

# The System of Sources of Law

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## ABSTRACT

This chapter aims to analyse the system of sources of law in the countries of the CEE region through a comparative constitutional lens. To this end, it first attempts to present and clarify some fundamental concepts that are necessary and relevant to examine the system of sources of law. Subsequently, it outlines the development of the various systems of sources of law from a historical perspective. In light of this general overview, the chapter then turns to each system of sources of law of this region to map and explore them in a comparative way. Accordingly, it describes the major characteristics of legal norms at various levels of the norm hierarchy as well as how they create a system of sources of law. Furthermore, it examines the place and role of international law and EU law. Finally, it outlines how states in the region provide access to legal norms in their respective systems.

## KEYWORDS

system of sources of law, legal norms, norm hierarchy, constitutions, acts, decrees, regulations, decrees of the local governments, access to legal norms.

## 1. General introduction

### *1.1. Fundamental concepts regarding the system and individual sources of law*

Sources of law can be examined from various perspectives and with regards to the numerous existing legal fields. The constitutional approach that is central to the present chapter uses the concept of sources of law in a dual sense. On the one hand, the legal rule that gives a frame to the law can be considered a source of law, which includes every form that contains the rights and obligations of legal entities. On the other hand, those who are empowered to make law can also be considered sources of law. Consequently, the concept of the sources of law refers to two major characteristics of the legal norms: from which organ it originated – i.e. which institutions have lawmaking powers – and in which forms the legal norms can appear – i.e. in what forms the lawmaking authority issue legal rules. These characteristics together allow one to define the unique place of various legal norms in the legal system, and the examination of the sources of law of a given state allows one to explore which organs

have lawmaking authority and how and in what forms they can exercise it. From these two approaches, this chapter favours the second one and describes the legal system of the examined countries according to the forms in which the legal norms can appear.

The various sources of law created by state institutions do not prevail simultaneously in a given state; instead, they rather have a hierarchical relation. This hierarchical system consists mainly of the same elements in Croatia, the Czech Republic, Hungary, Poland, Romania, Serbia, the Slovak Republic and Slovenia. Accordingly, two major groups can be distinguished: laws and public law regulatory instruments. The major difference between the two is in their binding power: laws have generally binding power, while public law regulatory instruments have an internal character, and they only bind the organisational units which are subordinated to the issuing authority. This latter category cannot establish rights and obligations for citizens. Within this public law regulatory instruments, one can find, among others, resolutions and orders. As the aim of this chapter is to examine the system of legal norms that have generally binding power, it focuses on laws and does not cover public law regulatory instruments.

Within the sources of universally binding law, the constitution is located at the top of the system of legal sources in each examined country. The highest level of law is the 'act', which can be of multiple types according to the rules relevant to legislation in the states that are examined, e.g. general category of legislative act, constitutional act or act with constitutional force, organic act and ordinary act. Acts are followed by generally binding legal norms adopted by either the executive or the heads of independent regulatory organs. These are adopted by each country in the CEE region under different names, namely decrees or regulations. As Karpen notes, "the admissibility and use of regulations on a hierarchical level below statute law differ from state to state, and are often not very transparent".<sup>1</sup>

This overview clearly shows that the system of legal sources in the region is rather diversified. Each source of law fulfils a social function, regulating generally valid and durable patterns of behaviour, and their violation has legal consequences. Therefore, each element of this system serves a common objective. These sources of law introduce settled expectation towards the people's behaviour and thus help prevent social conflicts as well as the resolutions of such disputes when necessary.

