of the government and of state departments).

And then we have two types of formal sources of law that have problematic status in the *civil law* context. The first of these is a legal custom. A legal custom was definitely a source of law from the historical perspective. However, nowadays in most *civil law* countries (including the Czech Republic), a particular legal custom is a source of law only in those cases when another source of law refers to it.[4] Therefore, its status of source of law is derived from another source of law (in most cases, a statute). Last, but not least, a source of law in formal sense is also a precedent. We know precedents mostly from Anglo-American legal context. To be

[1] See *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71.

[2] See *Knapp, V.* Teorie práva. Praha: C.H.Beck, 1999, ISBN 80-7179-028-1, pp. 129–130. Also *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71.

[3] E.g. the Czech Republic does so in Article 10 of the Czech Constitution, which states: "*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.*" It, therefore, does not state that international treaties are higher in the hierarchy of sources of law than Czech statutes. To be precise, it is only provided that their applicability is preferential. An international treaty applies and the Czech statute does not apply in case of the conflict between these two. But the statute is not derogated only by the fact of this conflict.

[4] See *Knapp, V.* Teorie práva. Praha: C. H. Beck, 1999, ISBN 80-7179-028-1, p. 136.

exact in my analysis, I will use the term "precedent" only in its traditional meaning, i.e. only in the context of *common law* system, where precedents are indisputably a formal source of law. When talking about *civil law* system, binding effect and role of court decisions in this system, I will use the term "case law".

However, I believe there is no great distinction between precedents in *common law* system and case law in the *civil law* system. I think that we still perceive them as distinct notions in legal theory only because of the historical context. In the contemporary legal systems, excessive distinguishing between conceptions of case law in *civil law* system and precedents in *common law* system is rather detrimental and is obscuring the development that legal systems of both civil law and common law nature made in recent decades. Yet, I believe there are some differences, so it is still useful to differentiate those two terms in this analysis. My goal in this article is to demonstrate problems of using the dualism of formal and material sources of law. I want to examine, whether the traditional view of sources of law based on this criterion is still actual and not outdated. Because especially concerning court decisions, the division on formal and material sources of law produces several paradoxes. I will argue there is another way to classify sources of law that is not as vague as the traditional classification of sources of law. It also provides new perspectives of sources of law. I am talking about division on autonomous and non-autonomous sources of law.

My goal is also to describe the way legal systems' perception of case law changed over time. I want also to show how legal theory perceives legal systems only in general contours and fails to acknowledge that the general claims about legal systems are not in accordance with state of the law in the particular legal systems. Even though the main method used in this paper is normative and its goal is to point out problems of current notions of legal theory, the paper uses comparative method concerning the status of case law in individual countries of *civil law* and *common law* system to show that the problem of case law is not so easy and clear as it is presented by the main body of the legal theory doctrine.

1. Binding Effect of Case Law

Each legal theory textbook openly and explicitly states that *civil law* systems do not know precedents and do not recognize them as a source of law. There are some exceptions to when we can consider a judicial decision as a source of law, and the Czech legal system knows only one exception of this kind. It is a situation when the Constitutional Court derogates a provision of a statute or another legislation because of its unconstitutionality.[5] This court decision has, therefore, the status of a formal source of law just because it in some way changes the legislation (which is a source of law). The term for this is "negative legislation" and it is considered as one of the types of *abrogation* as the statutory rule involved is no longer deemed

[5] For the Czech example, see *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71. It is the same, hovewer, in *civil law* system in general. E.g. German constitution provides in § 31(2) that, in several cases and especially where the court invalidates legal norms, these decisions have the force of statutes ('*Gesetzeskraft*'). See *Alexy R., Dreier, R.* Precedent in the Federal Republic of Germany. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 26. The same goes for decisions of the Constitutional Court of Italy. See *Taruffo, M., La Torre, M.* Precedent in Italy. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 154–155.

to "exist" in the legal system, it is not perceived as a full-fledged precedent as we know it from *common law*.[6] However, it is the only one instance where we can (in the traditional perspective) indisputably state that a decision of a court is a source of law in the context of *civil law*. Therefore, we must conclude that from the traditional perspective, the *civil law* system recognizes as a source of law only two of all four possibilities – legislation and normative treaties.

The case law has, in eyes of the legal theory, the same position since the 18th century.[7] In the traditional view, it is forbidden to courts in *civil law* system to make new general legal rules, to create new legal norms. The court is there to solve a problem of two parties in a dispute and its decision is binding only to those two parties, i.e. we call this effect an *inter partes* binding effect. What is forbidden, at least from this theoretical historical perspective, is for a court to make a rule that would be applicable *erga omnes*, even to parties not participating in this dispute. Therefore, a court cannot make a general rule that would be binding for other courts when deciding a case in a future which is similar to a case already decided. Therefore, from this proposition it is understood that the *civil law* system does not recognize precedents as the *common law* system does.

If we look at the binding effect of a decision from another perspective, we can also differentiate cassational and precedential binding effects. *Cassational binding effect* needs no further explaining. This effect takes places if a higher court derogates a lower court's decision. Therefore, when the lower court is making a new decision, it is logically bound by the decision made by the higher court. This type of effect is binding only to the parties of the proceedings, especially the lower court. It has, therefore, only *inter partes* effect. Cassational binding effect is undisputed and is part of all court systems which are based on the hierarchy of courts.

The second type of binding effect is called *precedential*. This might be at the heart of a dispute because the term precedential might imply that this effect applies only in legal systems where precedents are recognized as a source of law. However, this thesis would not be right. Precedential binding effect means that a decision that was previously made, is in some way binding for other courts. And I must make one clarification, because the word "binding" might be understood ambiguously. In legal theory, we tend to make one fundamental mistake as we consider a decision to be either fully binding or not binding at all. To make an analogy, the patient is either alive or dead. There is no middle ground. We, therefore, can have precedents that are fully binding in a normative way, or there is no binding effect at all. In my opinion, the more valuable perspective is to perceive varying degrees of binding effect. A patient may be alive, but he is still not able to walk, he is in a coma, he has to be on a specific diet, or he depends on regular medications. By accepting a bipolar view of either binding or non-binding court decisions, we fail to differentiate all the possibilities, how a previous decision can be accepted by other courts in their own argumentation, or how ignoring a previous decision might in fact mean unlawfulness of a court decision or even its unconstitutionality.

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[6] See *Taruffo, M., La Torre, M.* Precedent in Italy. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 154–155.

[7] One of the fathers, to whom we can award credit for the way how court decisions are regarded in *civil law* systems is Montesquieu, who in the middle of the 18th century formulated the division of powers in the way we perceive it nowadays – separating all three powers of a state – legislative, executive, judicial. See *Taruffo, M.* Institutional Factors Influencing Precedents. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 458.

