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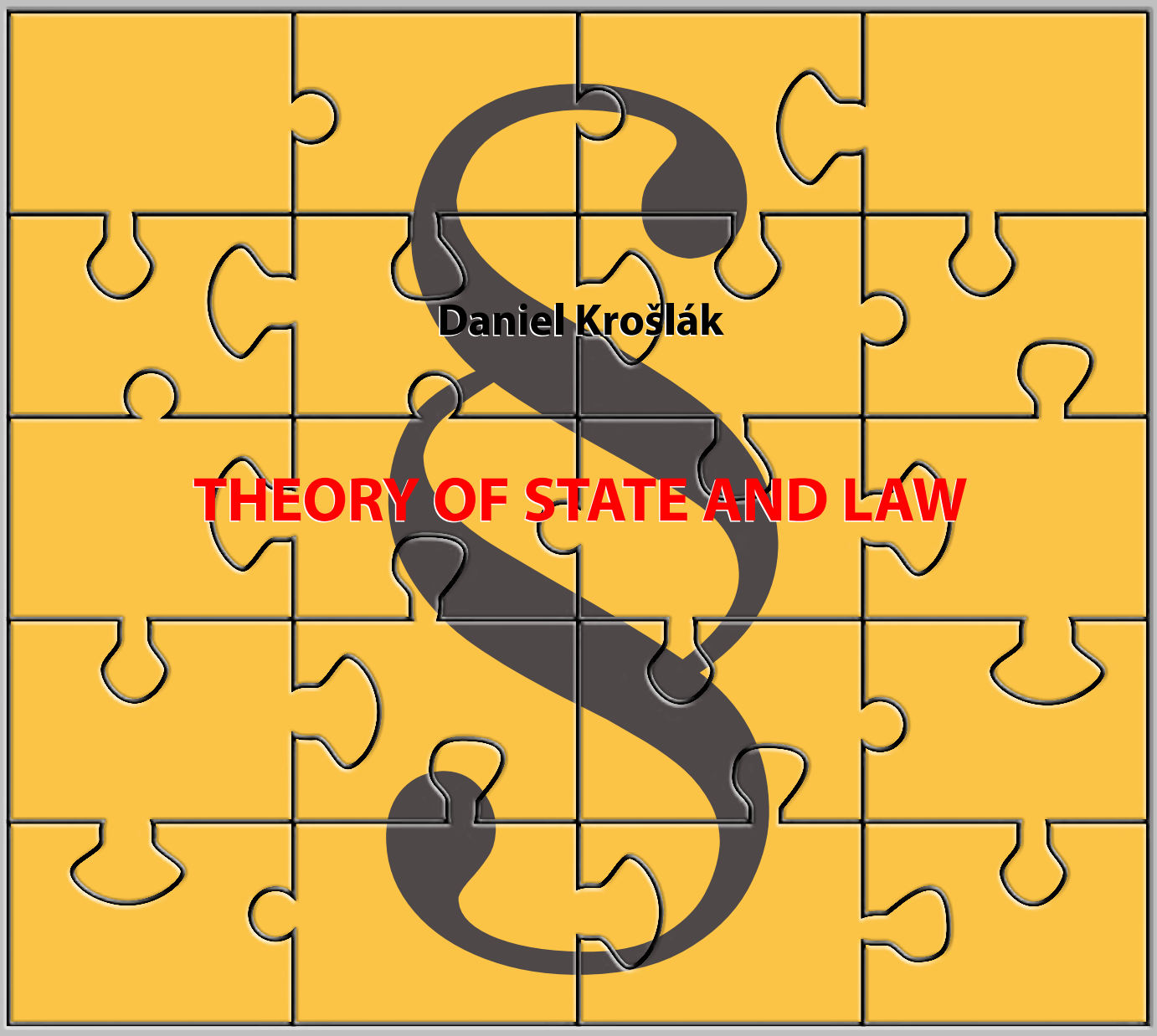

Daniel Krošlák

THEORY OF STATE AND LAW

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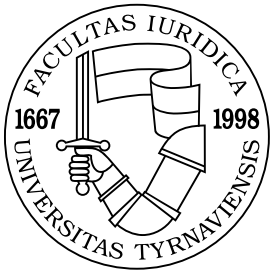

Theory of State and Law

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Content

1 STATE AND ITS SYMBOLS

A state is a social institution, a way of power and organisational arrangement of human society. It has its territory in which it controls the people living in this territory through institutionalized state power (power and administrative apparatus consisting of clerks, police and military).

States function on the basis of collecting various duties and taxes from people and they subsequently redistribute them to achieve the purpose of their existence.

The following text will focus on **primary symbols of a state**, which are:

a) state territory,
b) people,
c) state power.

1.1 State Territory

State territory is a part of the planet defined by state borders within which the state exercises its power. All persons residing in the given state's territory are, in principle, subordinated to this power (the territoriality principle) and no other power can exercise specific activity of ruling power in its territory without the express prior consent of the state in question.[1]

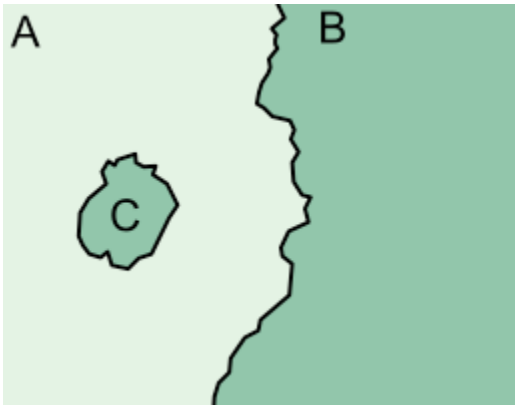
The state territory is created by a **three-dimensional area**, defined by the borders of the state within which the sovereign state power is exercised. To be specific, the territory is partly

1. **the terrestrial area including water areas**, which contains internal waters – mainly rivers, lakes, artificial lakes – and **coastal territorial waters** that follow the state's sea border (usually 3 – 12 sea miles from the coast);

[1] JELLÍNEK, J.: *Všeobecná státověda*. Praha : J. Laichter, 1906, pp. 412-413.

2. the second spatial dimension is **the area under terrestrial surface** definition of which is important mainly from the point of view of extraction of state's underground wealth;
3. and the third dimension, making up the state's sovereign territory, is the **area above the terrestrial surface** (the accepted line nowadays is the so-called Kármán line at the altitude of 100 km above the Earth surface).

Also other areas or objects, on which the state exercises the state power on the basis of international law (e.g. areas and buildings of embassies, decks of ships and air planes, etc.), are part of the state's sovereign territory. The territory need not to be a continuous geographical unit. Apart from so-called mother territory, it can also include territorially separated parts (so-called enclaves, exclaves).



Picture: Territory "C" is an enclave of state "A" and at the same time an exclave of state "B".

1.1.1 State Borders

The territories of states and their borders are nowadays defined mainly by **international law**, either on the basis of internationally ratified peace treaties or through international agreements on borders.

The state border is a line that separates the territory of one state from the territory of another state or international area that does not fall under the sovereign power of any state (e.g. open sea, Antarctica or the cosmos).[2] State borders are staked out on the basis of their delimitation and demarcation.

Delimitation is the definition of the course and nature of border by contract resulting in boundary line. Boundary line can be defined either in **orographic** way (naturally considering the location's relief; e.g. running through the middle of a river or the

[2] POTOČNÝ, M. – ONDŘEJ, J: *Mezinárodní právo veřejné. Zvláštní část*. Praha : C. H. Beck, 2003, p. 109.

ridge top) or in **geometric** way (basically, it does not consider natural features of the place; e.g. political reasons can be determining). Apart from that boundary line the definition can be done also based on parallels and meridians (so-called astronomic border).

Demarcation – specification (measurement) of state border is then done on the basis of delimitation directly in the field and the state border is marked with solid boundary signs (e.g. boundary stones).

1.1.2 Methods of Territory Acquisition

Primary occupation

Primary occupation is the acquisition of a territory that **does not belong** to anyone or was **abandoned**. This method of acquisition lost its importance nowadays because the entire Earth surface together with internal and coastal waters has been divided between existing states within the context of demarcated borders.

Accession

Accession is the method of acquisition of a state's territory gain by **the effect of natural forces** outside human will (e.g. alluvia on sea or river side, discovery of new island in coastal waters or change of boundary river's stream) or with **artificial territory gain** due to deliberate human actions (e.g. extension of dry land through drying up of shallow sea bays in the Netherlands, etc.).

Annexation

Annexation is a **forceful** and **one-sided attachment** of a foreign territory to the actual state. This method of territory acquisition used to be deemed as legitimate in the past (wars of conquest), today it is prohibited by international law.

Prescription

Prescription is a territory acquisition on the basis of **long-term, legitimate, continuous** and **uninterrupted possession.** It is a disputable method, mainly with regard to time needed for prescription.

Territorial Adjudication

Adjudication is the territory acquisition method on the basis of a **decision** of respective temporary or permanent international body.

Territorial Cession

Territorial cession is the method of acquisition of a territory of one state that **cedes** part of its territory to another state on the basis of an agreement.

1.2 People

The people consist of persons permanently residing in the state's territory. In terms of their relation to particular state they are either its **nationals** (nowadays all are virtually **citizens** of that state) and then **aliens**.

1.2.1 Citizenship

Citizenship as a political, cultural and social institution developed already in ancient Greece. For example, in ancient Athens it was acquired on the basis of ancestry, origin and status, and only those men held it who were ancestors of the citizens of Athens with the status of a patriarch of household, a soldier or a master of slaves.

Today the citizenship is more of a universal nature and not only more privileged

classes, which meet the requirements of origin, personal status, gender, etc., are citizens. This change happened gradually since the French revolution in the 18th century (the ideal of equality projected itself in this context in such a way that each person should be a citizen of a state).[3]

In today´s conditions, citizenship can be described as relatively **permanent, political and legal bond with the state**[4] through which a natural person acquires rights and obligations towards the state, including the right to participate in forming of that state and its policies as a member of civic community.

The specification of the content of citizenship, requirements for its formation and expiry are concerns of regulation of domestic, not international law. Therefore, the scope of citizen's rights can be very different in many states. Usually, it is broad in democratic states, in undemocratic ones the citizen's rights are reduced in some extent or are completely absent. Citizens have only duties towards the state there (e.g. military service duty, duty to keep loyal to the state when abroad).

Citizens, unlike other inhabitants of the state, possess, above all, **political rights of participation in the exercise of power**, in particular:

- right to vote and to be elected, as well as to be appointed to various public offices,
- right to participate in a referendum or otherwise in the administration and control of public affairs.

Because citizen is a political subject, the power of a democratic state is derived from him as the source of power, he legitimises it. The priority of citizen and society before the state is declared also in Article 2 (1) of the Constitution of the Slovak Republic: *"State power is derived from citizens, who execute it through their elected representatives or directly."*

At the same time, the citizens do not have to reside within the territory of the state.

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3 BRÖSTL, A. a kol.: Ústavné právo Slovenskej republiky. Plzeň : Aleš Čeněk, 2010, pp. 67-68.

4 The boundaries of permanency of state citizenship are accurately specified by the decision of International Court of Justice of 1955 in the Nottenbohm case: a German national Friedrich Nottenböhm acquired in 1939 the citizenship of Liechtenstein on the basis of economic investment (without permanent residency), then he travelled to Guatemala where he was interned as a "German" during World War II, extradited to the USA and all his possessions were confiscated. After the War, Liechtenstein filed an action for unlawful procedure of Guatemala with the International Court of Justice because according to Liechtenstein's opinion, Guatemala should treat Mr. Nottenböhm as a Liechtenstein citizen and not as a German citizen. However, the International Court of Justice did not identify the relation of Mr. Nottenböhm with Liechtenstein as "permanent" and thus internationally effective, because Mr. Nottenböhm acquired Liechtenstein citizenship without the prescribed length of residency.

Wherever they are, they remain citizens and can exercise their civil rights. They are entitled to consular help abroad, certain type of business activity, ownership of certain things, various social benefits, etc. – all that can be reserved for citizens only. A democratic state cannot deprive anyone of their citizenship against their will (see Article 5 (2) of the Constitution of the Slovak Republic). Therefore, the duration of citizenship should not be limited by time or place.

The requirements for acquisition and loss of citizenship are determined by states through domestic laws. In this context we can distinguish several ways to acquire and lose citizenship. Specifically, citizenship can be **acquired** in the following ways:

Birth

The acquisition of citizenship by birth is governed in different legal regulations:

- by the ***ius sanguinis*** principle (so-called right of blood) – citizenship is acquired solely through the citizenship of parents, regardless of the place of birth; or
- by the ***ius soli*** principle (so-called right of soil) – citizenship is acquired according to the state on whose territory the child is born (while assuming legal stay of parents and stay of parents without diplomatic immunity or performance of state service for their state).

The domestic legal regulation of citizenship acquisition contains elements from both principles in most states, but usually one of the principle prevails over the other. This is also the case of the Slovak Republic, in which the Citizenship Act is conceived on the basis of prevailing *ius sanguinis* principle with elements of *ius soli* present (e.g. a child is found on the Slovak territory, its parents are unknown and it is not proven that it has acquired foreign citizenship by birth, etc.)

The principle of blood is characteristic mainly for so-called national states that came into existence in the era of emancipation of nations in the sense of ethnicity in the second half of the 19th century and in the 20th century and in which one nationality dominates others (an example of Central and Eastern European states, Germany, Israel, Japan can be mentioned).

States that originated earlier (during the 18th century or in the first half of the 19th century) within the area of established historical units built their laws on the *ius soli* principle and perceived "citizens" as "nation" not in ethnic but in civic sense (here are some West European states, such as Great Britain, Italy, Spain and immigration states,

such as the USA, Australia, Canada and great majority of Latin American states).[5]

Naturalization

A certain amount of natural persons can acquire (or change) citizenship during their life. The change of citizenship during life is usually connected with the manifestation of will of the person or its legal representatives, with all legal consequences, for example, in form of loss of the then citizenship.

The most frequent method of acquisition of a new citizenship is **naturalization**. A person acquires citizenship in this case on the basis of their own application. Both states that grant citizenship in case of birth, applying the *ius soli* principle, and also states that apply the *ius sanguinis* principle, grant citizenship through naturalization. However, the states with the *ius soli* principle usually set more accommodating requirements for citizenship applicants (e.g. they rarely require a legal stay longer than 5 years). On the other hand, the states that apply the *ius sanguinis* principle have stricter requirement concerning the uninterrupted legal stay (e.g. the Slovak Republic requires at least 8 years of stay immediately prior to filing the application). Legal regulations of certain states also do not confer the same scope of rights to naturalized citizens as to citizens by birth (a well-known example is the USA, where a naturalized citizen cannot become a president).

Marriage or Birth of a Child

A natural person can acquire new citizenship also by entering into marriage with an alien or in relation to birth of a child, if the second parent is an alien. Cases when foreign citizenship is acquired automatically just by entering into marriage (or by birth of a child) and when entering into marriage (or birth of a child) only gives claim to citizenship, for which it is necessary to apply individually have to be distinguished. It often happens that marriage (or birth of a child) only liberalizes the naturalization requirements; primarily they shorten the period of continuous stay in the territory of given state.

[5] EMMERT, F.: Česká republika a dvojité občanství. Praha : C. H. Beck, 2011, p. 7.

Adoption

An under-aged person can acquire citizenship by **adoption** on the basis of manifestation of will of the adoptive parent and on condition that the adoptive parent is a citizen of the state whose citizen is the adopted person to become.

Option

Option is the method of citizenship acquisition in case of a change of borders. Citizens staying in the given territory (that is concerned with the change) have to decide for the citizenship of one of the states within a specified time limit: they either stay in the state-citizen bond with the state whose citizenship they had so far or they accept the citizenship of the state under sovereignty of which they were included by the cession of the territory.

The institute of option can be used also upon dissolution of a state. For example, in case of dissolution of Czechoslovakia, each Czechoslovak citizen could choose during 1993 whether they wish to continue being a citizen of the Czech or the Slovak Republic.

Loss of Citizenship

Domestic laws of individual states specify a wide range of methods of loosing citizenship. Essentially (apart from cases of territorial and political changes), they can be divided into two categories:

- **loss of citizenship in relation to the acquisition of a new one** – the loss of citizenship occurs in this way either by
  - discharge from citizenship upon own request (the citizen can request discharge on the basis of promise of new citizenship; if they fail to acquire the citizenship, they keep the original citizenship), or
  - acquisition of foreign citizenship (natural person is without own request discharged from the bond with the state whose laws automatically associate the acquisition of foreign citizenship with the loss of original citizenship; this procedure is applied in cases when the respective state authority finds out

that the then citizen has acquired another citizenship on the basis of manifestation of will);

- **loss of citizenship without acquisition of a new one** – this way is undesired in terms of international law because it contributes to the **statelessness**; however, legal regulations of certain states allow for the loss of citizenship without acquisition of a new one, in the following ways:
  - declaration of the citizen in front of a court or a state authority that they renounce their citizenship;
  - deprivation of citizenship of a person who moved abroad with the intent not to return;
  - deprivation of citizenship of a person who breached "loyalty" to their state, e.g. by entering military service in the army of another state, accepting public office in another state, committing the crime of treason (high treason, military treason, etc.).

1.2.2 Aliens and Their Legal Status

As already stated, apart from citizens there are persons who are present in the territory that can be summarily called **aliens**. They are citizens of another state and stateless persons in terms of international law.

Aliens can be in the territory either **temporarily** (the purpose can be e.g. business, employment, study) or **for a long time** (the purpose can be e.g. family reunion, intent to acquire citizenship). In both cases the aliens are usually obliged to register for stay with respective office in terms of domestic laws. Moreover, they are obliged to observe the laws of the state in the territory of which they are (the territoriality principle). However, that does not mean that their relation to the state whose citizens they are is thereby terminated (the personality principle). Thus the laws of two states apply to new legal relations and possible issues that can arise are usually solved by international rules of conflict of laws, which arise either from bilateral or multilateral agreements. The exception to the rule of effect of the two legal systems can be the exemption in case of diplomatic privileges and immunities.[6]

[6] OROSZ, L. – SVÁK, J. – BALOG, B.: *Základy teórie konštitucionalizmu*. Bratislava : Eurokódex, 2011, p. 164.

1.3 State Power

State power is a social power governed by law, capable to determine the acts of people inhabiting the territory through the law and also extralegal methods of exercise of power interests. It is the ability of an individual or a group of people, organised in state structures (institutions) to affect and determine the behaviour of people to ensure the reproduction of the society, individual and the state.[7]

State power constitutes the most important element of so-called **public power**. Apart from the state power represented by state authorities, the public power includes also the public power functioning of authorities of self-governance (e.g. local government, non-profit organizations and corporate governance).

State power and its functioning are examined in theory from the following criteria:

a) sovereignty,
b) legitimacy,
c) legality
d) efficiency.

1.3.1 Sovereignty of State Power

Sovereignty of state power is traditionally defined as the independence of state power from any other power inside the state and also outside its borders, independence in internal and outside functions of state, in domestic and international policy.[8] Thus internal and external sovereignty can be distinguished in this context.

Internal sovereignty means that the state is the independent and exclusive power institution in its territory. However, this sovereignty is not total, if it tries to function as a legal state. In a legal state, though, the state authorities are bound to act in accordance with adopted laws. The question whether the respective state authorities can adopt any legal regulations within so defined parameters is understandable. Those who answer this question negatively, usually reason with, e.g. the rationality of the lawmaker, the logic of public interest or the existence of unchangeable substantial core of the constitution.

[7] OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 111.

[8] PRUSÁK, J.: *Teória práva*. Bratislava : VO PF UK, 1995, p. 66.

The internal sovereignty of a democratic legal state is limited also by political participation and democratic control of the state by civil society (citizens are both the source of state power and control its exercise). In undemocratic states the state power depends on or is connected with certain political party (possibly state-party), with the army (military regimes) or with the church (theocratic states).[9]

In any case it holds that the internal sovereignty of the state is a condition of internal public order, internal peace, freedom of individuals and the society. The cases of breach of internal sovereignty are the civil war (that presents polarisation of the society, threat to life, freedom, security); the corrupting influence of financial groups, controlling relevant politicians (e.g. in Slovakia, the "Gorilla" affair),[10] etc.

External sovereignty means the independence of state power in relation to other states. It reflects in sovereign equality, optionality and reciprocity of relations between sovereign states.[11] As with internal sovereignty, even in case of external sovereignty it is not possible to talk about total independence. It is related mainly with the existence of international law that establishes legal framework of international relations and binds individual states to act in certain way.

External sovereignty is also relativized by the membership in international organisations and other supranational communities of states (e.g. in the case of Slovakia it is the European Union membership). The actual scope of external sovereignty of certain state depends also on other point. For example, on its geopolitical location, on power and economic status, on culture and rate of democracy of international policy and relations, etc.