Both the constitution and the law can determine hierarchical relations among the sources of the law. As a result of the hierarchical relations between the legal sources, provisions of the subordinate sources of law cannot be in opposition to hierarchically superior sources. In the case that the legal sources at various levels do contradict, the subordinate rules that are in contradiction to the superior ones are invalid. A normative act is superior in a hierarchy to another normative act if the former normative act can derogate from the latter normative act, while the latter normative act cannot derogate from the former one.<sup>2</sup>

1 Karpen, 2017, p. 2.

2 Jakab, 2020, p. 888.

A given legal norm becomes part of the legal hierarchy if certain conditions are met, the most important of which are the validity and the entry into force of the legal norms. In general, validity means that the legal norm is capable of having legal effects, and a certain legal source can be considered valid if it complies with validity requirements. One of these requirements is to originate from an organ duly empowered to make law, and it is fulfilled if the given state organ has a lawmaking competence provided by law with regards to the question that is to be regulated. Furthermore, the validity of the rule requires that legal sources be made in accordance with the relevant procedures, i.e. the legislature observes the procedural order. A fundamental requirement is that the legal rule should fit with the hierarchy of the legal sources, i.e. it shall not be inconsistent with superior rules. Finally, a further condition of validity is that the legal source shall be promulgated and accessible. This is usually fulfilled via publication in the official journal. A source of law is valid only if it fulfills all four validity requirements. By contrast, the entry into force of the legal norm means that the intended legal effects can be realised in a certain territory, time and with regards to certain persons, i.e. the actual source of law can and shall be applied and enforced. Based on its entry into force, the source of law can create, modify and terminate legal relations; accordingly, the entry into force has territorial, personal and temporal scope.

### ***1.2. Shifts in the system of sources of law from a historical perspective***

Two major cultural regions had been identified in Europe since Late Antiquity: the Latin (Catholic-Protestant), Western European region and the Greek (Orthodox and partly Muslim) Eastern European one. The border had been relatively stable between the Latin West and the Greek East, and the cultural differences between these two regions had a role to play in the legal culture because each region defined the role of law in a different way – at least partially.<sup>3</sup> Consequently, two distinct legal-cultural spheres can be delimited in Europe: Latin Western European and Greek Eastern European. The differences due to the different traditions are present in the buildup of the system of the sources of law. Although the countries that are examined in the present volume belong to the Western European legal culture, these countries are situated on the Eastern periphery of this region, which gives them unique characteristics.

World War I was a major turning point in the history of the countries examined.<sup>4</sup> The Austrian-Hungarian Monarchy that had dominated this region was dissolved, and Hungary could shape its constitutional system and legal order on its own. In the region between Germany and Soviet Russia – then the Soviet Union – Czechoslovakia, which had never existed before, was established; Poland was reborn; and Romania was significantly enlarged.<sup>5</sup> Hungary continued to exist with the largest territorial losses. Because several new states were established, the adoption of new constitutions

3 Küpper, 2017, [4]-[6]; Szűcs, 1981, pp. 313–359.

4 For more details, see Halász, 2014, p. 28–43.

5 Halász, 2014, p. 28.

became necessary.<sup>6</sup> Consequently, among the newly created constitutions were the Czechoslovak in 1920, the Polish in 1921, and the Romanian in 1923.<sup>7</sup> The newly established states enjoyed great liberty in the course of drafting their constitutions since they did not need to take into account the status of public law prior to 1920.<sup>8</sup> Therefore, the foreign, mainly Western constitutional models managed to prevail. The French constitutional jurisprudence had an influence on multiple parts of the 1920 Czechoslovak constitution as well as on the 1921 Polish constitution. Furthermore, there were American influences as well, and surprising as it may be, German traditions are also relevant in this region.<sup>9</sup>