In the following text, I will address a binding effect as a *precedential binding* effect, as I believe that it is an effect that is a part of all jurisdictions, even those of the *civil law* system. I want to note, however, that the issue of precedents and general applicability of rules postulated by courts is not a concept known only in *common law* countries. The history of the sources of law is more complicated than that. E.g., in the 16th century Italy court decisions had a binding character and we could look at them just like we perceive *common law* precedents today. *Regie Costituzioni* issued in 1729 stated that judges are bound, firstly, by the laws issued by the prince, secondly, by local statutes approved by the prince himself or by his predecessors, thirdly, by judicial decisions taken by the courts, and finally, by the i*us commune*.[8] In this sense, we would probably contend that case law was the formal source of law. However, in 1848, Article 73 of *'Statuto albertino'*, which later became the constitution of the new Italian kingdom, ascribed the power of interpreting the law with general validity only to the legislator.[9]

2. Historical Context of the Status of Case Law

The embodiment of the historical and traditional conception of case law not being a source of law can be found in § 12 of Austrian Civil Code[10] enacted in 1811. This provision states: "*The judgments given in individual cases and the judgments handed down by judges in particular disputes have never the force of a law; they cannot be extended to other cases or to other persons.*" The question I want to ask is, whether the rule as stated in § 12 of ABGB is still valid – if it is adhered to and if it is still applied. To be precise, it is controversial, whether this provision states a prohibition against the use of precedent.[11] Similarly, Article 5 of the Code civile[12] declares: "*it is prohibited for judges to decide by way of general provisions and rules on the cases that are brought before them*".[13]

What I want to bring up in contrast is § 13 of Czech Civil Code[14] enacted in 2014. This provision states: "*Anyone demanding legal protection may reasonably expect that his case will be decided in the same way as any other legal case that has already been decided and which corresponds to his or her legal case in essential consequences; if the case is decided otherwise, anyone seeking legal protection has the right to a compelling explanation of the reason for this deviation.*" This formulation of the rule seems to be in opposition to the statement that case law is not a source of law. To a legal theorist it may seem like a revolution, however, it is not so. This rule is only a result of a long process of development in the field of constitutional law and of other legal principles. An explanatory report to the Czech Civil Code in the reasoning for implementation of this provision into Czech legal order refers to Eugen Ehrlich, Austrian legal scholar and sociologist of law, who states that

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8 See *Taruffo, M., La Torre, M.* Precedent in Italy. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 183.

9 Ibid.

10 Allgemeines Bürgerliches Gesetzbuch (knows as ABGB), JGS Nr. 946/1811, Austrian Civil Code.

11 *Alexy, R., Dreier, R.* Precedent in the Federal Republic of Germany. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 32, quote Bydliski.

12 *Code civil des Français* enacted in 1804, French Civil Code.

13 See *Troper, M., Grzegorczyk, Ch.* Precedent in France. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 104.

14 Czech statute No. 89/2012, Civil Code.

adjudication of the same or similar cases differently is not the law, but arbitrarity and whim.[15] Reasonability of this normative rule is, however, argued not only on the basis of thoughts of legal theorists. The authors of the draft of the Civil Code also argue with the case law of the three highest courts of the Czech Republic – the Constitutional Court, Supreme Court and Supreme Administrative Court.[16] These courts refused "judicial arbitrarity" while deciding comparable cases differently.[17] The Constitutional Court emphasizes the importance of reasonable expectation that similar cases will be decided similarly to the previous decided cases, which are comparable.

Furthermore, authors of the Czech Civil Code argue that this normative construction (and they explicitly state that the conception of § 13 follows the principle of *stare decisis*)[18] has been accepted to promote legal certainty and stability of the law.[19] On the other hand, they warn against a conservation of decision-making practice while quoting E. Tilsch: "A statute is a rule written for present." It is, therefore, necessary to interpret and apply general legal norms with regard to the actual circumstances in the society.[20] That is the most frequently intimated objection to the binding effect of precedents, because the doctrine of *stare decisis* has a tendency to slow down and impede development of law. Authors of the Czech Civil Code, however, at this point state that this provision is not supposed to prevent changes in interpretation of the law and therefore hamper its development with regard to the current situation in the society.[21]

I think it is important to comprehend how the *civil law* system went from the premise that case law cannot create general legal rules and that it is not binding to other courts, to the new premise that case law has a precedential binding effect, which means that courts have to take into account previous decisions. Additionally,

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15 Explanatory report to the Czech Civil Code, § 13, p. 42, quotes *Ehrlich, E.* Grundlegung der Soziologie des Rechts. 1st edition. München: Duncker & Humblot, 1913, p. 106.

16 Explanatory report to the Czech Civil Code, § 13, p. 42.

17 Explanatory report to the Czech Civil Code, § 13, p. 42 quotes the decision of Czech Supreme Administrative Court No. 398/2004.

18 This is very interesting, since *stare decisis* is a concept from the *common law* system. It is the principle, which forms the ground of binding effect of precedents in Anglo-American legal system. However, applicability of this principle is refused even by many of those, who claim that case law has a binding effect even in the *civil law* systems. See *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 224. However, there are also authors who state that some courts of *civil law* countries have already started to apply the *stare decisis* principle at least in "*de facto*" sense. E.g., see *Barceló, J. J.* Precedent in European Community Law. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 433, also stating: "*To our knowledge, stare decisis has not been discussed in any ECJ opinion, but Advocate General Warner has addressed the topic both in one of his opinions and in scholarly writing. Warner's opinion in the Manzoni case, Case 112/76, [1977] ECR at 1657, is one of the clearest statements in support of the role of stare decisis in Community law, at least in Article 177 preliminary rulings on questions referred to the ECJ by a member state court. He stresses uniformity as the major purpose underlying the Article 177 procedure and the stare decisis doctrine: 'to hold that a ruling of the Court under Article 177 had no binding effect at all except in the case in which it was given would be to defeat the very purpose for which Article 177 exists, which is to secure uniformity in the interpretation and application of Community law throughout the Member States.' This, it seems to me, is where the doctrine of stare decisis must come into play.*" Ibid., p. 424: "*But one could say something similar about judgments of the US Supreme Court. They derive their validity from the US Constitution. But that does not prevent them from being sources of law and binding precedents.*"

19 Explanatory report to the Czech Civil Code, § 13, p. 43.

20 Ibid.

21 Ibid.

even though courts are not bound by the case law absolutely (i.e., they can issue a different decision even in similar case), they have to provide reasoning and reasons for this change. Is this only the case of the Czech Republic? Is the development in the Czech Republic different from that of other *civil law* countries? The answer is no. All legal systems of *civil law* at least in some way have accepted the notion of a precedential binding effect.