1.3.2 Legitimacy of State Power

Legitimacy of state power means its **recognition** (acceptance) by critical part of the society. The source of justification and acceptance of power can be law, tradition, religious consecration, accepted dynastic succession, derivation of power from people through regular elections in democracy, etc.

Power cannot be pure violence in the society – then it is inefficient. Thus the legitimacy of state power is the expression of conviction that the state power was formed on the grounds of a socially recognized reason. Max Weber differentiates between three types of legitimacy of power in this context:

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9 OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 111.

10 See NICHOLSON, T.: *Gorila*. Bratislava : Dixit, 2012.

11 OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 112.

- traditional, when the reason of reign is the long-term exercise of power and its conformity with tradition,
- charismatic, when the reason of reign are specific qualities of administrators of power, and
- legal, when the power is created and executed on legal grounds.[12]

The legitimacy of power has two aspects: **procedural** and **value**. The procedural aspect of legitimacy tells whether the ruling power group came to power in a regular way (e.g. in free and regular election). The value aspect of legitimacy represents the belief of citizens that the state power rules in accordance with overall value, cultural and ideological focus of the society. If that is not the case, e.g. use of civil disobedience or right of resistance can lead to redress (see Article 32 of the Constitution of the Slovak Republic).

At the end of this statement it can be added that the issue of legitimacy gains new dimensions in connection with increasing international integration of states.[13]

1.3.3 Legality of State Power

Legitimacy of state power should be secured by legality (constitutionality, lawfulness) in a legal state. The following conditions have to be met in this context:

1. transfer of power from the source of power (from citizens to representatives of power) has to be done on the grounds of law, mainly on the grounds of the constitution and laws (beginning with ensuring the periodicity of elections, the regulation of franchise, ensuring the execution of elections, including the process of handing over the power after elections); also another method of appointment into offices should be governed by law;
2. power must be exercised on the grounds of constitution and laws and in legally prescribed way also after acquisition of mandate.[14]

The term of legality of state power thus tells whether the state power is created and used in accordance with applicable laws or not.

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[12] WEBER, M.: *Metodologie, sociologie, politika*. Praha : Oikoymenh, 2009, pp. 247-248.

[13] See BELLING, V.: *Legitimita moci v postmoderní době. Proč potřebuje Evropská unie členské státy?* Brno : Masarykova univerzita, 2009.

[14] OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 114.

1.3.4 Efficiency of State Power

Efficiency of state power is the measure of to what degree the state institutions can achieve their objectives and affect the actions of citizens and other persons under its rule. Often, that depends on voluntary compliance with power but also on the ability to enforce own intentions by state enforcement.

2 INTERNAL STRUCTURE OF THE STATE

The internal (vertical) form of organisation of the state is represented by **regional and organisational division** that reflects the institutionalisation of mutual relations between the state as a whole and its regional parts. States can have several levels with regard to regional and organisational division (they are comprised of institutions of state and local self-government).

The territory can be internally organised in two basic ways:

a) **administrative and legal organisation** (only administrative units or self-governed units are parts of the state), or
b) **constitutional organisation** (regional parts have the nature of state units, sovereignty is divided or shared between the state as a whole and these regional parts).

On these grounds we speak about:

- **a unitary state**, in the first case,
- some form of **a composite state** (mostly federation nowadays).

2.1 Unitary States

In case of a unitary state it holds that its territory is divided to administrative parts only, without a title to sovereignty. They are fully subordinated to central power. Basic features of such state are:

a) united system of highest state authorities,
b) one constitution,
c) one law-making system (or one legal system in force in the whole territory),
d) one state citizenship,

e) one system of state symbols, etc.[15]

The mentioned administrative and legal units can have various names: regions, districts, counties, provinces, governorate, etc. and one state can contain more levels (steps) of regional and administrative organisation. This organisation is followed both within the **state administration** (which is organised hierarchically – i.e. on the basis of superiority and subordination of central and local authorities) and within the **self-government** (which presents a democratic organisational form of citizens' care for own affairs, independent and under state supervision).[16]

The regional and administrative division, i.e. specific regional units and their structure can be the result of natural historical development (e.g. provinces arising from original tribal territories) or of division by the decision of state power (i.e. from "above", for example, the French departments as a result of French revolution).

Unitary states can be:

- centralized, or
- decentralized.

2.1.1 Centralized States

In **centralized states** there is only the structure of vertically subordinate units (e.g. the French model). There are no autonomous or self-governed units in the state. However, the self-government can exist on the local level (municipalities, cities). Higher authorities fully control the lower ones. Decisions are made on the highest level and the lower levels only carry them out. The central authorities appoint the officials of middle and lower levels.

Decisions in centralized states are made exclusively on the highest level of administration and other organisational levels of administration only transmit the decisions and instruction from the centre to the place of their execution. It is **deconcentration** of power in such hierarchically organised administration of public affairs.[17]

The level of centralisation or decentralisation is determined according to the extent to which the unitary states transfer their competences to other subjects of public power (local government, non-governmental organizations etc.).

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15 OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 161.

16 HOLLÄNDER, P.: *Základy všeobecné státovědy*. Plzeň : Aleš Čeněk, 2009, p. 331.

17 OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 162.

2.1.2 Decentralized States

Although the state power is homogeneous in **decentralized states**, the independence and self-government of citizens is valued highly. A part of state power is exempt from the competence of state authorities and given to self-governed regional units.

These **self-governed regional units** are relatively independent, independent from the state power in terms of creation (they are elected directly by citizens and not appointed on the grounds of decision of state power) and are happening on grounds of own initiative. There is no relationship of superiority and subordination between the self-government authorities and units of various levels. Higher self-governing units handle only those issues that are not sensible or able to be handled on lower level.

The self-government authorities issue own (original, primary) **legal regulations** within the transferred competence. They are bound by the constitution and laws.

The state is authorized to **supervise** the activity of self-governments and to abolish their decisions, which are against the law. In such cases, the local authorities are authorized to initiate a review (administrative or judicial) of such course of state authorities.

3.1.3 Regional Self-government and its Authorities

The **authorities of regional self-government** are non-governmental authorities. They represent the original power of inhabitants of state on local level and the state power only specifies the limits of their competence with law and exercises supervision of legality of their decisions.

They are authorities independent of state administration; elected by citizens of given regional corporate unit (municipality, self-governing region) and they derive their legitimacy not from the state but directly from the voters.

Local self-government is not subordinated to state authorities and it acts independently in the area specified by law. However, *certain part of state administration can be delegated to* authorities of local self-government (this performance is then usually

financed and supervised by the state).

Local self-government, like local state administration, can be organised on individual levels (first level and higher levels).

There is no direct relation of superiority and subordination, analogous to authorities of local state administration, between authorities of local self-government of various levels (e.g. municipalities and self-governing regions).

The most typical self-governing regional unit (corporation) is **municipality**. It is associating citizens with permanent residence within its territory. It is a legal person with own territory, own inhabitants, own assets, financial resources, own economic activity and own competence.

The municipality has its own *representative body* (municipal representative body, city council, etc.) and also *own executive bodies* (municipal office, municipal police, etc.) The head of municipality is a *mayor*. The municipality can also establish other institutions and municipal enterprises.

The municipality, including its bodies (mayor, municipal council, and municipal office) has the position of a public authority, with resulting public rights and obligations. The municipality can, however, act as a subject of private law – it buys and sells assets and real estate, enters into contractual relations, etc.

Within the framework defined by legal regulations (the constitution, laws, etc.), the municipality can issue own *normative legal acts*, but binding only within the territory of the municipality (in the Slovak Republic they are called the generally binding municipal regulations).

The municipality is also usually the lowest segment of public regional administration (all the more, if it is also charged with performance of local state administration).

The higher level of regional self-government is represented by **higher self-governing units** (e.g. cantons, self-governing regions, counties) with its bodies and representatives (regional council, governor, hetman, etc.).

3.1.4 Autonomy

Autonomy represents more distinctive level of decentralisation. The autonomous

administrative and regional units possess greater scope of competences than other regional units. Basically, it is an *asymmetric decentralisation.*

Autonomies are established on the grounds of the constitution, special act or statute. Reasons for autonomy are various historical, geographic, ethnic, state and political and religious particularities of given region, taken into account by the state.[18] The extent of autonomy can be different and it includes cultural, educational, political and administrative, judicial, etc. autonomy. Contrary to federated states, the integrity of sovereignty of the state as a whole and its highest bodies still remains characteristic for the unitary state. The central government reserves the right to modify and change the status of autonomous units.

2.2 Composite States

Composite states are states that, apart from administrative and legal division, are divided also into constitutional units – member states. It can be simply said that these units have certain features of a state (the constitution, power bodies, legislative assembly, state symbols, etc.), but are not completely independent states. The internal sovereignty is divided between (or shared with) the umbrella state, e.g. the federation (this umbrella state possesses the external sovereignty).

Three types of composite states emerged in the 20th and the 21st century: **federation**, **real union** and **modern union**.

2.2.1 Federation

Federation consists of member states and the common federal state ("super state").[19] Some federations came into being from "below" – through fusion of formerly independent states, and some from "above" – by dividing of originally unitary state.

The reasons for federalism can be *ethnic differences* (former Yugoslavia, former Czecho-Slovakia, Belgium) or different *historical and political development* of individual higher territorial units (Germany, the USA, Brazil, and Austria). Both principles can be combined in certain federations (India, Russia, and Canada). The federation's legal ground is a constitution or special federation agreement. Moreover, this can deter-

[18] OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 164.

[19] KLÍMA, K. a kol.: *Státověda*. Plzeň : Aleš Čeněk, 2006, p. 67.

mine e.g. whether the member states have the right to leave the federation or no.

In federation, the sovereignty is divided between the federal state and member states. The constitution or fundamental contract stipulates which issues fall under *the exclusive competence of the federal state* (usually foreign affairs, defence, common currency) and which under the *exclusive competence of the member state* (e.g. culture, education, health care) and which under the *common competence* (e.g. economy affairs, justice, police, etc.). The federal constitution and constitution of member states, the legal system of federation and members states, dual system of state symbol, highest state authorities, citizenship, etc. exist at the same time.

Most of the big states today are federations (Germany, Russia, India, the USA, Brazil, Canada, Australia, Mexico, Argentina, Nigeria, etc.)

An example of a federation – the United States of America

2.2.2 Real Union

Real union is characterized by common head of state, certain common bodies and common administration of selected issues, which the both states declared as common.

Common bodies can thus be the head of state (usually a monarch), the ministry of finance, defence and foreign affairs. Unlike in federation, *a common law-making body is missing* – thus legally and theoretically speaking, there is not one "political nation", but more. Consensus of parliaments of all member states must be achieved in common issues or there is a common representative body (joint committee of members of parliament), designated according to certain key by parliaments of member states. Unlike in federation, both the union and the union's member states have legal personality.

An example of a real union is the Danish-Iceland union (1800 – 1918), the Austro-Hungarian empire after the compromise (1867 – 1918), the union of Serbia and Monte Negro (2003 – 2006), the Polish-Lithuanian union (1569 – 1791, so-called Union of Lublin) and apparently also the Norwegian-Swedish union (1815 – 1905, at least in the early periods, although this is labelled in literature also as personal union). But the Norwegian-Swedish union had, apart from monarch, also common foreign policy and embassies, factual monetary union (together with Denmark) and until the end of the 19th century also customs union and common state symbols.

2.2.3 Modern Union

In the 20th century, **modern union** was an attempt to transform former colonial empires to more equal bond between the metropolis (mother country) and former colonies. An example of modern union was, in certain periods, the *British Commonwealth of Nations (Commonwealth)* and a more transparent in systemic terms, the *French Union* (1946 – 1958) and the *French Community* (1958 – 1960), which replaced the so-called French Empire. The French Union consisted of France (including overseas departments and territories that legally and administratively belonged to metropolitan France) its colonies and trusteeships (all under direct French administration) and five protectorates with internal autonomy (Tunisia, Morocco, Cambodia, Vietnam, Laos). The French Community consisted of France and its colonies, which achieved extensive internal autonomy (they virtually achieved the status of a protectorate). France kept control over defence, monetary and foreign affairs.

The term "modern union" was an attempt within the context of that period (1950s and 1960s) to replace the profaned term "empire" or "colonial empire", while it was difficult to describe the newly established relations according to established concepts of, e.g. a federation.

The modern Netherlands creates a functional modern union with the islands of Aruba, Curaçao and Sint Maarten. Together they are called the Kingdom of the Netherlands. Despite the official equal status of all four lands, the central authorities of the

Netherlands are vested with common competences (defence, foreign affairs, affairs of citizenship, state symbols, sea transport, and human rights). When the Dutch government holds a session as the government of the Kingdom of the Netherlands about issues that concern also smaller members of the union, these are represented in the session and in decision making by authorized ministers of all three islands, who have a permanent office in the Hague. Another three Caribbean islands (Bonaire, Saba, Sint Eustatatius) are directly politically part of the Netherlands.

The continental European Denmark has similar relationship with Greenland and Faroe Islands and together they comprise the Kingdom of Denmark. The modern United Kingdom of Great Britain has permanent ties with 14 British overseas territories and specific, in terms of constitutional law very archaic looking bond with the Isle of Man and the Channel Islands. France has 5 overseas departments "across the Atlantic", which are an integral part of France and 8 overseas communities and territories.[20]

It is not easy to define current relations of Great Britain, France, Denmark and the Netherlands with the rest of overseas territories. Their inhabitants already have full citizenship of their respective metropolitan countries (thus being also the European Union citizens) and at the same time, they have broad autonomy, often including particular legal regime. Some of them even became integral parts of their metropolitan countries (e.g. Réunion). Definitely they are nothing like "colonies" in the term as was understood until the 1960s.

2.3 Unions of States

Such unions, associations and organisations of states that essentially *do not even have the characteristics of a state* must be distinguished from composite states, because they do not possess own sovereignty nor own power to subordinate member states to its decision against their will. Summarily, they can be called **unions of states**.

Unions of states are:

a) confederation,
b) personal union,
c) supranational association of states (advanced regional integration).

[20] More in ŠMIHULA, D. – BLAŽEK, L. – CSONTOS, J.: *Európa za oceánom (Zámorské územia krajín Európskej únie)*. Skalica : SEVS, 2011.

2.3.1 Confederation

Confederation is a union of sovereign states, established by a treaty between them. Both the confederation and its member states possess international legal personality. These member states establish common bodies of the confederation which administer common affairs (defence, finances, and foreign affairs). Their decisions (unlike common bodies in federation) are binding for the member states (and become binding for citizens of member states) *only after their ratification by the respective central body of the member state*. Contrary to the situation in international organisations of states where the common decision is binding only for states that voted for it, the valid decisions of confederation bodies are binding also for the minority of states which voted against (were outvoted). Dual citizenship can, but does not have to be in a confederation. The confederation's military can consist of contingents of individual member states. In practice, their dual subordination is maintained.

An example of confederation in the past can be the USA in 1778 – 1787, Switzerland until 1847, and German Confederation in 1815 – 1851. Since the adoption of Maastricht Treaty (1992), also the modern European Union possesses many features of confederation (but also federation), but the term "supranational association of states" is used more to describe it.

2.3.2 Personal Union

Personal union is when otherwise independent states share a common head of state. They do not have other common bodies.

It is true, it stems from logic that if the position of the head of state is not purely formal but the head possess certain real competences, states joined in personal union will gradually converge their foreign policy and still some common institutions are established (although they do not have the position of state bodies): common royal office, royal advisory council, common embassies, common headquarters of armies, etc. A personal union in the past was, e.g. the connection of Hanover and Great Britain in 1714 – 1837, Spain and the Holy Roman Empire during the rule of Charles V. (1519 – 1556), etc.

Nowadays, there is personal union between the United Kingdom of Great Britain and Northern Ireland and certain other countries of the (British) Commonwealth of Nations (e.g. Canada, Australia, New Zealand, Jamaica, Belize, and the Bahamas).

It is obvious that the personal union can be found, with some curious exception,

only in monarchy.

2.3.3 Supranational Association of States

The supranational association of states is the result of advanced regional integration. Today, the only real example of efficient supranational association of states so far is the European Union.[21] This regional international organisation, originally focused on economic cooperation, slowly began to establish also political structures and reinforce powers of its institutions. The scope of its activities was extended from the issues of common market to the area of foreign policy and defence.

Common bodies in a supranational association of state (today mainly in the European Union) can issue legal acts that are *directly binding for citizens* of member states. This is their biggest difference from international organisations of states (including initial phases of regional integrations).

The common law, based on community principles, is according to the European Court of Justice Decision No. 6/64 *Costa v. ENEL* superior to internal law of individual member states.

Although formally the member state remain independent sovereign states, in fact they handed over part of their competences – legislative and executive (mainly in the area of economy) to common supranational bodies.

Nevertheless, the European Union (connected with the European Atomic Energy Community) cannot be considered a state – despite broad competences. The basic difference is in that although it possesses many state-like competences, it *lacks real executive power structure* to enforce decision even against the will of member states. A European police force and European army is absent, bureaucratic apparatus is present only on the highest European level (the European Commission and its supporting bodies). Also so-called local offices of the European Commission are of a purely diplomatic nature. Thus the European Union (and its member states) must rely upon executive structures of member states in pursuing its goals.

At the same time, the European Union is *missing a power centre independent enough*, centre of political decision generation, which derives its legitimacy from some sort of European political "nation" or European Union citizens. The position of European Parliament is so far weak, the European Commission is de facto an executive body and the

[21] Other regional integrations (e.g. ASEAN, Mercosur) have not achieved the level of supranational association of states yet.

Council of the European Union and the European Council are composed of representatives of executive power of member states and are perceived as bodies representing the control of member states over the Union as a whole.

It is obvious that boundaries between real union, modern union, confederation, regional integration, etc. may not be quite clear in practice, individual forms can smoothly overlap and specific form of government can even change.

However, almost all attempts for a compound state and associations of states, *with the exception of federation* and one supranational association of states (the European Union) proved to be *less stable* or only as *transitional* forms.

3 STATE INSTITUTIONS

As already mentioned, state exercises its sovereign power over people in its territory through certain power institutions. The basic and crucial elements of this apparatus are **state authorities**. Without them there is no state.

State authorities are representatives, holder and executors of legislative, executive, judicial and control power of the state. On the grounds of the constitution and laws, they have their own **jurisdiction**, i.e. ability to issue legal acts (normative and individual). In a democratic legal state, they can exercise their jurisdiction only in such extent and in such way, as prescribed by the constitution and laws.

In the following text, focus will be put on highest state authorities, which can be described also as constitutional, because their establishment and existence is usually governed already by the basic legal regulation of the state. It concerns the following institutions: the parliament, the head of state, the government, courts, regulatory authorities and the central bank.

3.1 Parliament

Parliament is the highest representative body in the state. In a representative democracy system, it consists of elected representatives of people (i.e. the original bearer of state power). It represents the **constituent** and **legislative power** among the highest state authorities, although it does not have to be the only constitutional authority with legislative power.[22]

In the parliamentary form of government, the parliament has the most prominent position in the system of highest state authorities and the legitimacy of other

[22] Also other body can participate in or exert the legislative power under exceptional circumstances, e.g. during war or state of emergency. Nowadays the phenomenon of adopting subordinate legislation with the power of law (so-called delegated legislation) can also be encountered. For more information see KYSELA, J.: *Zákonodárství bez parlamentů. Delegace a substituce zákonodárné pravomoci.* Praha : Karlova univerzita, Právnická fakulta, 2006.

constitutional authorities, mainly the legitimacy of the government, is derived from his legitimacy. The parliament creates the government and other constitutional authorities with its decisions and decides on their powers.[23] However, in the practice of parliamentary democracy the opposite impression may often arise, mainly with regard to hierarchical arrangement of relations between the parliament and the government.[24]

In the presidential form of government, the parliament has the position of constituent and legislative authority, which presents part of arrangement of constitutional authorities in horizontal separation of powers completed with a system of checks and balances.

Also the question of its internal structure or internal arrangement comes under the general characteristics of the parliament. Parliaments can be divided from this standpoint to **one chamber** (unicameral**)** and **multichamber** (multicameral) ones.

Adoption of decision in a unicameral parliament (mainly passing of submitted bill) is the matter of one chamber. Such parliaments are typical for smaller and relatively homogeneous states. The **advantages** of unicameral system include the more efficient way of law-making and lower operating costs for parliament. However, the possible power superiority of the parliamentary majority which at the same time dominates the ruling power, can be seen as a **disadvantage**. Moreover, there is a risk that some important sector of society will not be adequately represented in the parliament.