However, the examined states were not able to catch up with the Western constitutional tradition despite the peaceful decades, and this hope was soon completely destroyed by World War II. After these turbulent times, the fate of the examined countries was definitely sealed amidst the shifting public law environment. While part of the Latin Western region consisted of states that are democratic and follow the rule of law, the Eastern segment of this region created socialist systems. The ruling Soviet dictatorship was clearly built upon Eastern historical, social and political characteristics, which countries in the region had to introduce into their societies. The aftermath of World War II, therefore, had a decisive role in shaping regional characteristics, and consequently, the legal-cultural region that is examined here consisted of such states that belonged to the Latin Western Europe and at the same time were under socialist rule. In 1948–49, these countries began to create and adopt so-called democratic constitutions when it turned out that they would be attached to the socialist geopolitical and societal system. Instead of the Western-type constitutions, the 1936 Soviet-type – the so-called ‘Stalin’ constitution – served as a model. Considering the system of sources of law as well as the legislative processes during this period, they continued to respect the rule of law traditions before the socialist rule. For example, they managed to maintain the hierarchy of the sources of law in the legislative process. In contrast, in the Soviet Union, a simple government decree could modify the constitution. The Polish, the Czechoslovaks and the Hungarians drafted the law in a far more precise way than the Soviets, and their promulgations were generally consistent with the rule of law requirements.<sup>10</sup> This type of system of sources of law defined the legal order up until the regime changes in these countries.

The last decades of the twentieth century marked another turning point in the history of the region, when the Soviet Union began to decline, and it became increasingly obvious that the Soviet-type government structure could not be maintained. In the second half of the 1980s, it became clear that the Soviet-type dictatorship could not be

6 Halász, 2014, p. 28.

7 In Romania, the 1923 constitution was replaced by the constitution that introduced a royal dictatorship in 1938.

8 Halász, 2014, p. 41.

9 Halász, 2014, p. 41.

10 Küpper, 2017, [34].

maintained in Central Europe without the support of the Soviet Union.<sup>11</sup> The question of coexistence of the Czechs and Slovaks was again in the forefront of public debate in this defining period of history. The resurgence of the opposition finally led to a peaceful division of the country into the Czech and Slovak Republics as two independent states.<sup>12</sup> The change of regimes was implemented peacefully, except for the case of Romania.<sup>13</sup>

Considering these developments, the change of regimes from socialist to democratic can now be considered completed; this, however, does not mean that all the socialist sources of law were eliminated in the legal orders in CEE. Even though increasingly fewer valid laws remain from the era of socialism, some important legislative acts still preserve the socialist traditions.<sup>14</sup> However, as socialism was introduced in countries where the level of legal development was different, after the homogenous socialist era, the region continued to develop in various ways and different manners after the change of regime.

In its constitution, every country examined defines itself as a state governed by the rule of law, the basis of which is the legislative act adopted by the parliament. The adequate regulation in details and in depth of the legislative process is therefore of fundamental importance. After the transition period of the change of regime, the number of legislative acts has increased in the region because this level of legislation has become the primary source of regulation.<sup>15</sup> The law is being frequently modified with the growing and shifting roles of the state, but these are regulated in acts instead of lower-level sources of law. Despite the recognition of the rule of law, the legal systems of these states are burdened by the legacy of the socialist past. Among such burdens are the excessive extent of legislation or the large number of specific details.

## 2. Specific provisions – systems of sources of law

One of the fundamental requirements of high-quality legislation is that the sources of law be in order. The hierarchy of sources of law is defined in the regulations of all the states that are examined, although there are differences in how the sources of

11 Gruber, 2010, pp. 71–91; Bartha, 2010, pp. 23–45.

12 Hamberger and Szilágyi, 2000, pp. 59–72.

13 The revolution that aimed to change the regime took place in Romania in December 1989. The revolutionary events began on December 16 in Timisoara, where the peaceful demonstration of a small group of believers supporting their church leader, László Tókéš, a reformed pastor, turned into an anti-regime uprising. As a result of the bloody retaliation that took place on the night of December 17–18, 1989, the revolution spread throughout the country. In Bucharest, on December 21, 1989, Ceaușescu ordered a mass demonstration that aimed to back the system; however, this was interrupted by objections and shouts, and an anti-regime demonstration soon ensued. The army forces were ordered to open fire on the demonstrators, causing a bloodbath. The insurgents reached victory on December 22 with the help of the army's converted units. Ceaușescu and his wife were captured while fleeing and executed shortly afterwards (Petrescu and Petrescu, 2015, p. 5.).

14 For example, even in Hungary, the area of international private law was regulated by an act adopted during the socialist era.