3. Rule of Law and the Legal State as Principles in the Background

An area of constitutional law sits on the throne of all legal systems of contemporary states. Our current notion of a state consists of two main presumptions. The first one is that the state should be democratic. All the power in the state belongs to the people. The power exercised by the state is therefore derived from the power of the people. The second presumption concerns the *legal state* (in the Anglo-American doctrine it is called the *Rule of Law*, but there are some key differences between legal state and the Rule of Law, which are not the cornerstone of this paper, I will therefore continue with analysing the notion of the legal state, which is a part of the *civil law* system doctrine). Legal state (or, in German, *Rechtsstaat*) is a doctrine in continental European legal thinking originating in German jurisprudence.[22] This doctrine implies the existence of a constitutional state, in which the exercise of governmental power is constrained by law.[23] Since this article is not focused on the analysis of the legal state, I will mention only two of the principles that govern the legal state. The first one is that law must be accessible and, insofar as possible, intelligible, clear and predictable, and that law must afford adequate protection of fundamental human rights. The second principle that must be noted – the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.[24]

These theoretical notions are manifested even in the positive law. Mainly in the aforementioned constitutional law, but also in the Czech Republic in § 13 of the Civil Code indicated above. One of the constitutional rights is a right to a fair trial, and one conclusion that the European Court of Human Rights,[25] European Court of Justice[26] and the constitutional courts in individual countries of the continental

[22] See *Tiedemann, P.* The Rechsstaat-Principle in Germany: The Development from the Beginning Until Now. In: *Silkenat, J. R., Hickey, J. E., Barenboim, P. D.* The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat). New York: Springer, 2014, ISBN 978-3-319-05585-5, p. 172.

[23] See *Sellers, M. N. S.* What Is the Rule of Law and Why Is It So Important? In: *Silkenat, J. R., Hickey, J. E., Barenboim, P. D.* The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat). New York: Springer, 2014, ISBN 978-3-319-05585-5, p. 4.

[24] See *Venter, F.* The Rule of Law as a Global Norm for Constitutionalism. In: *Silkenat, J. R., Hickey, J. E., Barenboim, P. D.* The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat). New York: Springer, 2014, ISBN 978-3-319-05585-5, p. 96.

[25] See *Albu v. Romania*, No. 34796/09, 10 May 2012. Available: http://hudoc.echr.coe.int/eng?i=001-110805 [last viewed 08.06.2018].

[26] *Barceló, J. J.* Precedent in European Community Law. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 422: "*In* Da Costa v. Nederland se Belastingadministratie*, Cases 28-30/62, [1963] ECR 31, the court stated member state courts are bound by prior ECJ decisions: they must either apply the previous decision or refer the question for a new ruling. The ECJ seems to regard its decisions as directly applicable sources of law binding on member state courts unless and until the ECJ itself alters the decision*."

legal system have arrived at is a right to the predictability of judicial decisions.[27] But other principles also apply – the principle of legal certainty, equal treatment under the law, uniformity of the legal system. All these principles support the concept of the binding effect of case law. These principles are used while arguing in favor of binding effect of judicial decision, whether in the *common law* jurisdiction, or *civil law* one.

Next to the reasons of the rule of law, stressing the importance of the citizen's ability to rely on the durability of pre-announced decisions in matters of law, formal justice reasons, captured with the slogan "treat like cases alike" it is possible to bring up the reasons of legal expediency. Aspects of this argument are deterring the expense of money and time involved in speculatively re-arguing points already determined by the highest judicial authority.[28] The use of precedent promotes judicial economy and efficiency, and conserves the resources of judges, lawyers and parties. Once an issue has been thoroughly examined by a court and resolved, it becomes "settled" and does not have to be examined anew in subsequent similar cases.[29] The practice of following precedent also "depersonalizes" decisions and thus renders it more likely that losing parties will adhere to the decision without the winning party having to resort to coercive measures (with attendant friction and waste). Losers will see that the decision is not merely "against" them, ad hoc, but "against all others similarly situated".[30]

An interesting point is that the presence of *stare decisis* in English law and its absence in French law derive paradoxically from the same purpose – the desire of a central government to strengthen and consolidate its authority. In England, the doctrine of precedent assisted the royal courts in gaining authority over the decentralized customary courts. Had the royal courts failed to follow their own decisions, they would have created uncertainty as to what the "common law" was and thus undercut the common law's authority. In France, the French kings sought to consolidate power over the local law-giving bodies by claiming exclusive legislative power for themselves. The leaders of the French Revolution apparently followed the same purpose in forbidding judges to lay down the law.[31]

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[27] E.g. the Czech Constitutional Court in its decision III. ÚS 252/04 held: "*In general terms with respect to the binding effect of judicial decisions, the previous interpretation of the law should be a starting point for the judicial decision-making in similar cases, unless there are sufficient reasons backed by rational and persuasive arguments for the change in the case law.* Ibid.: "*(From the thesis of the reasonable expectation) does not follow the categorical impossibility of change on interpretation of the law, but the obligation for this change with regards to the concrete circumstances (e.g. development in the society) to be predictable, or in case of an inpredictable change for it to be accompanied with transparent reasoning with rational and objective arguments. (…) Only following this process rules out, in the possibilities of human cognitive limits, arbitrarity while applying the law.*" Also in a decision I. ÚS 3143/08 the Constitutional Court held that the predictability of judicial decision-making is one of aspects of a right to a fair trial.

[28] *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 334.

[29] *Summers, R. S.* Precedent in the United States (New York State). In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 382.

[30] Ibid.

[31] *Barceló, J. J.* Precedent in European Community Law. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 425.

4. Common Grounds for Case Law in Common Law and Civil Law

In the previous chapters I have shown that a precedential binding effect has its place and is applied even in *civil law* system. Even though the continental legal system does not know precedents from the traditional perspective, the precedential binding effect has found extensive support. And that is how the conflict arose. The traditional legal theory concepts are still based on the 18th century notion of two types of formal sources of law, while the development in the applied law lead to the case law starting to have the same effects as if it was a source of law. The § 13 of Czech Civil Code is not the change itself, it is just a codification of the principle that has been a part of the constitutional law for a few decades now.

I want to provide a short comparison between precedents in *common law* context and the effect, which the principle of predictability and the principle of legal certainty as formulated by the constitutional law have on the case law in the *civil law* context. I tried to identify some point, based on which we can identify the common ground between those two contexts.

4.1 Taking Previous Case Law into Account

The first point is the obligation of the court to take into account previous case law. And this is definitely true for both *common law* and *civil law* systems. There can be an interesting perspective of the France and its legal order. French courts are known for providing only a very brief reasoning, in which they do not cite case law.[32] On the other hand, it is also known that Cour de cassation is very thorough while examining the previous case law. The fact that it is not cited directly in the reasoning of the decision does not change anything regarding the fact that the Cour de cassation holds a steady interpretative line of decisions. We can, therefore, state that even the countries with a practice of very concise judicial reasoning that does not involve directly quoting a previous case, do not necessarily disrespect the previous case law in their courts.

Even though French legal system is based on statutes, if one looks at the material that is in fact used, one realizes that the precedents are the most important here. The Civil Code itself only plays its role through interpretation that has been yielded by a precedent. One famous example is that of Article 1384 of the Civil Code, stating that one is liable for damages caused by "things that one has to guard". This provision was very rarely used by the courts until the Cour de cassation decided that these "things" meant machines, which caused injuries to factory workers, thus making the proprietor, the "guardian" of the machine, liable for these injuries. Hence, Article 1384 became one of the main bases of the law of torts.[33] Without the change of the statute itself, its application changed just because of the case law development.