In bicameral systems (bicameralism) the discussion of issues entrusted to parliament's competence takes place gradually or concurrently in two separate and in terms of their creation different chambers. The first (lower) chamber is usually created according to the principle of **democratic representation** (their members are elected in general, direct vote). The method of creation of second (upper) chamber which is usually more **conservative** (in terms of membership criteria, e.g. higher age qualification, class affiliation; classical example is the British House of Lords) differs or it is related to **federal** or **regional** organisation of the state (individual member states of the federation or individual regions are represented; the Senate in the USA, the Federal Council in Germany or the Senate in the Czech Republic). Other differences between both chambers include their term, difference in the voting system used, different powers, etc.[25]

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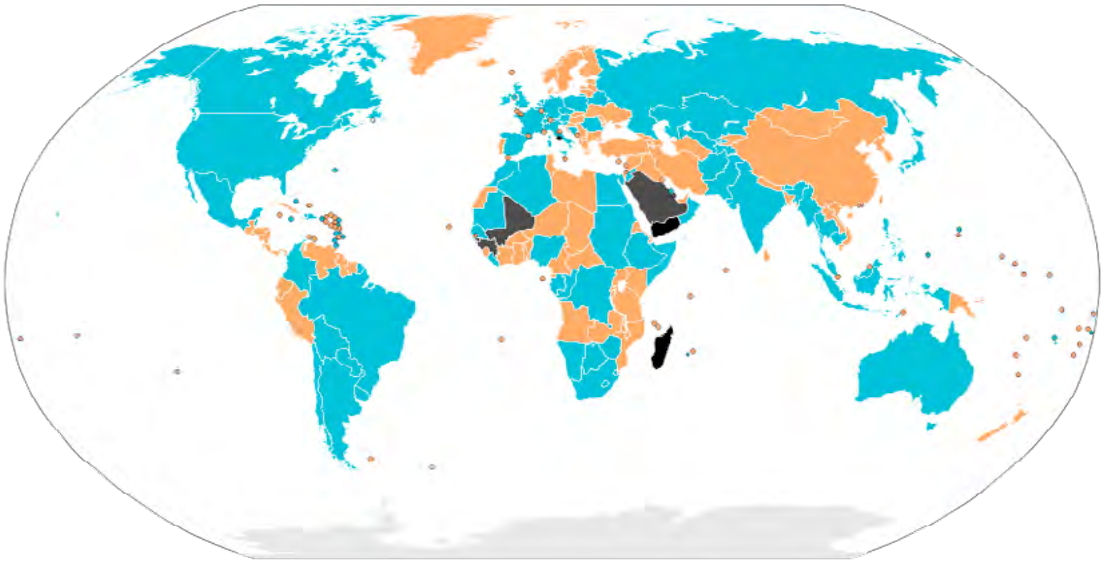
[23] OROSZ, L. – SVÁK, J. – BALOG, B.: *Základy teórie konštitucionalizmu*. Bratislava : Eurokódex, 2011, pp. 314-315.

[24] For example in the Slovak Republic, the government submits to the parliament most of debated bills and thus determines the subject matter of the parliament's activity, not to mention the situation when the number of debated bills does not leave any room for quality approach to the laws being adopted and the parliament thus acts as a formal adopter in terms of political arrangements.

[25] More on individual bicameral systems see e.g. KYSELA, J.: *Dvoukomorové systémy: teorie, historie a srovnání dvoukomorových parlamentů*. Praha : Eurolex Bohemia, 2004.

The purpose of the second chamber is reconsideration of the issue in discussion and finding broader agreement. On the other hand, the second chamber can act also as a "brake" and thus decrease the flexibility in the process of adopting decisions.



- States with unicameral parliament
- States with bicameral parliament
- States without parliament
- Data not available

3.2 Head of State

Head of state is the highest representative of the executive power in the state; it represents the states in internal and foreign policy. It can be a hereditary or elected **monarch**, **president** (elected) or in specific cases also **another officer** – e.g. in the former Soviet Union the nominal head of state was the Chairman of the Presidium of the Supreme Soviet. Apart from an individual head of state there is also the institution of a collective head of state (e.g. two Captain Regents in San Marino).

In monarchies, the duty of the head of state is entrusted to a monarch (king, emperor, tsar). The monarch is formally not accountable to anyone and is irrevocable.

The head of state in republics (president) is elected by the parliament (e.g. former Czechoslovakia), special assembly of electors (e.g. in the USA) or directly by people (e.g. in the modern Slovak Republic). It usually holds that the president elected directly

by people has "stronger position" (more competences) than the president elected by the parliament.

The head of state has *significant symbolic importance*. It can be said that even in republics the institute of the head of state proceeds from monarchist traditions and from the need of some form of personification of the state with a specific person. **The status of the head of state** depends on:[26]

a) constitutional powers,
b) method of creation,
c) formulation of constitutional and political accountability/unaccountability and formulation of legal and mainly criminal liability/irresponsibility.

Under the powers of the head of state usually fall:

- negotiating and signing international treaties,
- external representation of the state,
- declaration of war and negotiation of peace,
- appointing of high state officers (e.g. appointing the prime minister, ambassadors, generals, etc.),
- position of commander-in-chief,
- declaration of emergency,
- summoning and dissolving the parliament,
- granting pardons.

The head of state has the right to traditional **honorary prerogatives of the head of state**:

- using own banner and guard of honour
- granting and lending titles, honours and ranks
- ceremonial functions – e.g. opening the sessions of parliament

The position of the head of state is also specific in term of *its legal and constitutional and political accountability*. The head of state is:

a) in principle, constitutionally, politically and legally *unaccountable* during its term. The constitutional and political accountability for its acts or their part is borne by the government and its individual ministers.

[26] PRUSÁK, J.: *Teória práva*. Bratislava : VO PF UK, 1995, p. 80.

b) Legal (criminal liability) accountability of the head of state is executed only *in specific situations* (charge of high treason, etc.).

c) Potential constitutional and political accountability of the head of state (president) is exercised mainly at the end of its term (it is not re-elected - an example of *accountability to voters*).

d) Under very specific circumstances the constitutional and political accountability can be applied against the head of state even during its term. E.g. in the Slovak Republic under Article 106 of the Constitution of the Slovak Republic. The President of the Slovak Republic can be *recalled* by a popular vote.

A specific right of the head of state is the **right of pardon**. It is a certain correction of severity of judiciary by the executive power. It is executed in *general* (collective, i.e. toward a bigger group of people and criminal cases) and also *individual* sense (towards an individual).

The individual acts of pardon are:

a) *abolition* (the order of the head of state to law enforcement authorities not to commence criminal prosecution for a specific act or to suspend it);

b) *agratiation* (the order of the head of state to a court to remit or mitigate a valid imposed penalty)

c) *rehabilitation of the sentence* (the person must be treated as if it has not been convicted and punished - condition is usually preceding abolition or agratiation).

The general act of pardon is *amnesty* - in it, the effects of abolition and agratiation are applied through one general legal act to a bigger group of persons.

3.3 Government (council of ministers, cabinet)

The government (council of ministers, cabinet) is one of the highest collective state bodies. Whereas in the **parliament form** of government it has, *stricto sensu*, the character of highest executive body of state power, vested among others with decision making powers, in case of **presidential form of government** the cabinet does not have such powers and fulfils mostly the advisory, working and executive function in contrast to the head of state as the "head" (leader, "boss") of executive power.[27]

It is possible to meet two basic initial principles while analysing the method of for-

[27] SVATOŇ, J.: *Vládní orgán moderního státu: jeho původ a vývoj v některých evropských zemích*. Brno : Doplněk, 1997, p. 121.

mation of government or appointment of its members:

- **the principle of appointment** – the formation of government is bound to its appointment by the head of state; the process of government creating usually begins by granting authorization to assemble the government (granted by the head of state),
- **the principle of vote** – the formation of government is bound to election of its chairperson; e.g. in Germany the Federal Chancellor is elected by the Bundestag on the proposal of the Federal President who respects the results of parliamentary election in his proposal; after successful election and appointment the Chancellor proposes to the president the candidates for member of Federal Government, which are appointed by the president.[28]

In parliamentary form of government the process of formation of the government is usually finished by **declaring confidence** to the governmental programme by the parliament. The confidence, however, does not have to be declared to the newly formed government only, but the government can also connect vote on certain issue during its term (e.g. specific legislative proposal) with a confidence vote. In case of a failed vote (and no confidence vote) the government is then usually obliged to give its resignation to the hands of the head of state. Moreover, there is also the possibility of reversed procedure, i.e. to declare n**o confidence** to the government or its individual member, which results in termination of powers of the government or the member in question and recall by the head of state.

The concept, composition and structure of the government are most distinctively affected not only by the form of government, historical development, traditions, but also by tasks and activities performed and provided for by the government. In this context the following can be distinguished:

- **government organised on the principle of departments** (e.g. Italy, Austria) – such governments consists of the prime minister and ministers that are at the head of their departments (ministries); the main functions of the government are administration, coordination and overcoming differences between individual ministers; the government adopts its decisions either on the basis of unanimous agreement or according to majority vote of its members;
- **government with a prime minister (premier) at its head** – this type has historically evolved in Great Britain; the strong position of the prime minister stems from his position as the leader of the strongest party in the parliament; strictly speaking, also the so-called chancellor system in Germany, where the government is headed by a Federal Chancellor elected by the Federal Diet, can be included here; both the British prime minister and the German Chancellor

[28] For more see BLAHOŽ, J. – BALAŠ, V. – KLÍMA, K.: *Srovnávací ústavní právo.* Praha : Aspi, 2007, p. 143 et seq.

act as "chiefs of cabinet", decide on basic direction of the policy, for which they are accountable to the parliament, and chair the government;

- **government – council (directory)** – a typical representative of this model is the Swiss Federal Council; it consists of seven equal members elected for four years (they cannot be recalled) by the Swiss parliament.
- **monocratic government with a president at its head** (e.g. the USA) – president is the supreme constitutional representative of the executive power and the cabinet, which has his confidence, within the presidential form of government; as was already said, the president makes decisions within issues falling under his authority by himself; the cabinet has only an advisory function, unless the president states otherwise.[29]

4.4 Courts

The judiciary is a part of state instruments of power since their origin and its importance and position has changed throughout the history. Up until the beginning of enlightenment and the liberal state the judiciary was regularly connected with legislation (the absolute monarch as the highest justice) or with the administration (e.g. courts for subjects).[30]

Today, **the courts** are within the European (continental) systems of institutionalized separation of state powers bodies that **interpret** and **apply laws** (or legal regulations in general) **to specific cases** (for brief comparison: parliaments create laws and the government executes them). Within the context that they can interpret the law, they can also shape it (however in principle, they should not re-create it, just fill in the gaps; this does not apply e.g. to appellate courts in so-called Anglo-American legal system).[31]

Courts should be **independent** in their decision making and should adhere only to law (constitution, laws, other generally binding legal regulations). The independence of courts and judges means to create such relations between public authorities so the courts will not be subordinated to the parliament, bodies of executive power nor other public authorities.[32]

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29 SVATOŇ, J.: *Vládní orgán moderního státu: jeho původ a vývoj v některých evropských zemích.* Brno : Doplněk, 1997, p. 124.

30 HOLLÄNDER, P.: *Základy všeobecné státovědy.* Plzeň : Aleš Čeněk, 2009, p. 211. For more on historical development of judiciary in our territory see ŠVECOVÁ, A. – GÁBRIŠ, T.: *Dejiny štátu, správy a súdnictva na Slovensku.* Plzeň : Aleš Čeněk, 2009.

31 For more see KNAPP, V.: *Velké právní systémy: úvod do srovnávací právní vědy.* Praha : C. H. Beck, 1996, p. 163 et seq.

32 OROSZ, L. – SVÁK, J. – BALOG, B.: *Základy teórie konštitucionalizmu.* Bratislava : Eurokódex, 2011, p.

The system of courts consists of so-called **general courts** with general subject-matter and personal jurisdiction (they can decide in all cases concerning all persons about which the judiciary can decide).

Thus the subject-matter jurisdiction of general courts includes mainly:

- taking decisions on rights, obligations and interests protected by law,
- taking decisions on guilt and punishment or other repressive measure.

Moreover, there is also **special judiciary**, e.g. extraordinary courts for special types of cases or persons (labour courts, insurance courts, courts for crimes against state, etc.). A special category are military courts, taking decisions on crimes and professional offences of military personnel. An extraordinary court is also the court-martial, which decides on crimes, to which the martial law applies (i.e. special security regime declared during emergency or war).

But the most important representatives of special judiciary in the modern Central European area are the **constitutional courts**.[33] The main agenda of constitutional courts (in accordance with the original idea which led to creation of constitutional judiciary) should have been taking decisions on issues of legal control of constitutionality and legality, mainly **assessment of compliance** of lower legal regulations with the constitution and constitutional laws. However, over the last years (or decades) another type of agenda has soared, specifically the **constitutional complaints**, these have become the most frequently decided cases. Constitutional complaints are aimed against violations of fundamental rights and freedoms by decisions or actions of public authorities. Constitutional complaint is admissible usually only after all other possibilities of legal protection were exhausted.

Administrative judiciary represents another type of activity (it is performed either by general judiciary or special administrative judiciary, depending on given state). One of its functions is mainly the review of compliance of administrative decisions (individual administrative acts) and actions of public authorities with law.[34]

376.

[33] In this case it is so-called concentrated model of constitutional judiciary. The American, so-called diffuse model, typical for exercise of constitutional judiciary by general courts, should be distinguished from this. For more see BLAHOŽ, J.: *Soudní kontrola ústavnosti: srovnávací pohled*. Praha : Aspi, 2001.

[34] For more see SLÁDEČEK, V. – TOMOSZKOVÁ, V. a kol.: *Správní soudnictví v České republice a ve vybraných státech Evropy*. Praha : Wolters Kluwer, 2011.

3.5 Control Authorities

Control authorities have separate position, although they are sometimes seen as part of the executive power. Maybe *formation of new independent power - the control power* (along the three traditional powers of legislature, executive and judiciary) can be considered according to certain concepts.

Control authorities are independent in terms of creation from the government, appointment of highest officers of these authorities is usually within the jurisdiction of parliament or common jurisdiction of parliament and the head of state.[35]

On the other hand, these authorities usually possess no decision making power, they cannot solve conflict nor independently impose sanctions. Other, specifically authorised institutions impose sanctions on the grounds of their findings.

There are three basic control authorities:

a) supreme control office,
b) the office of public prosecution (or state prosecution office),
c) the office of public defender of rights (ombudsman).

3.5.1 Supreme Control Office

The supreme control office (under various names in various states) performs the audit of management of state budget funds, state property, property rights and claims and also other funds from public sources (health care payments, local taxes, etc.). Its position is often determined directly in the constitution.

3.5.2 The Office of Public Prosecution (State Prosecution Office)

In democratic states, the **office of public prosecution** is a state authority that oversees compliance with law of all state subjects and the society (state authorities, social organisations, enterprises and citizens). Individual prosecutors (e.g. district, regional) are appointed on respective levels of regional and administrative division (or

[35] PRUSÁK, J.: *Teória práva*. Bratislava : VO PF UK, 1995, p. 87.

following the territorial division of court districts) within the office of public prosecution. The office of public prosecution is usually headed by the chief prosecutor.

The office of public prosecution is obliged to investigate all suspicions of criminal activities it is informed about. Thus it has an *ex officio* duty to prosecute all crimes with the exception of civil action crimes. The prosecutor acts as the state (public) prosecutor in criminal proceedings, which is his main function in a democratic society.

3.5.3 The Office of Public Defender of Rights

The office of public defender of rights is an independent, special state authority, which cannot be classified with any traditional element of power and which aims to oversee the exercise of state power. It is headed by so-called public defender of rights and freedoms (**ombudsman**) who is elected by the parliament (or elected by the parliament and appointed by the head of state). He usually has immunity similar to one of a judge and he can be recalled only through a complicated special procedure.

The ombudsman is authorized to *investigate* the actions of the government, ministries and other public administration bodies, state officials and individual officers, by *own initiative* or a *citizen's complaint* against wrong administrative procedure.

He focuses mainly on:

a) violations of rights and freedoms of citizens by the actions of state authorities and other public authorities,
b) other breach of law by public authorities,
c) inactivity, failure to fulfil obligations, unlawfulness of procedures, delay in proceedings, errors, improper behaviour of state officials and officers, corruption, etc. (so-called *maladministration*).

After investigation he **notifies** respective authorities about found deficiencies and suggests adoption of specific measures. The ombudsman has no decision-making power nor power to impose sanctions. He cannot change or abolish decisions of other authorities.

However, he can publicly point out the deficiencies in standard procedure and public power's violation of citizen rights and notify superior authorities and the parliament.

The institutions of ombudsman was created in Sweden in 1809 and gradually spread to other Scandinavian countries and since the 1970s also to many other countries.[36]

4.6 Central Bank

Central bank (known also as bank of issue, reserve bank, etc.) is in charge of issuing currency and regulation of its amount and circulation (e.g. through emission of new banknote or by setting the interest rates).

It has supervisory powers over other (commercial) banks in given state, it provides them with loans, set rules of their actions and bank operation, regulates the exchange rate of own currency, etc. The aim is to prevent monetary insolvency, inflation and financial crisis. It can also manage state foreign exchange and gold reserves and regulate payment to foreign countries.

Usually it is a **state** or **public institution**. In developed democratic countries it is protected from direct political interference with its activity and has a governor and so-called bank council at its head.

[36] PRUSÁK, J.: *Teória práva*. Bratislava : VO PF UK, 1995, p. 89.

4 DEMOCRACY

Democracy means "rule of the people" in Greek – in ancient Greece it used to describe political system where all those with citizen rights (citizens) *were equal* and had equal *access to public offices*, at least theoretically.

The main decision-making body in the state was the assembly of citizens. However, ancient democracy concerned only *a small group of fully qualified male members of the society with citizen rights*, because women, slaves, foreigners and inhabitants without citizen rights (called *metics* in Athens) could not enjoy advantages of such democracy. In spite of that, Athens in so-called classical period (5^{th} – 4^{th} century BC) are traditionally considered the first democratic society.[37]

4.1 Concept of Democracy

The concept of democracy has not been defined in a generally accepted way. Democracy should represent rule of the "people", however, the term "people" itself is not understood in unified way. The American political scientist Giovanni Sartori introduces at least 6 possible interpretations of the term "people":

1. people literally as *everyone;*
2. people mean some undetermined big part, very *many;*
3. people in the sense of *lower class;*
4. people as inseparable entity, as an *organic unit;*
5. people in the sense of greater part described by the principle of the *absolute majority;*
6. people in the sense of greater part described by the principle of the *restricted majority.*[38]

[37] GRANT, M.: *Klasické Řecko.* Praha : BB-Art, 2006, p. 91.

[38] SARTORI, G.: *Teória demokracie.* Bratislava : Archa, 1993, p. 24.

Subsequently, possibility of different interpretation of the term «democracy» stems from each shown perspective. Also the method of how a democratic government should look in practice in terms of shown options – thus without becoming total anarchy and lawlessness, can be disputable.

The degree of democracy is the main criterion for assessment whether the form of state and governmental system is **democratic**, **undemocratic** or represent some transitional, combined or **semidemocratic** form.

Moreover, when analysing the term "democracy" it is necessary to be aware of the difference between the ideal of democracy and the practice of democracy, which is the result of the attempt to implement the ideal into real social conditions. This result is modified by social conservatism, selfish ambitions of individuals and groups, corruption, influence of other ideals (e.g. religious), etc.[39]

Full democratic participation in political life was permitted to only selected groups of citizens in the beginnings of democratic modern states. The right to vote was assigned only on the basis of property or education census. Women were denied the right to vote for a long time. The right to vote in most countries of Europe and both Americas was granted equally for individual social and gender groups only in the period between world wars.[40]

Thus, **political rights** can be also in democracy:

a) unlimited or general, and
b) limited (e.g. property census).

4.2 From Athenian Democracy to Present

4.2.1 Athenian Democracy

Actually, there is not much information about the Athenian democracy and its ideological grounds. The main "programme manifesto" of Athenian democracy, preserved until today, is the Pericles funeral oration in the first year of Peloponnesian war,

[39] SARTORI, G.: *Teória demokracie.* Bratislava : Archa, 1993, p. 10.

[40] PRUSÁK, J.: *Teória práva*. Bratislava : VO PF UK, 1995, p. 139.

as preserved by the Greek historian Thucydides (406 – 396 BC).

In this oration, Pericles described democracy as an establishment, in which:

- the power is in hands of all people,
- all citizens are equal before the law,
- abilities, not property are decisive for political career,
- political life is open and free,
- citizens are spontaneously interested in public affairs of the *polis*,
- the ability to discuss and argue in public are highly regarded and discussions are necessary preparation for wise actions,
- citizens freely engage in any craft, trade, science or art,
- citizens value their own well-being and they increase it deliberately.[41]

Democracy was not perceived quite positive after the end of Greek classic period. Platonic and Neoplatonic philosophy, which were accepted to certain extent also by medieval Christianity, were quite critical towards democracy. Democracy was perceived as a rather *negative phenomenon* up until the 19th century.[42] It was seen as rule of scum and idiots manipulated by demagogues. It was rather the "*republic*" that was seen as a more acceptable term expressing state of civic equality and broader collective rule. Medieval Christianity could not accept democracy – because in democracy the state and political power respect the will of people. According to Christian teaching on state, political power and states serve to bring the people with the help of instruments of power to one true religion and one right way of life and salvation, even against their will.[43]

4.2.2 Birth of Modern Democracy

Therefore, connection of modern democracy with ancient democracy is rather symbolic and looking back it can be said that the true evolution of democracy did not occur in the Anglo-Saxon world and Western Europe until the turn of the 18th and the 19th century.[44] Modern democracy has established only indirect and ideological connection with the legacy of ancient democracy. Besides the ancient democracy, anoth-

41 TUKYDIDES: *Dejiny peloponézskej vojny.* Bratislava : Tatran, 1985, pp. 109-116; OTTOVÁ, E.: *Teória práva.* Šamorín : Heuréka, 2006, p. 147.