15 Küpper and Szabó, 2016, p. 65.

law regulate this. It shall be noted that only a few countries adopt laws that regulate legislation and the system of the sources of law, the latter of which can be mostly determined by reading both provisions of the acts and decrees with the constitution.

The Polish constitution is the only one among these constitutions that regulates the sources of the generally binding law of the Republic of Poland<sup>16</sup> in a separate chapter of the constitution.<sup>17</sup> These sources are the constitution, acts, ratified international agreements, decrees as well as local legislation issued by local bodies in specific areas. The constitution also regulates the public law regulatory instruments, that is, the types of internal source of law (resolutions and orders) which are not universally binding.<sup>18</sup>

The Hungarian Basic Law defines the various types of norms at certain levels of the hierarchy of sources of law in a separate provision rather than in a separate chapter.<sup>19</sup> Based on Art. R), the Fundamental Law shall be the foundation of the legal system of Hungary and is thus located at the top of the hierarchy of the sources of law. According to Art. T), laws shall be acts, government decrees, prime ministerial decrees, ministerial decrees, decrees of the Governor of the Hungarian National Bank, decrees of the heads of independent regulatory organs and local government decrees.<sup>20</sup>

By contrast, the Croatian constitution declares succinctly<sup>21</sup> that the “laws shall comply with the Constitution and other regulations shall comply with the Constitution and law”. Finally, the Slovenian and the Serbian constitutions apply the same unique solution that is different from the other states. In their case, a separate chapter of the constitution called ‘Constitutionality and Legality’<sup>22</sup> lays down that laws, regulations and other general acts must be in conformity with the constitution.<sup>23</sup>

The constitutions of the other countries examined do not expressly define the various types of norms in the hierarchy of the sources of law; instead, they contain provisions on the types, creation and relations of the sources of law among the rules that govern the government arrangements and organisations. For example, the Slovakian hierarchical system of sources of law is based on the chapter of the constitution related to the Constitutional Court of the Slovak Republic.<sup>24</sup> The case is different in Romania, where the hierarchy of the sources of law is based on Art. 1 para. (5) of the

16 The Constitution of the Republic of Poland, Art. 87.

17 The Constitution of the Republic of Poland, Chapter III Sources of Law.

18 The Constitution of the Republic of Poland, Art. 93.

19 The Fundamental Law of Hungary, Art. R)(1) and Art. T)(2).

20 In addition, decrees of the National Defence Council adopted during a state of national crisis and decrees of the President of the Republic adopted during a state of emergency shall also be laws.

21 The Constitution of the Republic of Croatia, Art. 5.

22 The Constitution of the Republic of Slovenia, Chapter VII.; The Constitution of the Republic of Serbia, Part Eight.

23 The Constitution of the Republic of Slovenia, Art. 153; The Constitution of the Republic of Serbia, Art. 194.

24 The Constitution of the Slovak Republic, Art. 125.

constitution,<sup>25</sup> according to which “in Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory”.

The most important questions of the development of the system of legal sources and the adoption of legal norms located at various levels of each legal source are also always regulated by the constitutions. These provisions determine which bodies and persons are empowered to initiate or adopt legislation, and they also regulate the procedures whereby each type of norm can be created. The current chapter describes these issues only by way of reference from the perspective of the system of sources of law and taking into consideration the other chapters of the present volume – in particular, the chapters that explore the competences of the head of state, the legislature as well as the executive.

### ***2.1. The constitutions***

Sovereignty of the law in the states of this region is ensured by the fact that the constitution is the highest level of law, that is, it is situated at top of the hierarchy of sources of law. The provisions of the constitutions are mandatory, and they must be applied directly. The prominent place and significance of the constitution in the legal systems are manifested in different ways by the regulations of each country. For example, the Polish constitution<sup>26</sup> and the Serbian constitution,<sup>27</sup> like the Hungarian Basic Law,<sup>28</sup> declare that the constitution is the highest legal norm. In Romania, the constitution emphasises its own priority.<sup>29</sup> In Croatia<sup>30</sup> and Slovenia,<sup>31</sup> the constitutions provide that the laws and other legislation must be in conformity with the constitution.