4.2 Possibility to Change the Case Law

The second point is whether the case law can be changed. And again, we must conclude that it is possible in both legal systems. It may be more difficult with

[32] See *Troper, M., Grzegorczyk, Ch.* Precedent in France. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 112.

[33] Ibid., p. 113.

precedents in the *common law* system,[34] but both systems know a procedure to change the case law that has become outdated or is simply considered wrong.[35] There is no problem with overruling in the common law system despite the principle *stare decisis*. A superior court with the power to overrule can do so and does explicitly. The ratio of the overruled case then ceases to have any authority.[36]

However, there is a very interesting and significant difference between *common law* and *civil law* system. In *civil law*, when a judge is deciding a case, he has a possibility to follow a previous decision that was similar and decide in the same way. Or he may distinguish, which is a term known from *common law* system meaning that the judge provides reasons why he believes that the case is not similar and, therefore, it is possible to decide differently. Furthermore, he has the third option – to state that the previous decision was wrong (the statutory rule was not interpreted correctly, the judge failed to apply the rule that he was supposed to apply, the application of the accepted rule would lead to absurd outcomes, etc.) and decide differently, while arguing his position. Whichever of these three options the judge chooses, it is still in accordance with the principle of predictability.

It is, therefore, considerably easier for a judge to change the previous case law than for a judge in *common law* system to change a precedent, because in *common law* a court is bound to follow a precedent, unless the need for a new legal rule far outweighs the need for stability, predictability, and uniform application of the settled rules.[37] It is, therefore, a matter of weighing whether the benefit of changing a long-standing rule and interpretation is greater than brought by respecting an old rule, which is beneficial for stability and predictability of the law. Admittedly, legal certainty is a part of formal justice, and legal certainty is generally beneficial; but one aspect of justice or utility can sometimes outweigh another, and when it does, surely, the precedent should not be followed.[38]

I believe that the main difference between continental and Anglo-American system is the degree of stability that these systems strive to obtain from the court system. In the *civil law* system, the stability is derived mainly from codifications in the form of statutes. Therefore, it is possible to allow courts and judges to look for the most optimal rule and to abandon legal opinions that are less then optimal. No weighing is done for the protection of legal certainty and predictability of law, because the leading idea is that a court has to decide a case that is here right now and should not focus on other cases. The fact that its decision will in some way

[34] Concerning the possibility of changing the precedents, see *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 325–326.

[35] See e.g. for the United Kingdom *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 335: "*Precedent is an 'indispensable foundation' for law giving 'at least some degree of certainty' and a 'basis for orderly development of legal rules'. But precedent, if taken too rigidly, 'may lead to injustice ... and also unduly restrict the proper development of the law'.*"

[36] *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 342.

[37] *Summers, R. S.* Precedent in the United States (New York State). In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 380.

[38] *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 335.

influence future decisions is not taken into account in the moment of making a decision, as the primary goal of a *civil law* court system is to decide a case between two parties. On the other hand, in *common law* system, codification is not as extensive and vast as in the continental system. The importance of the stability of court decisions is, therefore, significantly greater. The primary guarantors of the stability of the law are the courts and not the legislator. Therefore, the courts have a higher standard regarding change of the previous case law, even though the new rule might provide a more optimal outcome. But unless the benefit from the outcome is of such significance that it outweighs deserting the *stare decisis* principle, the change will not be made.

Points of this chapter, however, do not in any way alter the fact that the case law is binding even in the continental system. The possibility of the change does not exclude the binding effect. Even in case of efforts to change the case law, courts must provide reasoning behind this change.

4.3 What is the Position of Case Law in Relation to Legislation?

The third point is whether the case law has the same power as legislation does. It will not be surprising that in the *civil law* system the answer is no. Yet, the same answer applies to the *common law* system. Precedents in the *common law*, even though they are a source of law, do not have the same power as legislation. A precedent has to be viewed as a subordinate source of law,[39] since the legislator (a parliament) can revise statute law in the light of current judicial (mis) interpretations, if it sees fit to do so.[40]

When the legislation changes, it is one of the reasons to alter the case law, as the legislation is usually one of arguments used in the judicial reasoning. As this underlying argument changes, it is not only possible but also necessary to change the case law that has been based on this legislation. In the *civil law* system, the position of case law in terms of its binding effect is explicitly derived from the validity of the legislation. However, this is true even regarding the *common law* system![41] We must remind ourselves that the sources of law have a hierarchy, both in *civil law* and *common law* systems. Legislation has a higher normative power than case law and (some of) normative treaties. The hierarchy of sources of law ordered by their normative power in the Czech legal system:

- the Constitution and constitutional statutes (legislation),
- international treaties (normative treaty),
- "regular" statutes (legislation),
- orders and regulations of the government and of state departments (legislation),
- collective treaties between employer and employees (normative treaty).

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[39] *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 331.

[40] Ibid., p. 329.

[41] *Summers, R. S.* Precedent in the United States (New York State). In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 365 argues that in other areas the existence of relevant statutory text requires that the language of the statute in question is the primary point of analytical departure and, of course, statute law prevails over any conflicting precedent. So, too, the constitution prevails over statute and case law. Also, a precedent interpreting a statute becomes a binding interpretation for future cases.

Therefore, even now the sources of law have a hierarchy. They are not all on the same level. Therefore, I do not think that this is a barrier to stating that case law is a source of law, as follows from the reason of having a lower normative power. The only thing we would be doing is adding one more bullet to this list at the very bottom – case law.

Right now, the case law is in the same category as legal literature (i.e. *communis opinion doctorum*). We call this category secondary sources of law. There is no need to explain why legal literature is not binding to a judge. A judge may or may not use arguments from the literature and may or may not decide in accordance with it. Maybe instead of arguing what case law has in common with legislation and normative treaties, the argumentation might possibly be as to how it differs from a legal literature – because if we do not state that case law is a source of law, it will still belong to the category of secondary sources of law, which generally have no binding effect.

There is a difference in the degree of decision's deficiency, if a judge fails to apply a piece of legislation in comparison with a situation when he fails to follow the previous case law. If he rules against an explicit provision of a statute, his decision is flawed, and we perceive the degree to which it is flawed as very high, because legislation is an important cornerstone of the *civil law* system. On the other hand, if a judge fails to follow the uniform case law of his appellate court, his appellate court will annul his decision in the same way as if he did not apply a statutory provision. Even though the deficiency of the decision is not perceived as high as in a case of the conflict with legislation.

The result will be, therefore, the same in both scenarios. The decision will be abolished and returned for obtaining a new decision, or decided directly by the higher court (depending on the procedural provisions). But again, let me once again remind of the wording in § 13 of Czech Civil Code. There is a right to a reasonable expectation that the case will be decided in the same way as the previous cases. However, it is not stated that the decision must always be same as the previous decisions. The second sentence of this provision specifies that if the case is decided otherwise then there is a right to an explanation of the reason for this deviation.