42 OTTOVÁ, E.: *Teória práva.* Šamorín : Heuréka, 2006, p. 147; ADAMOVÁ, K. – KŘÍŽKOVSKÝ, L.: *Dějiny myšlení o státě.* Praha : Codex, 2000, pp. 67-73.

43 ADAMOVÁ, K. – KŘÍŽKOVSKÝ, L.: *Dějiny myšlení o státě.* Praha : Codex, 2000, pp. 67-73, pp. 102-114.

44 DAHL, R. A.: *Demokracie a její kritici.* Praha : Victoria Publishing, 1995, p. 195.

er source of democratic ideas in city-states was direct experience with life in self-governing communes (cities), political life of medieval estates with their assemblies, with medieval guilds and order fraternities and egalitarian and self-governing protestant religious communities.

Modern liberal democracy (democracy in Western sense) can be defined as a political system with *high level of participation of the population on the exercise of public power.* Citizens also participate in creation of highest state authorities and also on the exercise of state power. *Citizen equality* and also *citizen rights and freedoms* are guaranteed. *The people itself, citizens*, are the source of power. The goal of democracy is dignified life of citizens and pursuing their interests.[45] Besides, political rights are held by all citizens or at least their majority.

The so-called **democratic principles** are applied within it: pluralism, justice, legal safeguard, consensus, legitimacy and protection of minority.[46]

The main difference between liberal democracy and democracy in medieval and ancient city-states lies in:

a) limitations of the rule of majority (by law and legally guaranteed rights of minority and the individual),
b) representative nature of modern democracy,
c) existence of election process,
d) exercise of state power through professional state bureaucracy and professional politicians – not directly by citizens
e) greater space for private life of an individual and assertion of his individuality.[47]

Modern liberal democracy, as formed in the period after World War II, offers *very broad political rights*. It can be defined by basic principles or **main features of democracy**. They should be incorporated directly in the constitution in a democratic state. These features are:

a) limited majority principle,
b) principle of general and equal participation in public administration,
c) political pluralism,
d) economic pluralism,
e) free elections principle,

[45] OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 146.

[46] ADAMOVÁ, K. – KŘÍŽKOVSKÝ, L.: *Dějiny myšlení o státě.* Prague: Codex, 2000, p. 316.

[47] SARTORI, G.: *Teória demokracie.* Bratislava : Archa, 1993, p. 32.

f) principle of power representation control.

The limited majority principle means that collective decision-making (in voting, in elections) is basically applied in democracy and proposal that acquires the majority of vote according to respective procedure is adopted. At the same times, constitutional and legal rights of the minority and individuals are protected also in exercising the majority proposal.[48] Final decision should be rather a result of discussion than hard "steamrolling" of the minority by the voting mechanism. The freedom of the dictate of majority is limited by the legal system that protects also minority opinions, views and groups. The minority and minorities have right to participate in the control of public and state affairs. True modern democracy is thus not rule of any majority, but so-called *limited majority*. The rule of uncontrolled and unlimited majority can be rather referred to as *ochlocracy* (mob rule) than democracy. It is also called the *tyranny of majority*.

The principle of general and equal participation in public administration – is the confirmation of the right of citizens to participate in the *administration of the society* (mainly through *elections*, *voting*, *standing as a candidate* for representative bodies) and of civic equality. All citizens possess equal rights and freedoms, including political rights, i.e. rights to decide on filling public offices, apply for them and also to participate in decision on other important issues. This state of civil equality and openness of social structures is also called social or societal democracy (not to be confused with political movement of same name).[49]

Political pluralism means a coexistence (and tolerance) of *several political ideologies and directions* in the society. The organisational expression of political pluralism is simultaneous existence of several *political parties* and movements, guaranteed by law, as well as *free competition during elections*, in which several political parties and candidates can compete for votes. Also *the freedom of speech* is part of the political pluralism.

Economic pluralism is equal coexistence and protection of various forms of ownership (private, state, public, cooperative) and in broader sense also the coexistence of a larger number of competing economic subjects, which is also a prerequisite for political freedom. It also contains the requirement of right to ownership, free market economy and free competition.[50] No one is discriminated on the market. This condition can be described also as so-called economic democracy.[51]

The free elections principle – means that in the society elections for political positions and positions of power are held in regular periods set by law. In modern de-

48 PRUSÁK, J.: *Teória práva*. Bratislava : VO PF UK, 1995, p. 143.

49 SARTORI, G.: *Teória demokracie*. Bratislava : Archa, 1993, p. 11.

50 PRUSÁK, J.: *Teória práva*. Bratislava : VO PF UK, 1995, p. 152.

51 SARTORI, G.: *Teória demokracie*. Bratislava : Archa, 1993, p. 12.

mocracies, these elections should be held on the grounds of *general*, *equal* and *direct* right to vote. The voting itself should be secret.

Principle of power representation control means that the constitution and laws grant people, the source of power, right to external and internal control of how representatives of public power exercise this power. The objective of such control is to prevent abuse of power. This control can be implemented through the ruling power's obligation to disclose information, freedom of speech and freedom to criticise the activities of public institutions through non-governmental organisations, free media and, finally, also civil disobedience and right to resistance. It is important that also representatives of the minority, a minority movement, participate in the control.

The modern liberal democracy is always defined and limited by law, only within which political and social life can exist. Democracy is a legal institutions and it grants citizens certain basic rights and freedoms that cannot be questioned by any political or decision making mechanism. Citizens or their representatives thus cannot "democratically" vote on that, e.g. they will displace, kill or expropriate certain smaller group of citizens or particular individual.

Ancient democracy lacked such clear safeguard of civil and human rights. Too often it contained destruction of weaker political fraction or its exiling after it failed in internal political struggle for power in a particular *polis*.

Apart from absence of legal safeguards, the ancient democracy was different from today modern liberal democracy also in that it developed the system of representative democracy only in a limited way and it lacked an elaborate mechanism of the right to vote.

Modern democracy in the Western sense is thus related not only with "rule of people" but also with high *level of civil freedom* (liberal democracy), *legal* and *developed social state*, *secularism*, developed and technologically evolved *market* (or social market) economy and also natural demand to respect *human rights*, maybe even to environmental protection, *sustainable development* and *peaceful coexistence of nations*.[52]

Therefore, in the Western sense of democracy (so-called liberal democracy) not only the process of choosing government (i.e. elections) is important, but also phenomena such as:

a) legal state,
b) separation of powers,
c) protection of basic rights and freedoms (freedom of speech, of assembly, of

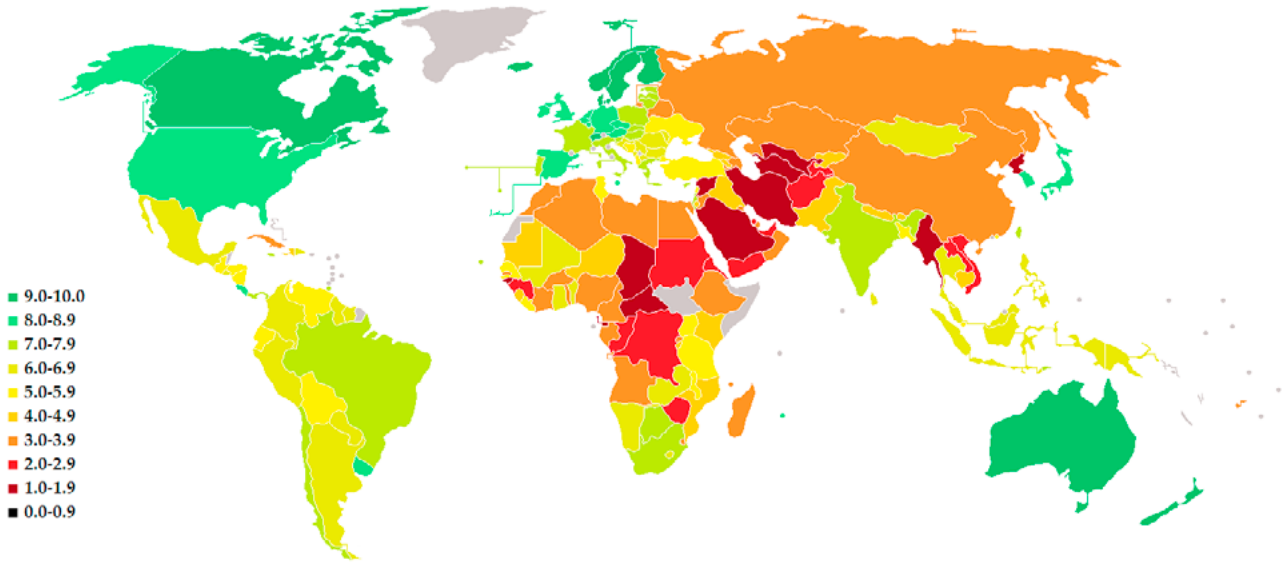
[52] See also GIDDENS, A.: *Důsledky modernity.* Praha : Slon, 1998.

conscience and belief, protection of ownership rights).[53]

Certain states can be speculatively described as "illiberal democracies" in this regard. For example, the modern Iran with its "Islamic democracy".

It is true in democratic states that **elected parts of state apparatus** (president, parliament) are superior to **unelected parts** (state authorities). An exception is e.g. hereditary monarch in constitutional monarchy or appointed judges of the constitutional or supreme court.

It must be always remembered that democracy can be possible only with people of certain ethical level that are willing to behave fairly in the political competition. It is very difficult to introduce democracy in a society that hasn't reached adequate social, cultural and economic level or that, in its own civilization tradition, does not attach adequate importance to democracy and human rights.



Map showing the so-called democracy index according to The Economist magazine in 2011. The higher the number, the higher level of democracy and freedom.

4.3 Critical View of Democracy

The critical view of democracy claims that not "people" but citizens rule. These choose, in optimal case, only between competing political elites, which is best expressed by proportional representation.

[53] ZAKARIA, F.: *The Rise of Illiberal Democracy*. In: Kritika & Kontext, 1998, no.1, pp. 9-13.

According to another critical view, democratic politics is only the area for psychological and media manipulation of voters who therefore do not vote with regard to their own interests but, being under the influence of the mentioned media manipulation, for interests of media owners and tycoons. Not the reality and real political intentions became the determining factor, but the ability to influence the vote and to win him to your side by persuasion techniques of the activity called "*public relations*".[54]

Democracy can be wrecked also due to the lack of interest of citizens in public affairs, factual inequality in the society, where certain individuals are endowed with greater power and wealth than their fellow citizens even despite the proclaimed ideal, and also due to the abuse of power by politicians and corruption.

An extreme opinion says that the attempt for democracy is nonsense and in reality a narrow elite must always rule, which is a natural order of things.

The risk for modern society is its atomisation – disintegration into isolated individuals after the structures of pre-modern society (religious and regional groups, clan, kin and profession bonds, etc.) were destroyed. Atomised individuals are easily controlled and unable of political action. The answer to this threat is the emergence and evolution of civic society with its structures.

It is necessary to bear in mind that in reality, political democracy, civic freedom and civil equality must be maintained by active interventions of the state and civil society institutions. Because in reality the natural form of human society arrangement (and which was prevailing until the 20th century) was authoritarian and hierarchical: the powerful controlled the weak, the rich controlled the poor, men controlled women (usually), etc. The society slides almost automatically towards such natural and often violent order during the disintegration of modern states and weakening of state power.

4.4 Direct Democracy

Historically speaking, there are *two basic forms of democracy*:

a) direct democracy,
b) representative (indirect) democracy.

[54] JAŠŠOVÁ, E.: *Slovná ekvilibristika v službách politikov.* In: Veda, média a politika. Bratislava : Veda, 2008, pp. 84-86.

Direct democracy is such form of organisation of society (state, tribe, self-governing city) in which the people as a sovereign directly decide about public affairs (about the exercise of state and public power, in law-making, in judiciary). Direct democracy is historically the oldest form of democracy and its origin can be maybe seen in tribal warrior gatherings (which is sometimes described as military democracy).

A typical method of direct democracy is the *assembly of citizens* where specific issues are voted on. It is known from ancient and medieval city-states and self-governing city communes. Today it can still be found e.g. in Swiss cantons and valid Slovak law permits it at local municipal level too (the assembly of citizens of municipality, local referendum).

Something like popular assembly is unimaginable in modern big territorial states with millions of citizens. However, technological development enabled direct instant voting through the Internet, which is used in certain countries also in taking decisions on issues of municipal policy in a fast electronic referendum (the USA, Canada, and Estonia).

But also for these reasons the so-called **representative**, **indirect democracy** gained upper hand.

4.5 Indirect Democracy

The essence of **indirect democracy** is that citizens do not decide about specific public issues directly, but they elect from among themselves a smaller number of authorized representatives, which have mandate to decide on these issues on citizens' behalf. Citizens are the source of power and its bearers are the elected representatives (deputies, members of parliament). Parliament as the main representative power body is typical for representative democracy.

Thus, **elections** are the crucial part of indirect representative democracy. These are regulated by rather clear legal rules. Voters choose in elections from among proposed candidates one or more persons for the public office.

The members of *parliament* and *self-government councils* at various levels, the *mayor,* the *highest representative of self-governing region*, the *president* of state, *judges*, etc. are chosen in elections.

There are several types of elections:

- direct and indirect,
- single-round, two-round and multiple-round,
- national, regional and local,
- general and by-election,
- ordinary, extraordinary and repeated.

In **direct elections**, citizens elect their representatives directly. In **indirect elections**, they first elect an assembly of electors, which then elects in their stead (presidential elections in the USA).

One-round, **two-round** and **multi-round** elections mean how many rounds are necessary to reach valid result. For example, if no candidate received the majority of votes in the first round, only two candidates with relatively highest number of votes compete in the second round.

In **general elections**, the whole representative assembly is elected at once. In **by-elections**, only deputies for mandates which become vacant e.g. due to death or resignations, are elected.

Ordinary elections are held at the end of the electoral term (term of office). **Extraordinary elections** are held in case of premature end of the term, e.g. when the parliament is dissolved. **Repeated elections** are elections held instead of elections that were declared invalid – e.g. due to their falsity.

Elections are connected with the term of **right to vote**. This term can be understood in two senses:

a) **individual right of citizens** available to them in elections – the citizens' right to vote;
b) **legal regulation** of elections themselves.

The citizen's right to vote includes:

- right to vote (active right to vote),
- right to be voted for (passive right to vote),
- right to participate in proposing candidates through political parties and movements,
- right to participate in electoral campaigning,
- right to information on elections and programmes of candidates,

- right to participate in or demand legality review of the course of elections.

The right to vote in democratic state is *uniform* and *general* for all citizens. In the past, the right to vote of individual social groups could be regulated differently (with regard to property and education, different weight of "city" votes against "country" votes, etc.). Part of inhabitants could even be denied the right to vote.

The right to vote as *legal regulation of elections* regulates several areas:

- the status of citizen – voter and his rights
- creation of administrative bodies of elections (election committees)
- voting system
- creation of electoral register
- method of proposing candidates
- electoral campaign
- determining the results of elections
- electoral control including civic and judicial review.

This right to vote is based in modern democracy on following principles:

1. generality
2. equality
3. directness
4. secrecy.

Generality means that all citizens of given state (or in case of municipal and regional election of smaller district) are voter without restriction by any electoral census (gender, race, property).

Equality of the right to vote is principle according to which each person applies their right to vote under equal conditions, have one vote and this vote has equal weight and is counted equally. It is also important that the electoral districts are of same size - thus to avoid that one deputy will represent different amount of voters than another one.

Directness of the right to vote means that the voters vote for candidates directly and there is no middleman in form of electors (who then choose from among real candidates for the office).

Secrecy of voting lies in ensuring that it will not be possible to find out how a specific voter voted (voting behind a screen, sealed envelopes, same ballot papers).

The basic principles of democratic free elections are applied also in other forms of voting (e.g. referendum).

Voting system is method of organisation and execution of elections on the grounds of the right to vote and also the system of determining and publishing results and assigning mandates.[55]

In general, there are three basic types of voting systems:

- plurality voting system
- proportional representation system
- combined voting system.[56]

In **plurality voting system**, the respective area of state (or other unit) is divided into relatively small election districts, whereas only one deputy is being elected in each district (usually in two rounds). There is as many election districts in the state as there are mandates. Simply said, the candidate who gets the most votes is the winner in given district. Votes in favour of unsuccessful candidates are not used anyhow.

The advantage of this system is that the candidate must run for the mandate alone, as a personality. He cannot "get a ride" on the party's list of candidates. However, in practice the majority of relevant candidates must have backing from some powerful political party. Because candidates representing certain minority political and ideological direction usually fail, the resulting composition of parliament does not reflect real distribution of powers in the society. Theoretically speaking, even a party with only 26% – 30% voters' support can have majority in the parliament. This voting system results in formation of two strong political parties. The government is usually more stable.

The election districts in the **proportional representation system** are usually bigger (eventually , there can by only one big voting district in the state) and voters vote for presented candidate lists of political parties en bloc - as a whole (or they can vote for selected candidates with a preferential vote). Mandates are distributed between individual political parties according to the number of received votes. Whereas in determining specific people for deputies also the order of candidates on the candidate lists and also preferential votes are taken into account. In certain countries it is required

[55] PRUSÁK, J.: *Teória práva*. Bratislava : VO PF UK, 1995, p. 151.

[56] For more see SARTORI, G.: *Srovnávací ústavní inženýrství. Zkoumání struktur, podnětů a výsledků*. Praha : SLON, 2001.

for a political party to achieve certain minimum level of votes cast (electoral threshold clause) – in the Slovak Republic the threshold is 5% at the moment.

This system can relatively precisely transfer to the parliament the distribution of powers and sympathies in the society.

The main disadvantage of the proportional representative voting system is the *monopoly of political parties in formation the candidate lists*. It is not possible to be a candidate without the support of political party, whereas fair and open method of candidate list formation may not be ensured in political parties. Moreover, the voter votes for unreadable party and its list of candidates (whereas he usually knows only one, two main leaders) and not for specific representative. Actual internal conditions in individual political parties do not even have to be too democratic. Besides, the parliament can consist of great number of small and weak political parties, which are able to assemble governmental coalition only with difficulties.

Combined voting system is, as the name suggests, the combination of proportional and plurality system. For example in such way, that one part of deputies are elected by plurality and second part by proportional system and the voter has two votes, which he casts separately (Germany). Or in case of two chambers, one chamber can be elected in a different way than the other one.

The ***transfer of power*** from its source (people, citizens) to elected representatives, who in this way gain authority to hold respective office and power from voters, occurs in elections. They obtain so-called **mandate** in this way.

This mandate can be:

a) imperative
b) representative.

Imperative mandate meant in the past that the deputy was bound by orders of his voters and these could recall him even the end of his term if he breached their order. The disadvantage of imperative mandate is virtual impossibility to achieve compromise or respond flexibly to the situation in a representative body meeting, because the deputies cannot withdraw from their fixed positions.

Deputy exercises the **representative mandate** in the name of whole political nation - not only his specific voters. After election and within period defined by his term, he acts independently according to his own conscience, conviction and deliberation (while he has to take into account the interests of all). His political accountability is applied only at the end of electoral term.

Several institutions of **direct democracy** can also be present in representatives (indirect) democracy: *referendum, plebiscite, right to petition, popular initiative and recall.*

Referendum is a citizens vote, regulated by the constitution and law, on proposals of constitution, laws and other important questions. Its results are legally binding.

A referendum can be:

a) according to the obligation to hold it: *obligatory* (mandatory) or *facultative* (optional);
b) according to the moment when it is held: referendum *ante legem* (before adoption of a law) or referendum *post legem* (it confirm already adopted law - ratification referendum);
c) according to subject authorised to announce it: *popular* or *governmental*;
d) according to geographic scope: *national* or *local*.

Plebiscite is a citizen vote on specific issue of public interested, announced by state authority. Unlike referendum, plebiscite is not clearly legally regulated and its result is not binding for the ruling power (it is only indicative). A special form of plebiscite is territorial plebiscite in which the inhabitants of given territory give their opinion on the nationality of that territory (i.e. to which state they want to belong).

Right to petition allows citizens to petition respective state authorities and regional self-government authorities with requests, suggestions, proposals and grievances.

Popular initiative is the ability of voters to initiate the discussion on proposal of law or proposal if its amendment within legislature. Its requirement is e.g. sufficient number of signature gathered under the proposal (usually tens of thousands), etc.

Recall is the right of voters to recall the holder of elected public office even before the end of his term, on the grounds of a petition signed by statutory amount of voters.

5 LEGAL STATE

Legal state is currently considered one of the supporting ideas many states try to follow. Together with democracy it often creates an axiomatic couple which can be found incorporated also in several constitutions as a fundamental constitutional standard. For example, Slovak Constitution of 1992 states in Article 1 (1): *"The Slovak Republic is a sovereign, democratic and legal state."* [57] But what does the term of legal state include?

5.1 Historical Genesis of the Idea of Legal State

The idea of a legal state dates back to Ancient Greece.[58] Law there was considered to be a part of harmony, natural order of the universe. It should rule above all and everything, even over the rulers. According to the opinion of **Plato** (427 – 347 BC) in his work Laws, law was an *unlimited master over rulers and rulers were only obedient servants of law*.[59] Formulation of the idea of legal state is obvious also it the works of **Aristotle** (384 – 322 BC) when he asserts that the rule of people introduces also an instinctive element into power, whereas he considers law as sublime product of reason. He further states in Nicomachean Ethics: *thus let us not allow a man but law to rule, because man rules for his own benefit and becomes a tyrant*.[60]

But it took the idea of legal state a very long period to transform from this plane of outlined thought ideal into reality. Actually, the idea of legal state was forced out in the Middle Ages by the preference of a stronger centralized state, defended in the constitutional thinking mainly by Jean Bodin (1530 – 1596) and Thomas Hobbes (1588 – 1679).

[57] Also Czech, Polish, Portugal, Romanian or Slovenian constitutions contain such provision.

[58] For details see SELLERS, M. – TOMASZEWSKI, T. (eds.): *The rule of law in comparative perspective*. Dordrecht : Springer, 2010, p. 11 et seq.; TAMANAHA, B.: *On the rule of law: history, politics, theory*. Cambridge : Cambridge University Press, 2004, p. 7 et seq.

[59] PLATÓN: *Zákony*. 715 c.

[60] ARISTOTELES: *Etika Nikomachova*. 1281 a.

5.1.1 Rule of Law

Creation and development of the idea of legal state occurs only from the period of bourgeois revolutions and construction of democratic constitutionalism in England.[61] The quote of the English lawyer Sir Edward Coke (1552 - 1634) who in the dispute with English king defended his opinion that **not the king protects the law, but law protects the king**, is quite often cited in this regard.[62]

However, only the English Bill of Right of 1689 means a breach in a constitutional form into the then valid principle *princeps legibus solutus* (the ruler is not bound by the laws) which enables the arbitrariness of the ruler, his position above the law. The *Bill of Rights* set out lawful limits of ruler's authority. It defined them by the principle of *debet rex esse sub lege* as obligations established by law against the society and not as a matter of good will, as was the custom so far. This important constitutional document **thus places the law above the English king** and is considered to be the foundation of the Anglo-American concept of legal state (***rule of law***).[63]

But the Anglo-American doctrine of *rule of law* crystallizes in England only later – in the 18th and the 19th century. Its formation is related mainly with the name of important English constitutional theorist **Albert V. Dicey** (1835 – 1922). In his *An Introduction to the Study of the Law of the Constitution* he states three basic tenets of the *rule of law*:

1. No man can be punished except for direct breaches of law which was proved in due trial.
2. No man can be put above the law and all are equal before the law regardless their social, economic or political status.
3. Rule of law also includes result of judicial decisions determining the rights of private persons.[64]

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61 For details see TAMANAHA, B.: *On the rule of law: history, politics, theory*. Cambridge : Cambridge University Press, 2004, p. 28 et seq.

62 *„...that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debed esse sub homine, sed sub Deo et lege [That the King ought not to be under any man but under God and the law.]."* 12 Co Rep 64, 77 ER 1342, [1607] EWHC KB J23.

63 OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, pp. 67-68.

64 DICEY, A. V.: *Introduction to the Study of the Law of the Constitution*. London : Macmillan and Co., 1915, p. 202 et seq.

5.1.2 Rechtsstaat

Elaboration of the legal state concept in Europe does not come until the German liberalism at the end of the 18th and in the first half of the 19th century.[65] **Immanuel Kant** (1724 – 1804) is considered the ideological father of the legal state (***Rechtsstaat***) theory. Although he formally does not use the term legal state yet, the modern theory of legal state in fact derives just from him. Kant saw the state's role only in creating a regime of lawfulness, thus in creation of system of valid law and ensuring its observance by all and everyone. Only so can the state ensure free development of individuals but also the development of the just state itself.[66]

The ideas of legal states were elaborated in the 19th century Germany mainly by lawyers **Robert von Mohl** (1799 – 1875)[67] and **Otto Bähr** (1817 – 1895).[68] They apprehended the legal state as necessary defence against too strong power: state that has power to efficiently protect its citizens is powerful enough also to oppress them. Their theories situate legal state **into contraposition to police state.** Both emphasise the idea that the state authorities are bound by law and that the state can interfere with the lives of individuals only on the grounds of constitution and laws.

Also the often cited quote of **Friedrich Julius Stahl** (1802 – 1861), according to which the legal state should *"precisely and irrevocably establish both tracks and boundaries of its jurisdiction, as well as the scope of freedom of its citizens and it should not execute and directly impose moral ideas of state's paths outside law"*, must be mentioned in this context.[69]

In 1871, after the creation of the second German Empire, the perception of legal state takes a turn. Its liberal variant was suppressed and the conservative mode, promoting state power's dominance over law, got gradually asserted. It was represented by authors, starting with **Karl Friedrich von Gerber** (1823 – 1891), through **Paul Laband** (1838 – 1918) to **Georg Jellinek** (1851 – 1911).[70]

The development in Germany between two world wars significantly affected other theoretical perceptions of legal state. One of the questions arising in this regard is

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65 For details see COSTA, P. – ZOLO, D. (eds.): *The rule of law: history, theory and criticism.* Dordrecht : Springer, 2007, pp. 237-260.

66 For details see KANT, I.: *Metaphysik der Sitten.* Stuttgart : Reclam, 1990.

67 For details see MOHL, R. v.: *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaats*. 3 vols. Tübingen : Laupp, 1832–4.

68 BÄHR, O.: *Der Rechtsstaat.* Kassel and Göttingen : Georg H. Wigand, 1864.

69 STAHL, F. J.: *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*. Tübingen : Mohr, 1878, p. 137.

70 For details see COSTA, P. – ZOLO, D. (eds.): *The rule of law: history, theory and criticism.* Dordrecht : Springer, 2007, pp. 247 et seq.

whether the Third Reich (1933 - 1945) was a legal state. Basically the issue is whether there is connection between that state and Weimar Republic. On January 30, 1933, *Hitler* was appointed the Chancellor of Germany under the Weimar constitution. On February 28, 1993, he convinced the old president *Hindenburg* that Germany is on the threshold of state of emergency, underlined by the fire in Reichstag on the previous day. *Hindenburg*, using his constitutional authority, issued the "Decree of the Reich President for the Protection of People and State". Significant parts of Weimar constitution concerning fundamental freedoms thus lost its force and persecution of political opposition became possible. Such deprivation of force of fundamental rights by declaring the state of emergency was "temporarily" admissible under article 48 of Weimar constitution.

Persecution of political opponents (mainly communists), which had the impression of legality, began to be directed also against the members of Reichstag after Reichstag elections on March 5, 1933. (Hitler got more than 40% of votes but not majority.) The political opponent was thus successfully decimated and intimidated. So the decisive action could come from the top. On March 23, 1993, the Reichstag adopted the "Law to Remedy the Distress of People and Reich" *(Gesetz zur Behebung der Not von Volk und Reich)*. This law eliminated the constitution with dry formulations. Article 1 stipulated: *"Laws of the Reich may also be enacted by the government of the Reich"*. Article 2 stipulated: *"Laws enacted by the government of the Reich may deviate from the constitution of the Reich."* This law became effective through it declaration on March 24, 1933 and should be effective until April 1, 1937.

But Hitler renewed his power every four years until the end of Third Reich. Therefore, voting in 1933 - 1945 can be hardly questioned. Some theorists consider Hitler's dictatorship constitutional from technical point of view as well as from narrowly positivistic point of view. Legislature and courts continue to operate despite the fact that the law was brutally manipulated during the whole period to serve narrow interests of the party.[71]

Before Hitler's rise to power the Austrian legal scholar Hans Kelsen (1881 – 1973) came with the idea of distinguishing between the legal state in formal and material sense. According to him the **legal state in formal sense** is every state governed by law regardless of its content. On the other hand, the **legal state in material sense** is every state whose laws contain "legal institutions, such as democratic legislature, binding force of executive acts of the head of state in connection with countersignature by respective minister, civil rights of subjects, independence of courts, administrative judicial system, etc."[72]

This distinction gained importance in the context of described development and it was also reformulated. The event of World War II showed how important it is with

[71] BRÖSTL, A.: *Právny štát: pojmy, teórie, princípy*. Košice : Medes, 1995, pp. 44-45.

[72] KELSEN, H.: *Allgemeine Staatslehre*. Berlin : Springer, 1925, p. 91.

regard to state's existence to pay attention to value foundations of content of laws. Naturally, a basic requirement was to **ensure respect for human rights.** Many authors still consider that as key part of *legal state in material sense*.[73] Understanding was changed also in case of *legal state in formal sense*: state that recognizes as crucial the separation of powers, independence of judiciary, legality of public administration, legal protection against public acts and public law redress, is considered a legal state in formal sense.[74]

5.2 Principles of Legal State

Although there is no exact definition of basic, immanent features of legal state in legal theory and individual feature cannot even be strictly separated from each other, it is possible to set apart as most important mainly the following:

1. limited government principle,
2. principle of constitutionality and legality,
3. separation and control of powers,
4. safeguards of fundamental rights and freedoms,
5. legal certainty,
6. independence of judiciary.

5.2.1 Limited Government Principle

The principle of limited government is derived from Anglo-American rule of *limited government*,[75] which is understood in broader sense than just a requirement for limiting the activity of government or the executive power. (Self)limitation of power as a whole, all its elements (including legislative power) is required to make it function to the benefit of citizens.

A legal state in this sense is such state which **establishes binding limits of its power interference** into citizens' life **for itself through law.** The regulation (constitu-

[73] For example, see GAMPER, A.: *Staat und Verfassung. Einführung in die Allgemeine Staatslehre.* Wien : Facultas.wuv, 2010, p. 231 et seq.

[74] See SCHMIDT-AßMANN, E.: *Der Rechtsstaat.* In: ISENSEE, J. – KIRCHHOF, P. (Hrsg.): *Handbuch des Staatsrecht füt Bundesrepublik Deutschland.* Band 2. Heidelberg : Müller, 2004, p. 541 et seq.

[75] For details see SAMPLES, J. (ed.): *James Madison and the future of limited government.* Washington, D.C. : Cato Institutite, 2002.

tional or legal) defining the scope of state's activity at the same time must be explicit to prevent development of arbitrariness and to check the natural expansiveness of state power.

Law is not given to the state in advance; it can create, change and abolish it. The state itself thus decides how and to what extent it will limit its power. In this way it provides individuals and society with security, predictability of power interferences, mainly state coercion and finally it leads to limitation of the use of force.

State power limitation with regard to citizens is usually incorporated in **constitutions of democratic states** in such way that citizens are allowed to do everything that is not prohibited by law, whereas the public authorities can act only on the grounds of the constitution, within its limits and scope and in the way defined by law (see Article 2 (2) and (3) of the Constitution of the Slovak Republic).

5.2.2 Principle of Constitutionality and Legality

The principle of constitutionality and legality is considered a cornerstone principle of a legal state. Quite often the understanding of a legal state, which is usually called a **legal state in formal sense** in contemporary theories, is narrowed down to this principle.[76]

Constitutionality in *formal sense* means the requirement for strict observation of constitution and compliance of laws and subordinate legislation, exercise of power as well as rights and obligations with the constitution. Constitutionality in *material sense* is the right for constitutional guarantee of fundamental rights and freedoms, as right to constitution.

Legality means that law is generally binding and all subjects of laws have unconditional legal obligation to observe law in force. Therefore, in a democratic society the requirement to observe law shall be applied also to state authorities, including those creating the law. Even the parliament as the supreme representative of state's sovereignty, legitimized by elections, must observe constitution and procedural regulations created by itself in the process of creating and changing laws.

This requirement is formulated as the **principle of state authorities bound by valid laws.** Even though state authorities create law, as if it emancipated after it creation from its creator and binds him equally as other subjects. Certain independence,

[76] For details see GAMPER, A.: *Staat und Verfassung. Einführung in die Allgemeine Staatslehre.* Wien : Facultas.wuv, 2010, p. 229-230.

separation of the life of law from the states shows also in that the legal standard lasts even after the body it adopted changes or ceases to exist.

State authorities shall be bound by strict legal rules also when exercising coercion. Thus they cannot wilfully exercise any coercion but only such that is executed in cases defined by law in advance and in a way described by law. Law protects in this way the scope of freedom which cannot be interfered with by any coercion not substantiated by law.

5.2.3 Principle of Division and Control of Powers

One of the oldest and still current questions concerning the exercise of power is: how to prevent concentration and abuse of power and how to efficiently control power or its exercise?[77]

Answers can be found already with several ancient authors. For example, **Aristotle** in the Athenian constitution distinguishes between making resolutions, commanding and judging. **Polybius** even proposes to divide the supreme power and to have individual powers separated and balanced to such extent so as *"no one would dominate the others and diverge but that all remained in balance as on scales, so that conflicting powers were overcome and the constitutional state be maintained for a long time."*[78]

The idea of separation of powers becomes particularly attractive only under the influence of experience with absolutist monarchy where the concentration of unrestrained, unchecked power in the hands of a ruler offers real opportunity for its abuse. Here, in the 17th and the 18th century, the concept of separation of powers, connected with the names of John Locke and Charles Montesquieu, was born. It is the result of their deliberations on how to institutionally prevent the abuse of power of unrestrained state authority, either made up by an individual or a certain group, or thus provide freedom of individuals and the society.[79]

According to **John Locke** (1632 – 1704), power should be divided to **legislative**, **executive** and **federative**. The highest of them, although not unlimited, should be the *legislative* power. As he writes, the legislative power has *"the right to decide how the state power should be used to maintain the community and its members"*.[80] The legislative power determines the rules of functioning of executive and federative power

[77] BRÖSTL, A.: *Právny štát: pojmy, teórie, princípy.* Košice : Medes, 1995, p. 53

[78] ZIPPELIUS, R.: *Allgemeine Staatslehre.* München : C. H. Beck, 2003, p. 323.

[79] OTTOVÁ, E.: *Teória práva.* Šamorín : Heuréka, 2006, pp. 73-74

[80] LOCKE, J.: *Dvě pojednání o vládě.* Prague: ČSAV, 1965, p. 208.

through laws. In Locke's theory the judicial power is a part of *executive power*. Its role should be in constant execution of laws and control of their observance. *Federative power* should defend the interests of citizens against foreign countries. It should solve disputes between anyone from the society and those outside of it.

Charles de Secondat Montesquieu (1689 – 1755) followed the ideas of John Locke. As he writes *"each state possesses three types of power: legislative power, executive power that governs the issues of international law and executive power that governs issues of civil law. Through the first one the sovereign or an institution issues laws, permanently or temporarily and corrects or abolishes those already issued. Through the second one he concludes peace and wages war, delegates or accepted ambassadors, establishes security, anticipates the enemy attacks. Through the third one he punishes crimes or tries the disputes of individuals. Let's call the last one the judicial power; and second simply the executive power of the state."*[81]

The essence of separation of powers theory is to ensure balance of all three powers. Only when no power has dominant position, the powers can effectively control each other, inhibit its expansion. However, this principle was finished only by American constitution theorists. Requirement for its exertion are the principles, elaborated by Locke and Montesquieu, of already mentioned separation of legislative, executive and judicial power, their independence, mutual unaccountability and incompatibility.[82]

Principles of Separation of Powers

The principles of separation of powers are:

- separation of powers and division of powers to three,
- their independence,
- incompatibility of powers,
- mutual unaccountability and non-subordination of powers,
- balance of all three powers, their mutual cooperation or competition through the mechanism of mutual control, checks and balances - mutual balancing of powers.[83]

The **principle of mutual independence** of individual powers is represented by the independence of individual powers with regard to their creation (so-called creation independence). It means that ***one power should not create another*** (e.g. the president of the USA as a representative of executive power is not elected by the par-

[81] MONTESQUIEU, Ch. S.: *Duch zákonov*. Bratislava : Tatran, 1989, p. 206.

[82] For details see GAMPER, A.: *Staat und Verfassung. Einführung in die Allgemeine Staatslehre*. Wien : Facultas.wuv, 2010, pp. 163-164.

[83] OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 76.

liament but by people through electors and a member of any house of parliament cannot become an elector). As opposed to *parliamentary system* with its constitutional and political accountability of the government to the parliament, such accountability cannot be applied within the separation of powers system in the *presidential republic*. Individual powers are therefore mutually politically unaccountable and are not subordinated to each other.

Powers are **incompatible** to be held in the hands of one state official. He can exercise his office only within one element of power. For example, the member of government cannot be a member of parliament or judge during his term.

Separation, independence, unaccountability and **incompatibility** of legislative, executive and judicial power are in term of separation of powers theory, however, not safeguard against the possibility of wilful abuse of power within individual powers. They do not eliminate the possibility of any of power gaining dominance, its own uncontrollability and control over other powers. Therefore, the most important principle of the system of separation of powers is the mechanism of **mutual control, checks and balances.** Hence constant tension should be between individual powers, whole network of control mechanism, ensuring that no power has the chance to significantly tip the scales to its side at the expense of other powers for a longer period.

This relativizes the Montesquieu's principle of separation of powers. This means that even though the highest representatives of individual powers (president, parliament, judiciary) are still separated, independent and individual bodies, at the same time each of them should act as a check and balancing agent against the other two. None of the powers thus can adopt a final decision without certain form of cooperation (control, consent or eventually support) with a body of another power.

Consistent application of separation of powers theory is constitutionally incorporated in the presidential form of government of the United States of America. Continuously it spread with certain modifications into countries of South America, East Asia and former Soviet Union. In continental Europe the prevailing system of democratic states is the parliamentarianism with characteristically dominant position of parliament. In spite of that the distinctive elements of the separation of powers are gradually exerting in constitutions of European parliamentary states (including the Slovak Republic).

Vertical Separation of Powers

The power in state is separated, apart from horizontal separation (i.e. at the level of highest state authorities), also vertically - between central (national) and local au-

thorities. Vertical division of power in state depends on the vastness of territories of modern states, which cannot be efficiently controlled from one centre. At the same time, territorial scope and scope of jurisdiction of individual territorial units of the state can be different (for details see chapter Internal Structure of the State).

Internal Separation of Powers

The term internal separation of powers is also used in theory and practice. It is separation and mutual balancing of power within one state authority. For example, the system of two chambers (the House of Representatives and the Senate) within the parliament of the USA, where the law to be adopted must win competent majority in both houses of Congress (for details see the subchapter on Parliament).

Control Power

In today representative democracies, where the people are represented in the decision-making processes mainly by their elected representatives who often represent rather the interests of political parties or their own interests and not the public interest, the existence of **fourth element of power – control**, is needed more and more. Today, control is considered by many theorists as the highest value of democracy.

5.2.4 Safeguards of Fundamental Rights and Freedoms

The priority of rights and freedoms of citizens and society against the state is specific for the legal state. Human rights and freedom are the most important subjective rights that are today guaranteed internationally and constitutionally.[84] However, such guarantees were not common in the past: international safeguarding mechanisms of respecting human rights appear within the Western civilisation area only after World War II, in states of former Soviet bloc only after the fall of individual totalitarian regimes.

Several generations of human rights are distinguished under one of the most gen-

[84] For details see , e.g. JANKUV, J.: *Medzinárodné a európske mechanizmy ochrany ľudských práv*. Bratislava : Iura edition, 2006; STRÁŽNICKÁ, V. a kol.: *Medzinárodná a európska ochrana ľudských práv*. Bratislava : Eurokódex, 2013.

eral classification:[85] **First generation** of human rights is represented mainly by personal freedom, civil and political rights. They are rights that should protect individual area of citizens' freedom mainly against the state and to ensure equality of all before the law.

On the European continent, the human rights of first generation were born in the fight of bourgeois against the institutional structure of feudal society, in the North America in the process of revolutionary movement for political independence from the British Empire. These movements produced documents which formally recognized human rights of individuals as natural result of their human essence. The milestones of evolution in this regard are considered to be the French ***Declaration of the Rights of Man and of the Citizen*** of 1789 and the United States ***Bill of Rights*** of 1791 (composed of the first ten amendments to the Constitution of the United States of 1787).