I believe this is interesting even in the context of the aforementioned right to a fair trial, because the next of its aspects is a right to a proper reasoning and argumentation. If the decision does not contain substantiation, it is also flawed.[42] Therefore, I believe that § 13 of Czech Civil Code just specifies and concretizes an aspect of a right to a fair trial – the part concerning proper reasoning and argumentation.

4.4 Recognition by the State

The legal theory doctrine provides that the legal norm is only such a rule of behavior that has the form of the source of law **recognized by the state**.[43] What does it mean that the source of law is recognized by the state? I believe it is not necessary to discuss legislation and normative treaties, because it is unequivocal that states recognize those two entities as sources of law.

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[42] See e.g. *H. v. Belgium*, No. 8950/80, 30 November 1987. Available: http://hudoc.echr.coe.int/eng?i=001-57501 [last viewed 08.06.2018]. Also *Suominen v. Finland*, No. 37801/97, 1 July 2003. Available: http://hudoc.echr.coe.int/eng?i=001-61178 [last viewed 08.06.2018].

[43] *Harvánek, J.* Teorie práva. Brno: Masarykova Univerzita, 1998, ISBN 80-210-1791-0, p. 144. Likewise, *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71.

We might argue that from the historical perspective the status quo is that case law is not a source of law. We might dispute the wording of ABGB, of French Civil Code and texts of historical legal theorist. However, can we assume that the state recognized the case law as a source of law, if highest courts of this state in accordance with international obligations recognize the precedential binding effect of the case law? Can we assume a state recognized it, if executive and legislative branch does not react to the decades' long development in the case law? Can such a consideration as what is a source of law be recognized conclusively without any explicit provision? And does accepting a wording of the § 13 of Czech Civil Code by a legislator mean that the state recognizes the case law as a source of law?

The problem is that from the historical perspective, the traditional view of formal sources of law has been based on the explicit wording of statutory provisions. We might assume that the formal sources of law are only statutes and normative treaties, because the ABGB provided so and because it is stipulated by Code Civil in France. We might, therefore, conclude that with regard to Austria and France the situation is clear. But what about the countries that do not have these explicit provisions? The Czech Republic is one of them, but it definitely is not alone. The concept of formal sources of law is a concept of legal theory, and we cannot assume that every country will explicitly incorporate it into its positive law. Should we then state that the Czech Republic recognizes only legislation and normative treaties as sources of law based on the fact that it is a part of *civil law* system family? Because the only provision in the Czech Republic concerning this issue is the newly accepted § 13 of the Czech Civil Code and, also, the Article 89(2) of Czech Constitution stating: "*Decisions of the Constitutional Court are binding for all authorities and persons*." This provision is controversial in a sense of determining its exact meaning. I stated previously that in the Czech Republic only Constitutional Court decisions that abolish a provision of legislation are recognized as a source of law. This provision, therefore, is not interpreted as implying that Constitutional Court case law is a source of law, at least among legal theorists. Judges of Constitutional Court might be of a different opinion, and they base the existence of a *precedential binding effect* on this particular provision.

However, we still have not found, what should be a basis for determining the sources of law recognized by the Czech Republic. This problem shows that the criterion of recognition by the state is the next criterion of formal sources of law that is unclear and poorly defined.

4.5 Ability of Sources of Law to Provide Rights and Obligations

The next objection could be based on the fact that no right and obligation to any subject in the *civil law* system can be established by the case law. The typical foundation for rights and obligations is legislation. However, legal rights and obligations can be based even on normative treaties, at least nowadays. We considered normative treaties as sources of law even in times when in an international law it was not accepted that individuals as subjects could invoke their rights and obligations based on international treaties. International treaties were at that time providing rights and obligations only to negotiating states. The so-called "classical" international law only recognized states as subjects of international law and exclusively governed state's rights and duties.[44] States were the sole subjects

[44] *Orakhelashvili, A.* The Position of the Individual in International Law. *California Western International Law Journal*, Vol. 31, No. 2, 2000, p. 243.

of international law, whereas no direct relation between that law and individuals existed.[45] Therefore, I do not believe that we can use this criterion to argue that normative treaties are, and in history have been, sources of law. Because if we used this criterion, it would mean that the criterion of providing rights and obligations to individuals was not met in the era of classical international law. The international subjectivity of individuals is a fairly new phenomenon that developed in recent decades, i.e., at the same time as the development of a precedential binding effect of court decisions. Nevertheless, we consider international treaties as a source of law, but we do not do so regarding the case law.

Concerning the collective treaties, i.e. the normative treaties entered into by an employer and employees' unions, their status is also problematic. Their scope is very limited by the fact that they are a source of law of under-statutory level. This could lead into argument that they are only a specification of what a statute provides. Their normativity is, therefore, significantly limited and to a great extent derived from the statute itself, as a situation of entering into a contract can impact rights and obligations of third parties uninvolved in the contracting process is not usual in the law.

4.6 Autonomy of Source of Law

Probably the strongest argument against perceiving the case law as a source of law is the autonomous status of legislation in contrast with the character of case law, which is in one sense derived from the legislation. One of the key differences between the *civil* and *common law* system is that in the *common law* system it is possible to base a court decision solely and exclusively on the precedents. That is what (at least theoretically) could not happen in *civil law* system.[46] Legislation is a cornerstone on which the *civil law* legal system is based upon. The courts, therefore, always use at least some legislative provisions. If a court were not to use any provision of legislation, it would be a departure from the usual practice. Even if a judge would have to solve a case in the area that is new and with regard to which the law failed to react, the judge would still use legislation. E.g., if it is a case about biogenetics (a lot of *civil law* countries still lack regulation concerning this topic, or it is not exhaustive) or virtual property, a judge will always use at least some provision of legislation. If the concrete legislation concerning this topic does not exist, the judge will use arguments *per analogiam* and will use the legislation that is closest to the topic, he will use the principles of the legal field, he will also provide arguments with the abstract constitutional rights (a right to property in case of virtual property, a right to life in case of biogenetics).

We could, therefore, argue that this is the reason why the case law is not a source of law in *civil law* system, because court decision cannot be based solely on them. The definition of formal sources of law yielded by the doctrine usually stipulates

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[45] *Orakhelashvili, A.* The Position of the Individual in International Law. *California Western International Law Journal*, Vol. 31, No. 2, 2000, p. 243.

[46] See *Taruffo, M., La Torre, M.* Precedent in Italy. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 158. But there are even authors who believe the opposite is also true. See e.g. *MacCormick, D. N., Summers, R. S.* Further General Reflections and Conclusion. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 533: "*It is no longer true that a well-justified judicial decision in a civil law country must always include a citation to the nearest applicable statute or code provision, no matter how remote or otherwise problematic the citation (again, France aside)*."

that it is a form that contains individual legal norms and which provides those rules with a character of law.[47] We could call this argument an autonomous applicability of the formal sources of law. Unfortunately, it is not an argument that would be used and defined by the legal theory doctrine. It is time to stop differentiating between formal sources of law and secondary entities, which can influence a court and which court can but does not have to use. Because from the above reasoning, the case law is not among those entities that a court can ignore. Moreover, there is a debate in Spain whether a jurisprudence should be a source of law.[48] In Sweden, legislative preparatory materials are a formal source of law.[49] In Norway, legal theorists came up with a conclusion that case law did not have a normative binding effect, but at the same time claimed that it was a formal source of law.[50] In other words, the current notion and definition of formal sources law is vague and the criteria for including some entity between sources of law are not applied uniformly among individual legal systems, even among those who are a part of the *civil law* system family. It is not a failure of those legal theorists to interpret the concept of formal sources of law correctly. There are different types of binding effects of case law that developed in jurisdictions of individual countries that were formulated only within the last decades, while the traditional concept of formal sources of law just failed to incorporate them into its framework.

If I propose to forsake the traditional division on formal and material source of law, what should I suggest regarding our view upon the sources of law? The criterion that I believe is more important to qualify an exact nature of sources of law, and that tells us more about the legal system, is a criterion of autonomy. Any norm or rule, which may constitute an independent basis of a judge's decision, shall be called an autonomous source of law, that is, such a norm or rule, which may be an independent source of our rights and duties. Such norms and rules, in turn, which cannot constitute an independent basis of judicial decisions, and from which we cannot directly derive our rights and duties, shall be called a non-autonomous source of law.[51] We would, therefore, categorize legislation (Constitution, constitutional statutes, "regular" statutes and understatutory legislation) and normative treaties as autonomous sources of law in the *civil law* system. In *common law* system, the precedents would also join the autonomous sources of law. Therefore, we would have three types of autonomous sources of law in *common law* countries (legislation, precedents, normative treaties) and two types of autonomous sources of law in *civil law* countries (legislation, normative treaties).

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[47] *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71.

[48] See *Miguel, A. R., Laporta, F. J.* Precedent in Spain. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 278–279.

[49] See *Bergholtz, G., Peczenik, A.* Precedent in Sweden. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 298.

[50] See *Eng, S.* Precedent in Norway. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 199: "*The Supreme Court treats its own previous decisions as arguments that must be taken into consideration, without, however, determining the result in the case at hand; that is, the previous decisions can be outweighed by reasons pulling in the direction of another result. This practice corresponds to not being formally binding, yet having (outweighable) force.*" Ibid, p. 202: "*During the twentieth century Norwegian lawyers have come to see precedent as a source of law independent of statute or custom. Before that a different view held sway: case law was seen as evidence of custom, that is, not as in itself constitutive of the law.*"

[51] See *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 233.

All the remaining rules and principles, which are specified as the reasons for the judicial decision should be included among the non-autonomous sources of law. Besides the case law in *civil law* system, even doctrine and jurisprudence would be a non-autonomous source of law. That would apply to both *civil law* and *common law* system.

The lack of autonomy of case law as a source of law is expressed in the fact that it is the main function of case law in the *civil law* countries to ensure uniform application and interpretation of the existing law and not to create new rules or correct the existing ones.[52] However, case law plays the leading role among non-autonomous sources of law. Case law functions in the strictest connection with statute law, since in practice these are judicial decisions, which determine the interpretation of the law.[53]

What exactly have we done here? Did we leave the notion of formal sources of law, which had three representatives in *common law* system and two representatives in *civil law* system just to make a new division, just named differently, but with exactly the same representatives? Did we just change the name? No, the goal here is not to make a new division just for the very fact of making a new division. The proposed change needs to happen because the traditional formal sources of law division fails to grasp the changes in the development of the law. On the other hand, the problems of this concept are not only a question of recent development. I believe, that the inner inconsistency is the problem of this theory from the beginning.

5. Problem of General Rules

What inconsistency do I have in mind? There are two main problems with the formal sources of law definition and what we expect from it. The most usual argument used against case law being a source of law in the *civil law* countries is the argument that case law cannot create general rules in *civil law* context. This is an argument that seems obvious. However, actually, is not true. The above discussion of the binding effect of case law makes it evident that case law creates some form of rules even in the *civil law* context. Doubtlessly, those rules are of different nature than precedents in *common law*. But still – if a court states that the annual interest of 30 % is not an 'usury' and, therefore, does not violate the principles of morality, while in other case it states that annual interest of 70 % is an 'usury' and it does violate the principles of morality and hence, the provision of contract specifying this amount of interest rate is null and void – what else is it than creating a general rule? As discussed above, courts are bound by previous case law and must decide in line with the previous case law or provide reasons for different decision.

This example is a simplification, e.g., the Supreme Court in the Czech Republic does not base its interpretation of the term 'usury' solely on the annual interest rate, there are also other criteria that come into play. However, the term 'usury' is provided by the legislator. It is a term used in the Czech Civil Code – but like many other statutory terms, it is quite vague and needs a further interpretation: "*If a person exploits distress, inexperience, mental weakness, agitation or carelessness of the other party when concluding a contract and causes the other party to promise*

[52] See *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 234.

[53] Ibid.

or provide to him or another person performance whose property value is in gross disproportion to the mutual performance, such a contract is invalid."[54] It is, therefore, up to courts to determine, whether a specific contract fulfills these conditions. The legal state and the rule of law should require and respect a requirement that this practice of interpretation must be consistent and predictable to people.

In the above example, the court defined a rule that 30 % was not sufficient to qualify as a gross disproportion with regard to the mutual performance, while stating that 70 % is enough. Therefore, the court in those two subsequent decision created two general rules: 1) 30 % annual interest is not a usury, 2) 70 % annual interest is a usury. We still have a range of 30 % to 70 % annual interest, in which the courts will still have to balance and interpret the statutory provision. The next decision might be that 35 % is not yet considered usury, however, in the next case the court could come to a conclusion that 50 % annual interest qualifies as usury. Therefore, the borderline between what is considered usury will come down from 70 % to 50 %, and the field of "uncertainty" will reign between 35 % and 50 %. Nevertheless, none of this states that a court might not change its view and change the case law. It is still possible to decide differently, and state that the previous case law was not correct – and decide differently. It is still in accordance with the principle of legal certainty, if there is a sufficientsubstantiation.

This is an easy example, as it presents only one variable, plus this variable is easily quantifiable, as it is a number. Yet the same approach of creating general rules is observed in case law interpreting any other legal term, or even balancing two human rights (e.g. freedom of speech and a right to privacy).

To conclude, it is not true that courts in the *civil law* system do not create general rules. Of course, they do. They decide individual cases, but as we want their decision-making to be consistent, they have to look at the previous decisions and compare their case to them. Here, the general rules created by courts come into play. Of course, they are of different nature than legislative rules. Yet, what the traditional definition of formal source of law fails to grasp is that it is still a general rule. It is possible to quote Hans Kelsen here, as he stated that "*Judicial decision-making is not in any case just usage of the law. It is also a continuation of the process of the creation of the law. It is an act of individualization of the general legal norm*".[55] There are many cases, in which the change of the case law meant the change of the statute, even though the wording of the statute did not change at all.[56] This is not to say that courts have an unlimited power to create new law. Rather, it should be acknowledged that, even in the *civil law* system, the interpretation of codes and statutes is now based largely upon case law already interpreting these codes and statutes. Case law has become unavoidable means for the 'concretization' of legal

[54] § 1796 of Czech statute No. 89/2012, Civil Code.