Today, the first-generation human rights are regulated mainly by United Nations international documents, specifically in the **Universal Declaration of Human Rights** of 1948 and the International **Covenant on Civil and Political Rights** of 1966. In the Constitution of the Slovak Republic, the fundamental human rights and freedoms (personal rights) are incorporated in Articles 14 to 25 and political rights in Articles 26 – 32.

The first-generation human rights comprise mainly of these rights:

a) **Civil Rights**

- right to life,
- right to inviolability of person and its privacy,
- right to personal freedom and prohibition of forced labour and services,
- right to protection of human dignity, personal honour, reputation and protection of name,
- right to privacy,
- right to ownership,
- right to inviolability of home,
- right to privacy of correspondence, secrecy of mailed messages and other document and protection of personal data,
- freedom of movement and residence,
- freedom of thought, conscience, religion and faith,

[85] It is said that the first to come with classification of human rights to generations was the Czechoslovak-French lawyer Karel Vašák. His classification into generations reflects the principles of the French Revolution: freedom, equality, brotherhood. See VASAK, K.: *Human rights: s thirty-year struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights.* UNESCO Courier 30:11, Paris : UNESCO, 1977.

- right to fair trial,

b) **Political Rights**

- freedom of expression,
- right to information,
- right to petition,
- right to assembly,
- right to organise,
- right to vote,
- right to resistance.

Unlike with the first-generation rights and freedoms connected with the state's obligation not to interfere with defined space of individual freedom, in case of the **second-generation rights** the activity of state is expected. It is the so-called positive obligation, based on which the state should adopt measures which enable exercise of these rights.

The second-generation rights include:

a) **Economic Rights**

- right to free choice of profession.
- right to engage in entrepreneurial or other profitable activity,
- right to work,
- right to equitable and adequate working conditions,
- right to freely associate with others in order to protect their economic and social interests,
- right to strike,
- right of women, minors, and disabled persons to an enhanced protection of their health at work as well as to special working conditions,

b) **Social Rights**

- right to adequate material provision in old age, in the event of work disability, as well as after losing the provider,
- right to protection of health,
- right to special protection of marriage, parenthood and family,

c) **Cultural Rights**

- right to education,
- right to freedom in scientific research and in art; right to legal protection of creative intellectual activity.

The origin of second generation of human rights was related to industrial revolution, when the excessive use of cheap labour of workers, who worked often in inhumane conditions, was quite common. Bourgeois freedoms were just an empty clause for them and for other people living on the poverty line. The second generation of human rights thus emphasises humanely respectable conditions and social environment, social guarantees of human rights equality.

The development of rights of the second generation is characteristic mainly for the period after World War II. Important international documents incorporating social right are mainly: The ***Universal Declaration of Human Rights*** of 1948 and ***International Covenant on Economic, Social and Cultural Rights*** of 1966, which were adopted on the ground of the UN. For Europe, it is mainly the ***European Social Charter*** of 1961. Extent of their incorporation in constitutions of individual states depends on each state. In the Constitution of the Slovak Republic they are incorporated in Articles 35 to 43.

The **third generation** of human rights emerge significantly later than the previous two. Whereas the first two generations of human rights present individual rights, the third generation consists of collective rights, rights reflecting the effort of joint solution of humanity's global problems. These include:

- right to a healthy environment,
- right to economic and social development,
- rights of national and ethnic minorities,
- rights to participation in cultural heritage,
- right to natural resources,
- right to communicate,
- right to intergenerational equity.

It is obvious from the basis of these rights that to ensure their protection certain form of participation and cooperation of multiple individuals and states is required. Exertion of these rights exceeds state borders and in many cases also the borders of regions or continents. But state sovereignty, controversial nature of these right and different economic conditions in different states are obstruction in incorporation of

these rights in international treaties. Therefore, the third-generation rights are included in non-binding documents only, such as the ***Declaration of the United Nations Conference on the Human Environment*** (Stockholm Declaration) of 1972 and the ***Rio Declaration on Environment and Development*** of 1992.

The second and third generation of rights have their advocates as well as critics. The most prominent critics include the representatives of liberal movement, such as F. Bastiat[86] or F.A. Hayek.[87] On the other hand, one of the prominent advocates of the second-generation rights is J. Waldron.[88]

Protection and Safeguarding of Human Rights

One of the most important guarantees of transformation of human rights from the level of their legal incorporation into execution is mainly the activity of independent and impartial **courts**, which are obliged to provide protection to these fundamental right in case of their violation by state authorities (so-called vertical effect of human rights) or individuals (so-called horizontal effect of human rights). Important role in human rights protection is played also by other state institutions, mainly **the office of public prosecution** and **ombudsman** (public defender of rights).

Guarantees of human rights are also reinforced by the existence of international mechanism of their protection. The base of the universal system of international protection and development of human rights became the already mentioned documents: *the United Nations Charter, the Universal Declaration of Human Rights* of 1948 adopted on its grounds and two covenants - *the International Covenant on Civil and Political Rights (1966)* and *the International Covenant on Economic, Social and Cultural Rights (1966).*

The covenants define in more detail the rights declared in the Universal Decla-

86 E.g. following quote of Bastiat's work the Law is being often cited in this regard: *"M. de Lamartine wrote me one day: "Your doctrine is only the half of my program; you have stopped at liberty; I go on to fraternity." I answered him: "The second half of your program will destroy the first half." And, in fact, it is quite impossible for me to separate the word "fraternity" from the word "voluntary." It is quite impossible for me to conceive of fraternity as legally enforced, without liberty being legally destroyed, and justice being legally trampled underfoot."* LEONI, B. – BASTIAT, F.: *Právo a svoboda/Zákon.* Praha : Liberální institut, 2007, p. 303.

87 See HAYEK, F.A.: *Cesta do otroctví.* Praha : Barrister & Principal, 2004.

88 *„In any case, the argument from first-generation to second-generation rights was never supposed to be a matter of conceptual analysis. It was rather this: if one is really concerned to secure civil or political liberty for a person, that commitment should be accompanied by a further concern about the conditions of the person's life that make it possible for him to enjoy and exercise that liberty. Why on earth would it be worth fighting for this person's liberty (say, his liberty to choose between A and B) if he were left in a situation in which the choice between A and B meant nothing to him, or in which his choosing one rather than the other would have no impact on his life?"* WALDRON, J.: *Liberal Rights: Collected Papers 1981–91.* Cambridge : Cambridge University Press, 1993, p. 7.

ration of Human Rights. Moreover, each of them also regulates procedures through which the respective UN bodies can control whether the member states apply the protected rights. These procedures are applied against states that agreed with them and thus acceded to the so-called *Optional protocol*.

Complaint can be filed by a person under the jurisdiction of a given state that thinks their rights guaranteed by any of mentioned international UN human rights treaties were violated. The essence of proceeding lies in the fact that after the complaint was filed the treaty body shall decide whether the violation of right occurred and shall propose eventual steps to be taken by that state to remedy. Decisions of treaty bodies thus do not have a character of a court decision but only recommendations for member states.

The specific control in the area of economic and social rights is performed by the **International Labour Organisation**, established in 1919. The specialized international agency **UNESCO** is concerned with supporting cultural rights.

Another element of the control system are non-governmental organisations, such as **Amnesty International**, **International League of Human Rights**, and others.

The European System of Human Rights Protection

The European Convention on Human Rights of 1950, adopted in the then newly established **Council of Europe**, is the expression of common European traditions and culture of European democratic states on the European continent.[89]

Every person or group of persons (organisation) convinced that any signatory state violated their rights recognized by the Convention, can on its ground file a complaint to the **European Court of Human Rights**, based in Strasbourg. The condition is that no more than six months have passed since the domestic decision. The subject of complaint before the European Court of Human Rights is usually the breach of right to court protection in civil cases, right to counsel in criminal cases, violation of right to freedom by the decision on detention or arrest, inadequate length of court proceedings, etc. In terms of Article 40 of the Convention, the final decision is binding and the state is obliged to execute it. The state has an obligation to provide restoration of violated rights, however it is free to choose the means to achieve this goal.

Another institution that became involved in the human rights protection system in Europe, has also lately become the **European Union**. That is, by the end of 2000 it has adopted the ***Charter of Fundamental Rights of the European Union*** at an intergovernmental conference in Nice as joint and not binding document of the European

[89] For details see e.g. CAMERON, I.: Úvod do Európskeho dohovoru o ľudských právach. Bratislava : Nadácia Občan a demokracia, 2000.

parliament, the Council of the European Union and the European Commission. Originally, the Charter should become the second part of the European Constitution (and thus gaining legal binding force), but when this project failed, the Charter got into the document, which is valid at the moment and which replaced the Constitution – into the ***Treaty of Lisbon***.

The extent of fundamental human and civil rights, shown in the Charter, is substantially broader, compared to codes of human and civil rights incorporated in constitutions originating shortly after World War II, as well as compared to the *Convention on Human Rights*. New conception of human and civil rights in the *Charter of Fundamental Rights of the European Union* essentially abandons usual classifications shown in previous international law and constitutional documents on human and civil rights. This fact does not mean that authors of the Charter dismissed in theory the traditional classification, but they abandoned it during the design of Charter's text so that the Charter could express equal value position of all rights incorporated in it as fundamental.

Since the Treaty of Lisbon became effective (December 1, 2009), the **Court of Justice of the European Union**, based in Luxembourg, can apply and construe the *Charter of Fundamental Rights of the European Union*. The Court of Justice of the European Union has strict rules for filing actions, thus making the possibility to file an action more difficult. Therefore, the possibility to file complaint with the European Court of Human Right in case of violation of human rights is used more often in practice.

Since 2007 also a special agency of the European Union in the area of human rights protection – the European Union Agency for Fundamental Rights, based in Vienna. Its goal is to provide assistance and professional counsel to respective bodies and agencies of the Community and its member states on fundamental rights in execution of legal regulations of the Community, adopting measures and proposing adequate procedures.

However, the guarantees of fundamental rights and freedoms are not only the matter of state or institutions of international community. Also the "civil maturity" is their guarantee. If citizens do not know their right or if the civil awareness and sentiment, respect to human rights and freedoms are underdeveloped, it is hard to expect quality of their implementation. Therefore, the importance of education and training in the area of human rights is being globally emphasized. The objective of human rights education is to achieve self-respect, that everyone will be aware of their rights and at the same time also respect and sensitivity towards rights of others shall be taught and activity to provide rights of all shall be supported. With this comes hand in hand development of tolerance, mutual respect and solidarity. Education should ensure that individuals know how the human and social rights can be introduced into social and political reality, at both the national and international level.[90]

[90] OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 87.

5.2.5 The Principle of Legal Certainty

Law, through establishing clear, predetermined and generally knowable rules and its consistent execution, allows to recognize what actions are required from us, what actions can we expect from others, mainly from state authorities. It allows predicting the results of actions and thus it provides subjective certainty to individuals that law will be complied with against them, that justice will be served in specific cases. Legal certainty is therefore certainty provided to us by law, its confidence in law.[91]

Partial principles, specifying the principle of legal certainty, are:

1. actions of state authorities must be **predictable** within some limits to the citizens and thus possible **to be estimated**;
2. laws should be formulated **clearly** and **unambiguously** to allow for the citizen to get an idea about the legal situation; this implies that the legislator should be using vague legal terms and general clauses minimally;
3. laws should not be retroactive (so-called **prohibition on retroactivity**), i.e. they should not introduce into laws upon becoming effective specific rights and obligations that are treated as if they were valid already in the past; it is necessary to add in this context that it should be distinguished between ***true*** and ***false retroactivity*** – as for true retroactivity, the later legal regulation does not recognize rights and obligations acquired during the validity of previous legal regulation; as for false retroactivity, the rights and obligation acquired under previous legal regulation are recognized, however these relations are assessed according the new legal regime since the new regulation became effective, thus rights or their content can be changed or new right introduced.[92]

6.2.6 Independence of Judiciary

Judges in a legal state are independent in the performance of their office and are bound only by law in taking decisions. The concept of independent judges has two roots. It stems from the neutrality of judge as a guarantee of just, impartial and objective proceedings (trial) and of securing rights and freedoms of individual by the judge who is protected from political power.

Theory distinguishes between three types of judicial independence:

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91 OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 88.

92 Compare BRÖSTL, A.: *Právny štát: pojmy, teórie, princípy*. Košice : Medes, 1995, pp. 81-82.

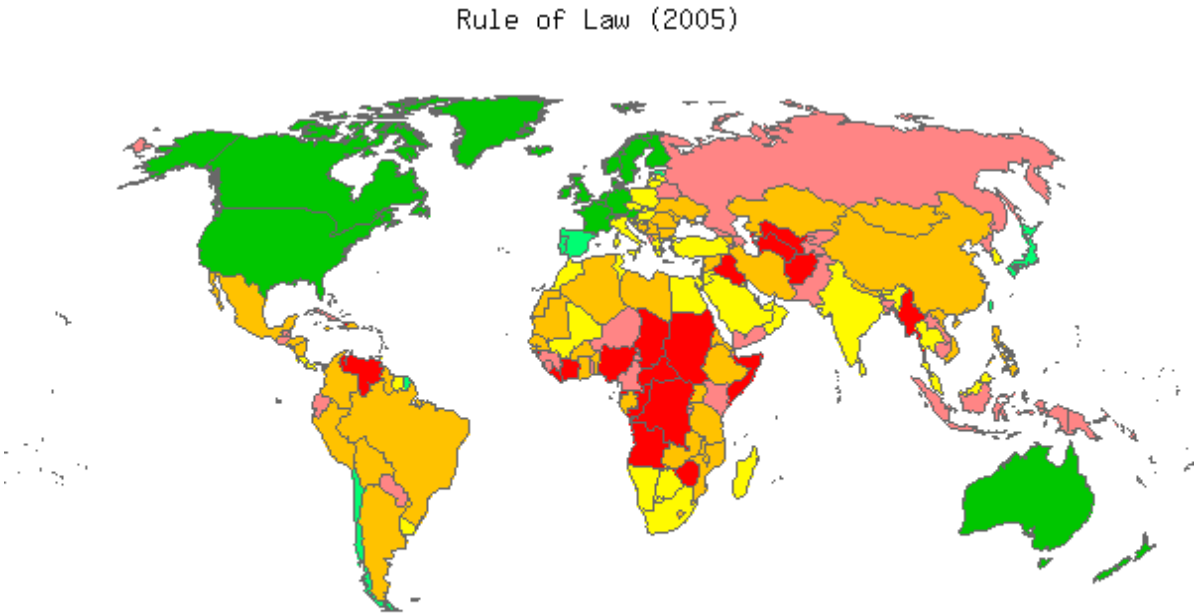
- **personal independence** – the judge has his profession guaranteed by law with the freedom to apply for judicial profession, he *cannot be removed* (or more precisely, he can be removed only in extreme cases, e.g. if he commits a wilful crime) *nor transferred*.
- **organisational independence** – courts are strictly separated from the administration (executive power, government); also it is inadmissible for a legislative body to exercise judicial power;
- **functional independence** – interference with the functions of judiciary by other element of public power is prohibited, including influencing trials, abolition of judgements by executive bodies or by implementing retroactivity of laws governing trial proceedings or merits of crimes by legislative power.[93]

Moreover, the condition of judicial independence is also the **professionalism of a judge**, his/her **impartiality** and **judicial ethics**. With regard to professionalism, the fact that the judicial profession is performed by lawyers with university degree with particular specialisation, confirmed by professional exam, is not sufficient for the judicial profession. Also preparation for every particular decision is important and not only with regard to the knowledge or relevant legal regulation but also other expert information that are necessary to pronounce qualified judgement.

The impartiality of the court and the judge is basic condition for objective and just decision. Impartiality is the state of judge's internal open-mindedness toward the case, his conviction that he is not influenced in favour or against any of the parties to proceedings, which could affect his decision.

Judicial ethics is the manifestation of non-legal rules of conduct of a judge in his profession, which has also considerable importance. Though, a judge is also led by his moral sentiment, conscience and knowledge in making decision. Ethical codes of judiciary profession exist in many states to make the decision making and finding justice for judges easier.

[93] See details and compare MACKOVÁ, A.: *Nezávislost soudců.* Praha : Právnická fakulta Univerzity Karlovy, 1999; SVÁK, J. – CIBULKA, Ľ.: Ústavné právo Slovenskej republiky. Osobitná časť. Bratislava : Eurokódex, 2009, p. 729 et seq.



2005 map of Worldwide Governance Indicators, which attempts to measure the extent to which agents have confidence in and abide by the rules of society. Colours range from dark green (90th – 100th percentile) to light green (75th – 90th percentile), yellow (50th – 75th percentile), orange (25th – 50th percentile), pink (10th – 25th percentile) and red (0th – 10th percentile). Percentile rank indicates the percentage of countries worldwide that rate below the selected country.

7 SOURCES OF LAW

The legal theory distinguishes between sources of law in two basic meanings:

1. sources of law in material sense – the so-called material sources of law,
2. sources of law in formal sense – the so-called formal sources of law.

Material sources of law are the sources of the content of law, sources affecting the content of legal standards. They include all social, political, economic, natural, technological, demographic, international politics related, moral and other conditions that are important with regard to social dynamics and create request to react by respective law-making bodies.

The term of sources of law is used more often in its formal sense, i.e. in the sense of **formal sources of law** or simply forms of law. The distinguishing criterion of individual sources in this case is, on the one hand, the ***method*** *how was the legal standard created* (which varies according to subject that created it) *and how was it communicated to its recipients* (in authoritative and binding form).

Traditionally, it is distinguished between four types of sources of law on the basis of the method of creation and the binding form in which they are expressed:

1. legal regulations,
2. legal precedents,
3. normative agreements,
4. legal customs.[94]

7.1 Legal Regulations

[94] The first to come with this classification was probably GRAY, J. Ch.: *The nature and sources of law.* New York : The Columbia University Press, 1909, p. 145 et seq.

Basic formal sources of all legal system in the (European) continental family of law are the legal regulations. **Legal regulation** can be defined in the most general way as a material holder of immaterial legal standard, i.e. as a material medium through which is the legal standard communicated to its recipients. That means that the legal regulation is an official and formal document, declaring (at least) one legal standard as generally binding rule of behaviour.[95]

The legal regulation is a **normative legal act** in its form, but that does not mean that both terms are interchangeable. The term normative legal act is broader than the term legal regulation; it describes all outcomes of law-making process, regardless of their content. Therefore, only such normative legal acts that contain legal standards are legal regulations. For example, any **statute** is a normative legal act. In case the statute contains legal standards (the absolute majority of law does) we can refer to it as a **legal regulation** and a source of law. However, if the statute contains only a *political proclamation* or *individual order*, it is not a case of legal regulation and it cannot be considered as a source of law.[96]

As a specific example for normative legal acts that **are not** legal regulations, the so-called "statutes on merits" can be stated.[97] None of them can be considered a legal regulation because they do not contain legal standards as generally binding rules of behaviour, breach of which is sanctioned by the state authority. Statutes on merits usually contain in the first part only a statement that certain historic figure has extraordinary merit (e.g. *"Alexander Dubček has earned extraordinary merit for democracy, freedom of the Slovak nation and for human rights."*). They are not written in a general way and lack sanction (e.g. they contain an individual order to establish a commemorative plaque and bust for a particular person, but should the obligation be not fulfilled, it would not lead to immediate legal consequences).[98]

Legal regulation is a general term, in individual states it then has specific form determined by the state, of:

- **constitution** *(Verfassung, constitution, constitución)*
- **statute** *(Gesetz, loi, ley)*,
- **delegated legislature** *(Verordnung, législative déléguée)*,
- **decree**, etc.

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95 See KNAPP, V. a kol.: *Tvorba práva a její současné problémy.* Praha : Linde, 1998, pp. 20-21.

96 HARVÁNEK, J. a kol.: *Teorie práva.* Plzeň : Aleš Čeněk, 2008, p. 252.

97 In case of the Slovak Republic it concerns these statutes: Act No. 117/1990 Coll., on merits of M. R. Štefánik; Act No. 402/2000 Coll., on merits of Milan Rastislav Štefánik for the Slovak Republic; Act No. 531/2007 Coll., on merits of Andrej Hlinka for state-building Slovak nation and for the Slovak Republic; Act No. 432/2008 Coll., on merits of Alexander Dubček.

98 For details see ŠMIHULA, D.: České a slovenské „zákony o zásluhách" ako teoretickoprávny problém. In: Právny obzor, 2011, issue no. 3, pp. 290-304.

As an universal and generally binding legal regulation, it applies to indefinite number of subjects of the same kind (e.g. employees, soldiers, road users) and to indefinite number of situations of the same kind (although different case-by-case).