[55] *Harvánek, J.* Poznámka k soudcovské tvorbě práva. In: *Večera, M., Hapla, M*. Weyrovy dny právní teorie 2017. Brno: Masarykovy univerzita, 2017, ISBN 978-80-210-8752-1, p. 298 quoting *Kelsen, H.* Všeobecná teorie norem. Brno: Masarykova univerzita, 2000, ISBN 80-210-2325-2, p. 297.

[56] *Harvánek, J.* Poznámka k soudcovské tvorbě práva. In: *Večera, M., Hapla, M.*. Weyrovy dny právní teorie 2017. Brno: Masarykovy univerzita, 2017, ISBN 978-80-210-8752-1, p. 305, reference No. 16. The example of France concerning the interpretation of the term 'things that one has to guard' referred to above in chapter 4.1 is relevant here. The change of interpretation of the liability for damages to include machines, which caused injuries to factory workers, which happened without the explicit change in the wording of the statute can also be an example of this issue (see chapter 4.1).

rules and principles.[57] In this context – is it possible that § 12 of ABGB is just a theoretical construction and pipe dreams of legal theorists?

It is often argued that if courts had the power to create general rules, it would be a violation of division of powers. It would mean interfering with the role ascribed to the legislator. I partially agree with this argument. I disagree with it in the context of case law as of "regular" interpretation of the law. Hierarchical court systems with regard for the uniformity of the case law will always be convergent as to the binding effect of case law. The precedent operates predominantly as a procedural device. It creates a burden of proof in favor of the solution laid down by the precedent case.[58]

There are, of course, rules and rules. The fear of allowing judges to create the rules is understandable in a sense of autonomous rules similar to those created by the legislator. This type of judicial activity does not, from historical perspective, have a place in the *civil law* system. If courts were to start creating legal norms in this way, it would be a reason for overruling these types of cases. Creation of general rules permissible in the *civil law* context means only the general rules created in the process of interpretation of autonomous sources of law. The judicial lawmaking outside the context of a concrete dispute is, however, a problem not just in the *civil law* system. It is not possible even in the *common law* system.[59]

I agree with the apprehension that courts might trespass upon their typical role of interpreting the law and deciding cases between individual parties, and this time really threaten the division of powers by interfering with the exclusive right of a legislator to create law. I do not see this type of threat in the precedential binding effect. On the other hand, we should perceive the types of consolidating and unifying opinions drawn up by high courts not in individual cases, but as their way of generally influencing the case law in their jurisdiction, with much greater fears than the precedential binding effect. Many high courts in European countries, especially in Central and Eastern Europe, have this competence. On the one hand, it is a positive way to unify the interpretation of statutes and promote predictability of the law, on the other hand, this is a power that should not belong to a court, but instead to a committee of Parliament or any other body associated with legislative power.

6. Consequence of the Violation of the Binding Effect

There are theories that attempt to differentiate between the types of binding effect and thereby support the traditional concept of formal sources of law. Under those theories, *precedents de iure* and *precedents de facto* can be separated.[60] We can

[57] *Taruffo, M.* Institutional Factors Influencing Precedents. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 459.

[58] *Bell, J.* Comparing Precedent. Cornell Law Review, Vol. 82, issue 5, 1997, p. 1246.

[59] See *Summers, R. S.* Precedent in the United States (New York State). In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 386.

[60] See *MacCormick, D. N., Summers, R. S.* Further General Reflections and Conclusion. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 532–533. From the French legal doctrine it is also possible to accentuate the term of 'relative binding force' (*autorite relative de la chose jugee*), which has the same meaning. See *Troper, M., Grzegorczyk, Ch.* Precedent in France. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 111.

differentiate between *precedents of solution* and *precedents of interpretation*.[61] And we can also set apart a *normative binding effect* and a *discursive binding effect*.

Without grinding heavily upon those theories, I do not believe that they can change anything. E.g., regarding the division between precedents *de facto* and *de iure* – what does it really mean? If we state that there is a normative binding effect in precedents *de iure* and in precedents of solution, what difference does it make in comparison with the precedents *de facto* and precedents of interpretation – if the result remains the same? The decision that does not respect a decision of a higher court, even though it is in the system, where court decisions are understood only as precedents *de facto* and therefore without a normative binding effect, will still be abolished. What is the difference between a normative binding effect and a discursive binding effect? A normative binding effect would mean that a lower court has to respect a higher court's decision, unless there is a reason not to follow the decision, for example, to overrule it. A discursive binding effect means that there is no normative rule that would be binding for the court in making a decision, but the court has to discursively argue with a higher court and the previous case law to decide differently. Which has, in the end, the same consequences.

The next possible objection is that in *civil law* countries there is no punishment for a judge who does not follow the previous case law. This is also a weak argument. First of all, the situation of not having a sanction for following the statutes is also numerous. E.g. in the Czech Republic, the ignorance of the law is not a disciplinary offense of a judge. The current state of debate in the Czech Republic is that the disciplinary sanction to a judge for not deciding in accordance with the law is a violation of the judicial independence. Hence, even when a judge is not applying a statute, he is not committing an offense! Here, I would like to caution that in defense of the traditional concepts of legal theory we should not define conditions for the entities that should not belong to those traditional concepts in a way that would in the end be impossible to fulfill even to those entities that usually adhere to these concepts.

The Czech Republic is not an exception in not ascribing a disciplinary offense to a judge for failure to follow the law. A similar lack of a sanction against a judge for not following the law is also the case in other countries of both *civil law* and *common law* system. E.g., Denmark also does not incur a disciplinary sanction for not following the statute.[62] Does it mean that statutes, therefore, are not sources of law in Denmark? On the other hand, in the United Kingdom, a typical domain of *common law*, a jurisdiction, where precedents are unquestionably binding *de iure*, the prevailing conception of judicial independence precludes any possibility of civil or criminal sanctions being imposed on a judge on account of errors, however gross, committed in a judicial capacity.[63] An interesting comment can be made about Sweden and Finland, where a judge who ignores a binding statute can be prosecuted. This is not true of a judge who ignores a precedent. Sweden and Finland therefore,

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[61] See *Troper, M., Grzegorczyk, Ch.* Precedent in France. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 126. Also see *Bankowski, Z. MacCormick, D. N., Morawski, L., Miguel, A. R.* Rationales for Precedent. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 484.

[62] See *Peczenik, A.* The Binding Force of Precedent. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 468.

[63] See *Peczenik, A.* The Binding Force of Precedent. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 469.

have a system which recognizes formal bindingness that is bindingness *de iure*, and yet does not contain any sanctions brought about by the breach of such a norm.[64]

The conclusion of this chapter is that the criterion of sanction for violating the binding effect of judicial decision is not a correct criterion that would enable to determine whether a case law is a source of law in a given jurisdiction or not. I believe that the only way how legal theory may catch up with the development of the law in the last decades is to adapt to the conclusions of comparative studies made between legal orders of individual states.

The second reason why the above argument is weak calls to explore, what exactly are the differences between the *common law* system and the *civil law* system? If a lower court's decision does not respect a higher court's decision, it is abolished. What is, therefore, the distinction? I believe that **the difference between case law in *civil law* system and precedents in *common law* system is of a quantitative, not qualitative nature.** The reasoning often goes that *civil law* courts are not normatively bound by the case law. Consequently, if the higher court does not agree with the fact that the lower court failed to follow the previous case law, it will abolish the decision. It is not clear how exactly this differs from the situation in *common law* system. Someone could see the difference in the fact that the precedent in the *common law* system is overruled at the level of a higher court, not at the level of the court bound by the precedent. The argument could be that in *civil law* countries, the courts can overrule the precedent themselves, without a need for the higher court, who has previously issued the decision with the binding effect.

I must again state that I do not see any other than quantitative difference here. It is only a matter of stricter procedure for overruling precedents in *common law* countries. It is also not true that the lower court is the one implementing overruling in the *civil law* system. Technically speaking, yes, this court issues the decision that is different from the previous case law, but is it possible to state that the previous case law has been overruled until the higher court has confirmed or disproved the arguments of the court trying to change the case law? The civil law system is more flexible and adaptable, as it proposes a very easy procedure for lower courts to "offer" higher courts their arguments for a change of case law. They do so by simply issuing their decision while presenting reasoning for the desired change. However, we must still perceive it only as a proposal for a change – would we really call it an overruling, if the higher court dismissed the arguments of lower court, abolished lower court's decision and held to its previous case law? The body making the ultimate decision,is (the same as in the *common law* system) the higher court, the author of the case law.

Therefore, I must conclude that these comparative arguments at the level of bindingness of case law are not sound. I think that the distinction between discursive and normative binding effect is interesting, but it is again building of theoretical sand castles with no effect on the practice whatsoever, and it even fails to be descriptive about the actual decision-making.

Conclusions

It is sometimes mentioned in comparative legal studies that the systems of *common law* and *civil law* gradually become more convergent. The growing role

[64] See *Peczenik, A.* The Binding Force of Precedent. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 468.

of statute law in Anglo-American countries and of 'case law' in the countries of continental Europe is one of the symptoms of this tendency.[65] The caricature of *civil law* systems free from the shackles of precedent in contrast to the *common law* enslaved to its own past (or 'preserving the good old order') is certainly no longer even remotely accurate, if it ever was.[66]

One of examples of this convergence is a precedential binding effect. We do not have to look at it from the perspective of mixing up the aspects that are alien to the system. I believe the better perspective to look at it is from the point of view of inspiration. We are not forced to take into our legal system the aspects that we do not want to implement. The globalization only gives us an opportunity to see the functioning of legal systems of specific countries more easily than ever before. We can see what is working and what is not, and it may inspire us to do some changes in our own legal system.

Yet on the other hand – would we not arrive to the same conclusion even without taking inspiration from the *common law* system? Is it not just and right to ensure that judges decide similar cases in a similar way? That is the only meaning of the precedential binding effect. It does not mean that a judge has to follow the previous case law in any case. The precedential binding effect means that if the court wants to decide differently from the previous case law, it must provide a substantiation why it did so. If it fails to do so, its decision is defective in the same manner in *civil law* and *common law* systems.

None of comments made by this paper should be, however, interpreted in a way that would imply that case law in the continental legal system is the same as precedents in Anglo-American legal system. There are differences connected to the different historical development. At the same time, it should be noted that the factual strength of the precedential binding effect, the factual application of the law and the hierarchy of formal sources of law differ significantly even between individual countries of *civil law* among themselves but also between individual countries of *common law* countries among themselves. And it is a challenge for the field of legal theory not to remain solely on the level of the distinction between continental legal system and Anglo-American legal system, but to actually provide the theoretical background that would correspond to all of the "shades of gray" of individual legal orders.

I believe that we should classify case law among other formal sources of law even in continental legal system, and that differences between precedents in *common law* system and case law in *civil law* system are of quantitative and not qualitative level. The changes and the development made in recent decades concerning the application of a right to a fair trial or a right to equal treatment under the law altered the perception of the binding effect of case law in historical context. With the courts developing the doctrine of precedential binding effect and its practical application, the status of case law changed, and legal theory should react to this.

Application of the precedential binding effect is a fact. If a court system does not remedy or otherwise take account of inappropriate departures from precedent,

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[65] *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 252.

[66] See *MacCormick, D. N., Summers, R. S.* Further General Reflections and Conclusion. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 532.

the judges will not interpret and apply codes, statutes and precedents in rule-like fashion, and will thereby sacrifice such formal 'rule of law' values as legitimacy, objectivity, certainty, equality before the law, dispute avoidance and private dispute settlement.[67] The binding effect of case law is accepted by the European Court of Human Rights, Court of Justice of European Union, to the same conclusion came even highest courts of different European states. It is also a fact that is accepted as correct in the field of constitutional law, as it is compliant with the principles of constitutional law, human rights and also with the theoretical notion of legal state (*Rechtsstaat*). Furthermore, I believe there is nothing to criticize from the perspective of legal theory, since the application of this doctrine leads to outcomes that are just. It is not possible to ignore decisions that have been made in other cases when deciding similar cases, if the principles of legal states are being adhered to. This thesis is true for both the *common law* and *civil law* system. We do not have to have any provision § 13 of the Czech Civil Code for this rule to apply. This would be relevant even based on the constitutional principles and philosophical foundations of the legal state in the *civil law* system and rule of law in the *common law* system.

The debate whether a case law should be classified as one of the formal sources of law is only theoretical. That should not be interpreted as irrelevant and useless. However, it does not change anything regarding the fact that the precedential binding effect is applied. The final answer to the question of whether a case law is or is not a source of law in *civil law* system depends solely on the degree to which we are strict about our requirements to classify an entity as a source of law. I have, however, proposed a different way to classify sources of law – autonomous sources of law and unautonomous sources of law. The criterion of autonomy is a criterion that more convincingly and precisely speaks about the nature of a source of law in each jurisdiction.

The legal certainty is an important value and the law should do its best to uphold it. On the other hand, just the legal certainty and predictability of the law are not enough when other legal values are not present. The uniformity of the application of law should not be a fetish, because uniform decision-making does not necessarily mean correct decision-making.[68] Even though the law in Nazi Germany was predictable, it did not generate the right outcome. The rules were strict and clear, the outcome for the person involved, was predictable but ultimately it did not mean justice. A jurisdiction, where the law is not predictable, cannot be deemed to bring justice and to be fair, at the same time, only predictability and certainty without any regard to substantive respect toward people and their rights is just the same, maybe even graver denial of justice.

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[68] *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 244.

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