Legal regulations are classified according to the criterion of **legal force**, which stems from the hierarchic position and jurisdiction of authorities that issue them. The highest legal force and also the highest level of universality and general binding effect is possessed by legal regulations issued by the supreme public authority. In today´s situations of separation of powers it means usually the parliament. With regard to that the parliament in democratic systems is constituted in elections and thus it derives its position (in terms of the sovereignty of the people principle) from the people as the source of power in the state, its law-making authority lies in issuing legal regulations with the highest legal force. Specifically, it issues the following original **(primary) legal regulations** (arranged according to the level of legal force): *the constitution and constitutional laws, organic laws* (e.g. in France)*, laws.*

Constitution is a legal regulation of the supreme legal force, consists of systematically arranged set of legal norms with the predominant purpose to define the values of the state and the society and to regulate fundamental social relations, mainly the principles of relations between the state and individuals as well as relations towards other states and international community, and also the foundations of organization and operation of public authority, form and territorial division of the state (including relations between the state as a whole and its territorial parts). Constitution is the foundation of law of every modern state and enjoys particular legal protection.[99]

The most common form of primary regulation in the continental legal culture is a ***statute***.[100] The parliament can regulate any social relations through statutes that are expedient to be regulated by law.[101] But statutes must be (with regard to their legal force) in compliance with the constitution and constitutional laws, as well as with international treaties that have priority to laws in terms of national law.

Apart from the above forms, there are also **derived (secondary) legal regulations**. These usually contain more detail legal regulation of relations that are essentially regulated by original (primary) legal regulations, mainly statutes. Derived legal regulations shall not be inconsistent with primary legal regulations, they are issued to execute them, within the limits of express authorization contained in the primary

[99] OROSZ, L. – SVÁK, J. – BALOG, B.: *Základy teórie konštitucionalizmu*. Bratislava : Eurokódex, 2011, p. 15.

[100] For details see GERLOCH, A. – MARŠÁLEK, P. (eds.): *Zákon v kontinentálním právu*. Praha : Eurolex Bohemia, 2005.

[101] An enormous increase in adoption of legal regulations has occurred over the last two decades, some authors speak in this context about *legislative optimism*, *hypertrophy of law* or *legislative vortex*.

regulation (*secundum et intra legem*).

Derived legal regulations of the Slovak Republic are issued mainly by these authorities:

- the Government of the Slovak Republic (***government orders***)
- ministries and other central public authorities (***decrees, ordinances and measures***).

7.2 Legal Precedents

Precedent is a legal rule or principle included in a court decision (court precedent, judicial act) that binds courts (of the same or lower level) in terms of arguments in taking future decisions.

Court precedents are considered an important group of sources of law (the so-called *judge-made law*), mainly in the Anglo-American legal culture. On the other hand, court precedents can be found also in the legal systems of the continental European states. Nevertheless, it is necessary to keep in mind that the Anglo-American precedent and the precedent in the European continent are different.[102]

Slovak courts use the so-called constant **judicature** in their decision making, consisting of selected and published court decisions. In practice it means that primarily the decisions of the Supreme Court of the Slovak Republic (which should consolidate the decision making of courts) serve as the source of (understanding of) the law, mainly for lower courts.[103]

According to J. Svák, the Slovak judicial system is based on the traditional civilian notion of the precedent that is derived from the position of the judge to the law. As a

[102] Z. Kühn sees their difference in the following aspects:

[in] terms of understanding of the binding force of precedents;

[in] the perspective of perception of law in both legal cultures;

[in] terms of legal certainty, which was traditionally achieved in both legal cultures in different ways;

[in] different function of supreme courts (the Anglo-American courts usually decide prospectively, the continental courts retrospectively).

[For] details see KÜHN, Z. – BOBEK, M. – POLČÁK, R. (eds.): *Judikatura a právní argumentace*. Praha : Auditorium, 2006, p. 25 et seq. Compare also KÜHN, Z.: *Aplikace práva ve složitých případech (k úloze právních principů v judikatuře)*. Praha : Karolinum, 2002, p. 268 et seq.

[103] For details see MAJERSKÝ, R.: *Zjednotenie rozhodovacej činnosti súdov v Slovenskej republike*. In: Justičná revue, 2007, issue no. 12, p. 1591 et seq.

rule, the judge does not seek to resolve the case outside the legal rule and his primary task in creating the precedent is to construe ambiguous or incomplete provisions of the legal rule. In doing so, the judge has to tune in on the mentality of creation of the legal rule. This interesting fact has created the concept of the so-called **clauses of the decision** or **case law**.

These clauses or case law become precedents in Slovak conditions. Although they are based on a specific judgment, the very fact that the author (exceptionally also the publisher) has 1) singled out these clauses, 2) shaped them into a separate normative text and 3) formally separated from the reasoning (as a rule, before the actual judgment), means that the precedent, in the form of a clause or case law, becomes legal rule, similar to law. The judge, similarly to the legislator and following his example, tries to make general rules from the specific case, thus judicial precedent creation takes the form of a legislative process rather than administration of justice.

In administering justice, judges approach these clauses as legislative enactment, a general rule, which is separate from the original judgment and the specific facts of the case which enabled these clauses or case law to arise. These clauses or case law are applied as valid legal rules without allowing to exercise discretion in their application which, in fact, means that in the Slovak legal system (but also in the majority of countries of Continental Europe) judicial precedents have greater actual influence and importance than in the common law systems.[104]

For comparison, let's have a look now at the Anglo-American judicial system, in which the judicial decision making is based on **the obligation to adjudicated cases in compliance with previous precedent** (the so-called ***stare decisis*** principle). Specifically it means that the judge must be aware of precedents that are relevant for his case and take them into account when deciding a case.[105]

On the other hand, the court is not obliged to apply the precedents in all circumstances. The first fact that plays a role in this is the question of mutual relation between the given court and the court that issued certain precedent. In general, it can be said that **binding precedents** are created within one judicial system only by appellate courts. The court is, in principle, obliged to follow the precedents, if a binding precedent exists.

However, there are also **non-binding precedents** apart from binding precedents. They are mainly precedents that are not part of the same judicial system (e.g. case is tried by the court in Washington and one of the parties is referring to a Californian precedents) and therefore can only be effective by the force of their persuasiveness

[104] SVÁK, J.: *Súdna moc a moc sudcov na Slovensku*. Bratislava : Eurokódex, 2011, pp. 121-125.

[105] KÜHN, Z. – BOBEK, M. – POLČÁK, R. (eds): *Judikatura a právní argumentace*. Praha : Auditorium, 2006, pp. 15-16.

(*persuasive precedents*).

A complex question is, which part of the precedent should be considered binding. By far it is not true that each and every court's deliberation in its decision can serve as a binding rule for later cases. Strictly speaking, the binding part (called ***ratio decidendi***)

- must be a legal rule of certain level of universality,
- must be a rule that was decisive for the sentence of the decision and
- at the same time does not exceed the definition of merits of given case.

All other parts of the decision (called ***obiter dicta***) are not binding.[106]

The application of a precedent looks as follows: First, the judge must ascertain whether the merit circumstances in relevant aspects of the actual and the precedent case are similar in principle. In case he reached a conclusion within his discretionary powers that such similarity exists, he would apply a rule and issue a decision.

If the relevant facts of the precedent and actual cases are different, according to judicial discretions, he must state these differences in the decision (the so-called ***distinguishing***). In case of appellate proceeding, the appellate court will then examine the precedent and the actual case and if he admits there are such differences, he can create a new precedent by his decision (it is called overruling; judge of a lower court may not issue a decision that will be in contradiction with a binding precedent).

7.3 Normative Agreements

Normative agreements are similar to normative legal acts in their essence. They are **written**, **normative** and they **bindingly regulate** a whole group of relations of the same kind and indefinite amount. Unlike normative legal acts, they are not created by authoritative decision (i.e. unilaterally) but on the grounds of consensus of two or more parties (contracting parties).

Normative agreement is thus a mutually affirmative expression of the will of several subjects, which does not regulate specific rights and obligations of actual subjects but defines them in general for the whole group of cases of the same kind.[107] Expressed in negative, they are not relatively binding agreements of private-legal nature (e.g.

[106] For details see KÜHN, Z. – BOBEK, M. – POLČÁK, R. (eds.): *Judikatura a právní argumentace*. Praha : Auditorium, 2006, p. 19 et seq.

[107] OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, p. 189.

purchase contract, contract for work, etc.).

Normative agreements can be divided into two groups to agreements:

- international,
- national.

International agreements are concluded between subjects of international public law, i.e. mainly states and intergovernmental international organisations.[108] These can be regarded in terms of national or international law. In terms of national law, not every international agreement can be understood as a normative agreement. Such description is used only for those containing also generally binding legal regulations, besides relative obligations of parties. Other international agreements, i.e. those regulating only mutual obligations of parties are not considered normative agreements and therefore they are not sources of law in terms of national law.[109]

Normative provisions can be found also in agreements of pure **national** nature. This category contains provisions of so-called *collective agreements*, concluded between the representatives of employees and the employers; furthermore it can be the provisions of so-called *public-legal agreements*, i.e. agreements concluded between individual state bodies (or bodies of self-government).

7.4 Legal Customs

Legal customs are historically the oldest, original sources of law. They present a transition of sorts from original customs, from social self-regulation of the society to regulation by law.[110]

For a certain custom to be considered legally binding, it shall meet the following conditions:

[108] See JANKUV, J. – LANTAJOVÁ, D. a kol.: *Medzinárodné zmluvné právo a jeho interakcia s právnym poriadkom Slovenskej republiky.* Plzeň : Aleš Čeněk, 2011.

[109] HARVÁNEK, J. a kol.: *Teorie práva.* Plzeň : Aleš Čeněk, 2008, pp. 255-256.

[110] For details see BEDERMAN, D. J.: *Custom as a source of law.* Cambridge : Cambridge University Press, 2010; SHINER, R. A.: *Legal institutions and the sources of law.* Dordrecht : Springer, 2005, pp. 63-84.

- it shall be **repeatedly used in the long term** (*frequentia actum*);
- is shall be **generally recognized, actually observed** in given community/society/state (*opinio necessitatis*);
- their content shall be **certain and consistent** to indicate which rule of behaviour it establishes.

Legal custom can thus be defined as a rule of behaviour which became a part of awareness and behaviour of people due to long-term repeated use and is generally accepted and actually observed in given community, society or state.

The general conviction about the legal custom's binding force shows on one hand in the fact it is really observed by the members of given community/society/state and through being confirmed in the application activity of respective authorities and sanctioning its non-observance.

Legal customs were the basic source of law in our territory from the period of late Middle Ages until the first half of the 20th century.[111] The first work dedicated in our country to customary law and which is also its listing is the *Tripartitum* by lawyer Štefan Werböczy (its first issue published in 1517).[112]

Nowadays, in our country the customary law is used as source of law to minimum extent (however, more research must be done in this regard). This situation is similar also in other legal systems of the (European) continental family of law. Certain residues of customary law remain at present in Great Britain, in the form of constitutional customs (however, these are classified also as binding non-legal customs) and customs at local level.[113] Customs are sources of law in Islamic law[114] and in traditional legal

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111 T. Gábriš states in this context the following: *"... in the oldest period of the existence of the Hungarian state, the population was governed mainly by conceptions of justice and morality, not by specific written legal standards. Also adjudicating disputes stemmed only from the conviction of "judges" about the justice and morality, which was labelled as "custom".... Document material (not only) from this period proves only pragmatic ad hoc solutions of dispute by chosen arbiters, or eventually by Royal judges, without particular references to a custom or a statute or law in general."*GÁBRIŠ, T.: *Právo a dejiny. Právnohistorická propedeutika*. Kraków: Spolok Slovákov v Poľsku, 2012, p. 177. For details see and compare also LACLAVÍKOVÁ, M.: *Právna obyčaj v postavení prameňa (súkromného) práva platného na území Slovenska do roku 1848*. In: Historia et theoria iuris, 2009, issue no. 1, pp. 29-44; *Právna obyčaj a formovanie novodobého (súkromného) práva na našom území*. In: Historia et theoria iuris, 2009, issue no. 2, pp. 36-52; *Právna obyčaj - prameň práva na území Slovenska v období medzivojnovej ČSR*. In: Historia et theoria iuris, 2010, issue no. 4, pp. 22-35; LUBY, Š.: *Obyčajové právo a súdna prax*. Bratislava : Právnická fakulta Slovenskej univerzity, 1939.

112 ŠTENPIEN, E.: *Tripartitum*. Bratislava : Eurokódex, 2008.

113 See DICEY, A. V.: *Introduction to the study of the law of the constitution*. London : Macmillan, 1915, p. 413 et seq.; ELLIOTT, C. – QUINN, F.: *English legal system*. Harlow : Pearson, 2009, p. 110 et seq.; KNAPP, V.: *Velké právní systémy. Úvod do srovnávací právní vědy*. Praha : C. H. Beck, 1996, p. 165 et seq.

114 For details see POTMĚŠIL, J.: Šaría – úvod do islámského práva. Praha : Grada, 2012.

systems of Asia and Africa.[115]

[115] For details see DRGONEC, J.: *Právne kultúry Ázie a Afriky*. Bratislava : Veda, 1991; KNAPP, V.: *Velké právní systémy. Úvod do srovnávací právní vědy*. Praha : C. H. Beck, 1996, p. 202 et seq.

8 LAW-MAKING

Law making is a constitutive moment in terms of regulation of social relations through law. That is, legal standards as generally binding rules come to existence through creation of law the breach of which is sanctioned.

The public authorities with the power to **authoritatively** set certain legal regulation (e.g. the parliament adopts laws; the government issues orders; municipal councils adopt generally binding regulations) have key position in creation of law. But legal standards can be created also in a **consensual way**, i.e. in form of normative legal agreements (see 7.2.3) or **spontaneously**, in form of legal custom by long-term observance of certain rule (see 7.2.4).

8.1 Legislative Procedure

The main method of creation of law in the European continental legal culture is the **legislative procedure**.[116] The legislative procedure in *the strict sense* is regarded as a legal procedure regulated by law (constitution and statutes), i.e. formalized procedure of the creation of legal standards, which constitute the content of normative legal acts. It is usually done through the activity and cooperation of multiple state authorities, but also of authorities in question, interest groups, etc. and is finalized in the body with law-making (legislative) power.

In *broader terms*, the legislative procedure can be seen as a social process. It begins significantly earlier than the legal process itself, which is part of it. Legal theory regards as its initial stage the recognition of need for legal regulation of certain social relations. It means the discovery that conflict social situations either not regulated by law or their current regulation being insufficient and not adequate are systemically repeatedly occurring and the regulation by social standards is not sufficient to solve

[116] In case a more detailed view on the issue of creation of law is needed, the well-developed and substantiated classification of creation of law to legislative, judicial and autonomous, as described in GERLOCH, A. et al.: *Teorie a praxe tvorby práva*. Praha : Aspi, 2008, can be consulted.

this condition but a legal standard is needed.[117]

The sources of law regulating the legislative procedure in the Slovak Republic are mainly the Constitution of the Slovak Republic, the Act No. 350/1966 Coll., on the rules of procedure of the National Council of the Slovak Republic and the Act No. 1/1993 Coll., on the Collection of Laws of the Slovak Republic. Besides these generally binding normative legal acts, the legislative procedure is regulated also by internal, organizational acts (specifically the Legislative rules on creation of laws and the Legislative rules of the government of the Slovak Republic).

The legislative procedure can be divided into several phases:

1. legislative initiative – submission of bill
2. discussing the bill in the parliament;
3. voting on the bill;
4. signing the bill into law;
5. announcement (publication) of the law.

8.1.1 Legislative Initiative

Legislative (law-making) initiative is the qualification of certain group of subjects to submit bills to the parliament. Under Article 87 (1) of the Constitution of the Slovak Republic this option is available to

- **committees of the National Council of the Slovak Republic,**
- **members of the National Council of the Slovak Republic,**
- **the government of the Slovak Republic.**

For example, after the public administration reform in the Czech Republic, the qualification to submit a bill to the Chamber of Deputies is held also by the government or the council of the self-governing region.

Under Article 41 (2) of the Constitution of the Czech Republic, the subjects with legislative initiative are conceived in broader terms. The bill can be submitted by a member of parliament, groups of members of parliament, the Senate, the government or the council of the self-governing region.

[117] OTTOVÁ, E.: *Teória práva*. Šamorín : Heuréka, 2006, pp. 197-198.

The right of legislative initiative belongs in the Slovak Republic also to **citizens**, who can request to have a referendum announced, in which their proposal should be voted on, through a petition with at least 350,000 valid signatures. The proposals adopted in the referendum will be subsequently announced as laws by the National Council of the Slovak Republic (Article 98 (2) of the Constitution of the Slovak Republic).

According to the rules of procedure of the National Council of the Slovak Republic, the bill shall be submitted in the **exact legislative form** together with the **explanatory memorandum**, also in an electronic form. The explanatory memorandum shall contain the assessment of current conditions with regard to society, economy and law, stating the reasons for new legal regulation and the method of its execution. The explanatory memorandum must state the compliance of the bill with the constitution and other laws and international treaties and the compliance of the bill with the law of the European Union, done in a form of a clause of compliance of this bill with the legislation of the European Union. The explanatory memorandum contains, apart from the general part, also the grounds for individual provisions of the bill (special part).

The majority of bills are submitted by the **government**. The coordinator of the governmental bill is usually the respective **ministry** on the grounds of substantive jurisdiction.

8.1.2 Consideration of a Bill

The second phase of creation of law is the consideration of a bill. In terms of the rules of procedure of the National Council of the Slovak Republic, the bill is considered in **three readings**.

First reading takes place in the session of the National Council of the Slovak Republic. Its purpose is to *discuss the substance of the bill and to ascertain if there is any political will to adopt such legal regulation*. The bill is introduced in the session by its proposer. After him, a designated rapporteur will come and summarize the proposed legal regulation. The members of parliament are allowed to lead only a general discussion about the bill without the option to propose changes or amendments.

If the National Council of the Slovak Republic decides on the grounds of the discussion results that the consideration of bill will continue, the bill passes to **second reading**. The crucial moment here is the consideration of bill in the committees of the National Council to which the bill was delegated. The Constitutional Committee has the obligation to consider every bill, mainly in terms of its compliance with the Constitution of the Slovak Republic, constitutional laws, international treaties binding for the

Slovak Republic and the legislation of the European Union.

Proposals for changes and amendments to be voted on after the end of consideration in the committee can be submitted in the second reading. Usually more than one committee considers the bill. Therefore it is necessary to unite their positions prior to the consideration of the bill in the session of the National Council of the Slovak Republic. This is realized at the meeting of the so-called directing and coordinating committee, which then approves the joint committee report by a special resolution. This report constitutes grounds for the discussion and vote on the bill in the session of the National Council of the Slovak Republic. The submitted proposals for changes and amendments are voted on after the discussion within the second reading in the session of the National Council of the Slovak Republic.

Third reading is limited only to those provisions of the bill, for which the proposal for changes and amendments were adopted in the second reading. The members of parliament can in the third reading initiate only corrections of legislative technical and language errors. Proposals for changes and amendments to remove other errors must be submitted by at least 30 members of the parliament. After considering them, the bill is voted on as a whole.

8.1.3 Vote on the Bill

The third and last stage within the parliamentary consideration is the vote on the bill. Here, different conditions set by the constitution and laws are applied in the Slovak Republic with regard to adoption of the constitution, constitutional laws or the so-called regular laws.

For the constitution or constitutional law to be adopted, changed or their certain provision abolished (with the exception of provisions regulating human rights and freedoms, which are according to the constitution irrevocable), the approval of the so-called **qualified majority**, i.e. three-fifths majority of all members of deputies of the law-making body, is needed. For a regular law to be adopted, the approval of the absolute majority of present members of parliament is required. At the same time, the absolute majority of all members of the parliament must be present. The necessary majority to be present during vote for the parliament to be able to make valid decisions is called **quorum**.

8.1.4 Signing the Bill into Law

The signature of adopted bill by respective constitutional officials is called **signing**. The act of the National Council of the Slovak Republic is signed by, apart from the chairman of the National Council, also by the president of the Slovak Republic and the prime minister of the Slovak Republic.

- **The signature of the chairman of the National Council of the Slovak Republic** (NCSR) on one hand confirms that the formal procedure in considering and adopting the bill was observed and at the same time the chairman of the NCSR assumes responsibility for congruity of the signed text of law with that was adopted by the members of parliament.
- **The signature of the president** represents the head of state's approval with the law. The right to refuse the approval with the content of law is called the **right of veto**. It is applied in such a way that the head of state refuses to sign the adopted law due to deficiencies in its content and returns it together with comments for re-consideration to the National Council of the Slovak Republic. The returned law is considered in the National Council in the second and third reading, whereas the subject of consideration is only the comments of the president. The parliament can, but does not have to, take into account these comments during the vote. In case of the Slovak Republic, the president has the so-called *suspensive veto*, which can be overridden by the parliament on condition it adopts the returned constitutional law or law again in the original wording. In that case the law must be announced even though the president is not obliged to sign it. Unlike the suspensive veto, the *absolute veto* must be normally overridden by the so-called qualified majority (i.e. 2/3 of all members of the Senate and the House of Representatives).
- **The signing of law by the prime minister** means mainly the readiness of the executive to ensure putting the law in practice, mainly its application by executive bodies.

8.1.5 Publication of the Law

The last stage of the legislative procedure is the publication of the final version of the law. Today, the so-called **formal publication** is done in all states that fall under the continental legal culture. Through it, the state formally fulfils its obligation to inform the subjects of law with adopted laws.

In terms of the regulation in force, the Constitution of the Slovak Republic, constitutional laws, laws and other legal regulations are announced in the **Collection of**

Laws. The legal regulation becomes valid through the publication in the Collection of Laws and becomes part of law. Since the moment of validity of the legal regulation, the subjects of law are obliged to get acquainted with its content and to take necessary measures to put their activity in the broadest sense in conformity with the legal regulation in question. To adapt to the new legal regulation the lawmaker shall set the so-called **vacatio legis period**, during which the published law has indeed the formal legal force, but it is not binding for its recipients.

The published legal regulation becomes effective in reality only from the moment of acquisition of substantive legal force – the so-called **effectiveness**. The moment of becoming effective is established in the last provision of the legal regulation in the kind of formulation like "This act becomes effective on...". In practice, the situation when the lawmaker does not establish the moment of effectiveness in this way can ensue. In such case it holds that the legal regulation shall become effective on the fifteenth day after its announcement in the Collection of Laws.

Further it holds that the legal regulation cannot become effective earlier than it became valid by its announcement. Otherwise it will be the breach of guaranteed principle of legal certainty.

Since the moment when the legal regulation became valid and effective, nobody can be exempted from legal liability upon its breach with the excuse of not knowing it or knowing it only poorly. Nobody thus can claim ignorance of the law, because the **ignorance of the law is no excuse** and everyone is obliged to observe the valid laws.

8.2 Development of Legislative Activity of the NCSR

The development of legislative activity of the National Council of the Slovak Republic can be introduced as stated in the following charts.

Electoral term I, 1994 – 1998

<table>
<tr><td colspan="3">electoral term I</td><td colspan="3">1st – 52nd session</td></tr>
<tr><td colspan="3">All adopted laws</td><td colspan="3">313</td></tr>
<tr><td>Governmental bills (GB)</td><td>Bills by MPs (BMP)</td><td>Fast-track legislative procedure (FLP)</td><td>258</td><td>55</td><td>46</td></tr>
<tr><td colspan="3">Constitutional laws</td><td colspan="3">18</td></tr>
<tr><td>Adopted</td><td colspan="2">Not adopted</td><td>4</td><td colspan="2">14</td></tr>
<tr><td colspan="3">Laws returned by the president</td><td colspan="3">32</td></tr>
<tr><td>Adopted</td><td>not adopted</td><td>not considered</td><td>28</td><td>3</td><td>1</td></tr>
<tr><td colspan="3">Bills not adopted</td><td colspan="3">142</td></tr>
</table>

Electoral term II, 1998 – 2002

electoral term II			**1st – 63rd session**		
All adopted laws			532		
GB	BMP	FLP	406	126	104
Constitutional laws			24		
Adopted	Not adopted		3	21	
Laws returned by the president			72		
Adopted	Not adopted	Not considered	52	19	1
Bills not adopted			252		

Electoral term III, 2002 – 2006

electoral term III			**1st – 62nd session**		
All adopted laws			550		
GB	BMP	FLP	458	92	36
Constitutional laws			35		
Adopted	Not adopted	Not considered	14	18	3
Laws returned by the president			60		
Adopted	Not adopted	Not considered	52	6	2
Bills not adopted			216		

Electoral term IV, 2006 – 2010

electoral term IV			**1st - 53rd session**		
All adopted laws			530		
GB	BMP	FLP	442	88	52
Constitutional laws			34		
Adopted	Not adopted	Not considered	1	33	-
Laws returned by the president			28		
Adopted	Not adopted	Not considered	19	9	-
Bills not adopted			312		

9 IMPLEMENTATION OF LAW

The objective of law functioning as a normative system is the most efficient regulation of social relations. At the beginning of this process there is the existence of legal norms, or more precisely *creation of law*. The second inevitable step is the *implementation of law* and legal standards, confirming their function and purpose.

Implementation of law means execution of law in legal practice, i.e. using the rights and observing legal obligations by legal subjects, as well as taking decisions on rights and obligations and eventually coercion to fulfil the obligations.

The following can be considered as basic form of implementation of law and thus also regulative effect of legal norms on human actions:

- performance of rights and fulfilment of obligations,
- private-legal acts - they are mutual expressions of will of two or more equal subjects whom the law provides certain disposition autonomy or contractual freedom (e.g. concluding a contract);
- public-legal acts - this form of implementation of law is used by state bodies with administrative, judicial and control jurisdiction; position of subject within this form is not equal (unlike the previous case), said bodies act in subordinate position and issue authoritative decision; this form of implementation of law is called *application of law*.

9.1 Performance of Rights and Fulfilment of Obligations

The simplest form of implementation of law is the immediate performance of subjective rights and fulfilment of legal obligations arising from legal norms (e.g. performance of right to life, fulfilment of obligations arising from prohibition of certain behaviour, e.g. prohibition of theft or murder). It is such form of implementation of law when the subject of law behaves in compliance with law, is implementing legal standards without being obliged to enter into legal relations with particular subjects.

The rights and obligations are usually exercised within legal regulations. However, with rights of absolute nature (personal rights, property rights) the implementation of law is possible without direct cooperation of another subject. An obligation of indefinite number of subjects to refrain from interfering with these rights corresponds to this right. Failure to fulfil this obligation is an offence, it results in emergence of the so-called legal liability relation between specifically defined subjects.

9.2 Creation of Legal Relations

Legal relations represent one of the most important methods of implementation of law. Legal relation is a social relation of at least two specific legal subjects which are holders of mutually connected subjective rights and legal obligations arising to these subjects directly on the grounds of legal standards or in connection with legal facts.[118]

Legal relations are created, changed or abolished either by operation of law (*ex lege*) or more often due to legal fact foreseen by legal norm. Legal relations are

- **absolute** (they are relations of subjective rights holders against all other legal subjects (*erga omnes*), i.e. in case of property rights, especially right of ownership) and
- **relative** (they are relations of specifically defined legal subjects, e.g. in obligation law, more precisely the contract of purchase or contract of donation).

Specific legal relations contain:

- subject(s),
- object(s),
- content.

9.2.1 Subject of Legal Relation

There must be someone in legal relation who is entitled or obliged to act in certain way. Subjects of legal relations are *natural* or *legal persons* that the law recognizes as persons in legal sense - i.e. have legal personality. A person in legal sense is not

[118] GERLOCH, A.: *Teorie práva.* Plzeň : Aleš Čeněk, 2007, p. 154.

identical with human person in biology, sociology or psychology. Law is concerned with personality only with regard to its position in law and legal regulations, from the aspect of rights and legal obligations determined by law.[119]

Natural persons are actual biological people, living as individuals. In modern democratic states, *all human beings* are natural persons. Law gives them the mentioned ability to hold rights and obligations and also to acquire rights and obligations through their own actions.

Legal persons are organisations of people and property that were created for certain purpose and the valid law gives them legal personality, whereas this personality does not have to by full (general legal personality) and can be limited only to certain areas of legal relations. It concerns the following organisations:

- business organisations (state-owned enterprises, corporations);
- political organisations (political parties and movements);
- advocating certain interests (civic associations, professional chambers);
- public benefit organisations (foundations).

Legal personality includes:

a) capacity to **hold rights and obligations**,

b) capacity to **acquire rights** and **incur obligations** by own legal and illegal act (including incurring legal liability for own actions).

Capacity to have rights and obligations is the very basic feature of any legal subject. Without it, the law cannot consider such person, either natural or legal, as a subject of law.

In case of natural persons, the capacity to have rights and obligations can be restricted only by law. *It comes into existence:*

- in civil law in general by birth; in certain cases also an unborn child (*nasciturus*) has capacity to have rights and obligations;
- e.g. in constitutional law the condition is the age of at least 18 or 21 (active and passive right to vote, respectively);
- e.g. in labour law the condition is the age of at least 15 or related to completion of compulsory school attendance.

[119] For details see BERAN, K.: *Pojem osoby v právu (osoba, morální osoba, právnická osoba).* Praha : Leges, 2012; PELIKÁN, R.: *Právní subjektivita.* Praha : Wolters Kluwer, 2012.

Expiration of the capacity to have rights and obligation is usually connected with death of a natural person. An alternative is to pronounce the person dead by court.

In case of natural persons, their capacity to have rights and obligations is usually limited to the area of their activities, when compared to natural persons. It is the power to establish, change or abolish legal relations by own actions. Legal personalities acquire this capacity either by operation of law itself (taking into account the specific nature of legal person and its objectives) or under its founding document. For example, capacity of legal persons to most rights under the family law is ruled out. Legal person thus cannot enter into marriage, adopt a child, etc. On the other hand, certain legal persons cannot run a business and create profit, etc.

Capacity to legal acts and illegal actions is the expression of active side of legal personality. It is the ability to acquire rights and incur obligations by own actions as well as the ability to take the consequences of culpable violation of law.

This capacity can be:

1. full
2. limited.

Factors limiting this capacity can, ***in case of natural persons***, be:

- age
- mental health
- gender, marital status
- state citizenship
- also estate membership, profession, citizen's honour and its lack, religion, etc., in the past.

Persons with limited capacity are called *insane, infants, minors*, etc. The limitation of capacity to acquire right and incur obligations by own legal acts and illegal actions arises:

- either directly by operation of law,
- or a court can make a decision about it on the grounds of law.

The limitation on *the grounds of age* arises directly by operation of law, e.g. persons are fully capable in terms of civil law only after reaching maturity (sane, enjoying full rights, in the Slovak Republic by turning 18). Minors have capacity only for such legal

actions which are by their nature adequate to mental and will maturity corresponding to their age.

A court decides on *other reasons* than age *for limitation* of this capacity (e.g. due to mental illness).

Also the illegal action with subsequent legal liability is a specific category of legal action. This liability is conditional on the so-called criminal capacity - the capacity to be liable under valid law for own illegal actions.

There are certain limitation of legal capacity (in this case the criminal capacity) and subsequently also legal liability in criminal law - similar to civil law - on the grounds of age and mental health.

In case of legal persons, the origin and cessation of capacity for legal actions is in principle identical in terms of time with the origin of their capacity to have rights and obligations. The limitation of their capacity to acquire right and incur obligations by own legal acts and illegal actions arises either:

1. by operation of law; or
2. from the court decision; or
3. from the legal person's founding document.

9.2.2 Object of Legal Relation

Object of legal relation is the reason for which subjects actually enter into legal relations. Because legal relations are not without purpose and should serve for implementation of interests of subjects arising from real life.

Objects of legal relations can be:

- real estate (plots and buildings fixed to the ground);
- personal property (all other material objects including natural powers controllable by human - such as electricity, for example);
- rights and legitimate interest of persons (e.g. claims);
- values of human personality (e.g. health, life, honour, dignity, etc.);
- material values, if their nature permits is (technologies and manufacturing processes, know-how, etc.);

- results of creative human activity (literary, art, scientific works, etc.);
- conduct and result of the conduct (performance of certain type of work, etc.).

However, in the end the legal relation should result in certain action - even though in relation to certain material object. For example, the object of legal relation in the sale of an item is this specific item, at the same time this relation contains the obligation to hand over the item, receive money, pay for the item, etc.

9.2.3 Content of Legal Relation

Content of legal relation are rights and legal obligation arising from given legal relation.

Legal obligation is the implementation of necessity to behave in a way, determined by a legal norm. This legal obligation can have these possible forms:

- active action, e.g. obligation to hand over an item, work for someone;
- passive activity, obligation to refrain from certain action;
- to suffer certain action, e.g. in state of emergency suffer entry on own land.

In obligation legal relations, the creditor's right is called a *claim* which corresponds on the other side to the *debtor's obligation*. Legal relations (and obligation legal relations in particular) are thus characterized by - as already indicated - by correlativity. The right of one party corresponds to the obligation of the other party. Although only in form of obligation to accept the performance.[120]

9.3 Legal Liability[121]

With regard to the fact that legal standards assume breach of legal rules and make provisions for sanctioning those who break these rules, the legal liability can be considered as form of implementation of law.

Legal liability is a special type of legal relation, arising **due to breach of legal obli-**

[120] For details see e.g. LAZAR, J. a kol.: *Občianske právo hmotné 2*. Bratislava : Iura edition, 2010.

[121] For details see e.g. BREJCHA, A.: *Odpovědnost v soukromém a veřejném právu*. Praha : CODEX Bohemia, 2000.

gation and resting in **emergence of new (secondary) obligation** of sanction nature. It is usually a result of offence or eventually an illegal state.

There is *criminal*, *administrative*, *disciplinary* liability and various types of *private legal liability* (for damage, from unjust enrichment, from default, for defects, etc.).

Breach or primary legal obligations can occur either by **active** behaviour or **inadvertently** (certain legal subject can be legally liable also for what he did not cause by his actions).

Legal obligations can be stipulated directly in legal standards or are included in legal acts or can arise from law application acts. If primary and secondary obligations are not voluntarily fulfilled, they can be enforced even against the will of liable subject. In this sense we distinguish between the so-called indirect enforcement (emergence of legal liability) and direct enforcement of performance of obligation (usually in form of an execution).

9.4 Application of Law

Application of law is the qualified form of implementation of law performed by public authorities, in which the classification (*subsumption*) of specific merit under respective abstract legal nature, stipulated in the legal norm.

The result of the process of application of law are the law application acts, by which courts, administrative authorities and other public bodies issue decision on specific subjective rights and legal obligations of natural and legal persons. The process of application is very often connected with content assessment of already existing relation. The outcome is usually creation, change or abolition of legal relations. The bodies of application of law must strictly adhere to competence norms and further comply with procedural norms.

Main types of the process of application of law are civil legal proceedings,[122] criminal legal proceedings[123] and administrative proceedings.[124]

Application of legal norms is not a separate form of implementation of law. It either precedes the origin of legal relations or (which is more frequent) solves specific

[122] For details see e.g. ZÁMOŽÍK, J. a kol.: *Civilné právo procesné.* Plzeň : Aleš Čenek, 2013.

[123] For details see e.g. ŠIMOVČEK, I. a kol.: *Trestné právo procesné.* Plzeň : Aleš Čeněk, 2011.

[124] For details see e.g. ŠEVČÍK, M. a kol.: *Správne právo procesné.* Bratislava : Eurounion, 2009.

disputes and conflict in already existing legal relations.

The process of application of law can also be the result of breach of obligations, stipulated directly by a legal standard or on the grounds of standards issued by individual legal acts or by entering into a contract. Then there is primarily imposition of sanctions as a response to the breach of obligation in the already existing legal relations.

There are mainly **three basic phases of the process of application of law**:

1. ascertaining the factual merit, facts of the tried (adjudicated) case;
2. identification of statutory merit - ascertaining of respective legal standard under which the specific case can be classified (subsumed);
3. issue of the law application act (individual legal act).

Ad 1. Ascertaining the Issue of Facts

The basic condition of just decision it the as complete as possible ascertaining of facts of the case, finding ultimate facts of the tried case. Because it is issuing decision on things that used to take place in the past, direct observation of circumstances to be ascertained is not possible (although certain facts can continue to exists and it is possible to perceive them directly with senses, i.e. existence of an art forgery, forged money, documents, etc.).

Therefore, the direct recognition must be replaced with indirect, intermediated recognition. Thus the central method of finding facts and at the same time the most important part of this phase is the **evidence**.[125] The court provides evidence only of such facts, which are in doubt. In case of birth certificate, validated marriage certificate, proof of citizenship, etc. no evidence has to be furnished because they are indisputable evidence.

As evidence can serve all resources, permitted by law, by which the factual merit can be ascertained. The reality is important in terms of just decision. It is mainly the statements of parties to proceeding, testimonies, expert opinions, expert's reports, items and document, pictures, reconnaissance, etc. But the submitted evidence may not be unambiguous; they can be contradicting with each other. If the law application body is to find objective truth, the real state of facts, during the proceedings it shall test the quality and credibility of gathered evidence, appropriately assess them, find their objective content. And this is quite often very complex process.

[125] For further reading see e.g. SVOBODA, K.: *Dokazování.* Praha : ASPI, 2009.

Execution of evidence, its analysis and assessment lead to formulation of conclusions on existence or non-existence of facts in evidence. These are then factual basis for the decision.

Ad 2. Identification of Statutory Merit (Subsumption)

Second phase of law application process and at the same time important condition of legality in application of law is the identification and interpretation of respective legal norm, under which the specific case must be legally qualified and solved. The specific case shall be judged under the legal norm which predicts and regulates such cases in general. Thus it is the classification of factual merit under the legal (statutory) merit.

This confrontation of factual state with the legal state, classification of specific case under the general legal norm, is called *subsumption*. Subsumption is a logical operation, legal conclusion (syllogism) under the rule *"dictum de omni et nullo"* - what is valid in general for every element of certain set, is valid also specifically for any of these elements.

Simply put, this syllogism can be schematically expressed as follows:

For every element of the set A is valid that: if there is **a**, then there should be **c**.
There is a specific a, which is an element of set A.

From it the logical conclusion results: there should be **c**.

The process of subsumption can be demonstrated also on simple example:

Person E found a case with documents in the name of Jozef Mak on a bench in park and EUR 200 of money.
Pursuant to provisions of S 135 (1) of Civil Code: "Who finds a lost item shall be obliged to hand it over to the owner. If the owner is not known, the finder shall be obliged to hand it over to respective state authority. Should the owner fail to claim it within one year from its handover, the item lapses to the state."

Conclusion: Person E is obliged to hand the case including the contents over to Jozef Mak.

Should the finder fail to hand the found items over to the owner, the legal qualification of facts would be unjust enrichment under S 451 of Civil Law. In case of a greater amount of money (in terms of S 125 (1) of Penal Code it should be more than EUR 266), this action could be qualified at the same time as the offence of concealment (S 236 of

the Penal Code).

When the body of application of law identifies the legal standard that can be applied to solve given case, at the same time it shall ascertain if this legal standard is valid - whether it was duly announced in respective official collection of laws, whether it was not abolished or amended by other legal norm (in practice, the legal information system are used, however, they may not be unconditionally reliable).

The situation when a legal standard is obviously in collision with another valid legal norm should occur only exceptionally in a legal state. But if such case occurs, the body of application of law shall decide which of the colliding legal regulations to apply. If it is conflict between normative legal acts of the same level of legal force, the body of application of law will apply the legal standard contained in normative legal act, which was announced on a later date (*lex posterior derogat legi priori*). If the body of application of law finds conflict of a piece of subordinate legislation with the law, it will proceed according the law (*lex superior derogat legi inferiori*). If the standard is in conflict with the constitution and constitutional laws, submits the case to the constitutional court. If an exceptional case of logical contradiction between two norms of the same normative legal act occurs, it can be only consistently removed by amendment only.

More difficult than identification of suitable legal standard according to which the given case should be solved, is in practice its right interpretation. Legal standard is a general rule after and specific case has always its particularities. Various forms of interpretation are used in interpreting legal standard. Recognition, formal and logical and assessment processes are overlapping in that.

The **completion** of subsumption is legal qualification of specific case. The result is pronounced in form of a verdict, by which the specific case is classified /or not) under the respective legal standard.

Ad 3. Issue of Individual Legal Act (Decision)

The third phase and at the same time the completion of the whole process of application of law is ascertaining legal consequences, namely by pronouncing an authoritative decision - by issuing individual legal act (law application act).

Individual legal act is the decision that regulates with authority the legal relation of specific subjects - it establishes, changes, abolishes or authoritatively ascertains specific rights and legal obligations of specific subjects, it solves a specific situation on the grounds of valid law.

Hereby is the individual legal act as the result of the process of application of law

substantially different from a normative legal act, which is the result of the process of making the law and is characterized by universality, mainly with regard to subjects (universal personal jurisdiction) and the object of regulation (universal material jurisdiction). Normative legal act is generally binding, whereas the majority of individual legal acts (unless they become legal precedents) are binding only for subjects it concerns directly (*inter partes*). But also the authority that issued the individual legal act is bound by it. It can be amended or abolished only by statutorily prescribed way.

The individual legal acts as a statutory act must be distinguished from also from private actions of natural or legal persons. As was already stated, it represents authoritative form of implementation of law and its effects follow regardless of the will of recipients.

Another peculiarity that differentiates the acts of application of law from private-legal actions is the presumption of correctness of law application acts. It is conditioned by state and power nature of the law application acts and also the requirement of legal certainty. Whereas the imperfection of private-law action results in its invalidity, a legal act defective with regard to form or content remains valid, unless abolished by statutorily prescribed way.

Individual legal act consists of three basic parts:

- verdict (enunciate) - the decision itself,
- argument - it has meaning mainly from the standpoint of force of the decision and its ability to be reviewed,
- advice - mainly about the possibility of legal remedies.

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