All constitutions that are examined are codified ones, and most of them were adopted after the change of regimes throughout the 1990s.<sup>32</sup> The Hungarian Basic Law is an exception that is only a decade old; in a similar vein, the situation of Serbia is also exceptional, where the Constitution of 1990 was in force until 11 November 2006. The

25 Popescu and Gheorghe, 2012, pp. 104–105.

26 The Constitution of the Republic of Poland, Art. 8(1).

27 The Constitution of the Republic of Serbia, Art. 194.

28 The Fundamental Law of Hungary, Art. R)(1).

29 The Constitution of Romania, Art. 1(5).

30 The Constitution of the Republic of Croatia, Art. 5.

31 The Constitution of the Republic of Slovenia, Art. 153.

32 The dates when the constitutions entered into force are the following: The Constitution of the Republic of Croatia (Ustav Republike Hrvatske) 22 December 1990; The Constitution of the Czech Republic (Ústava České republiky) 16 December 1992; The Fundamental Law of Hungary (Magyarország Alaptörvénye) 1 January 2012 (adopted on 25 April 2011); The Constitution of the Republic of Poland (Konstytucja Rzeczypospolitej Polskiej) 17 October 1997 (adopted on 2 April, ratified in 25 May); The Constitution of Romania (Constituția României) 8 December 1991 (adopted on 21 November); The Constitution of the Republic of Serbia (Устав Републике Србије/ Ustav Republike Srbije) 8 November 2006; The Constitution of the Slovak Republic (Ústava Slovenskej republiky) 16 September 1992; (adopted on 1 September); The Constitution of the Republic of Slovenia (Ustava Republike Slovenije) 23 December 1991.

adoption of new constitution became necessary when Serbia became independent after Montenegro's secession and the dissolution of Serbia and Montenegro.<sup>33</sup>

The prominent place of the constitutions in the hierarchy of the legal sources is illustrated by the fact that their amendment requires special procedures. The constitutional amendment procedure is regulated in a detailed way in most of the constitutions of the countries examined. The Czech constitution provides that the constitution may be supplemented or amended by constitutional acts<sup>34</sup>; in contrast, the Croatian,<sup>35</sup> Polish,<sup>36</sup> Romanian,<sup>37</sup> Serbian<sup>38</sup> and Slovenian<sup>39</sup> constitutions set out the rules that are necessary to amend the constitution in a separate chapter or title. The Hungarian Basic Law contains the provisions that governs its adoption and amendment in Art. S).

## 2.2. *The acts*

The legislative acts are binding rules of conduct that govern fundamental areas of the relations between the individual and society. Below the hierarchical level of the constitution, they regulate all essential questions that are necessary for the functioning of the state. The constitutions of the countries examined all recognise the general category of legislative act.<sup>40</sup> At the same time, however, differences exist with regards to the special categories of acts provided in each constitution. A common feature of the latter special category is that a higher than simple majority votes, and a qualified majority is required for their adoption and amendment.

Some of the states examined have so-called constitutional acts or acts with constitutional force, which can be adopted, amended or repealed by the majority that is required to amend the constitution. According to the Czech constitution,<sup>41</sup> the constitutional order of the Czech Republic<sup>42</sup> is made up of the constitution, the Charter of Fundamental Rights and Basic Freedoms and the constitutional acts adopted pursuant to the constitution. Under the Czech constitution, a constitutional act may designate the conditions under which the people may exercise state authority directly,<sup>43</sup> and the constitution can only be supplemented or amended by a constitutional law.<sup>44</sup>

33 The proposed text of the constitution was adopted by the National Assembly on 30 September 2006 and put to a referendum, which was held on 28–29 October 2006. After 53.04% of the electorate supported the proposed constitution, it was officially adopted on 8 November 2006. Further: Kálóczy, 2010, pp. 7–8.

34 The Constitution of the Czech Republic, Art. 9.

35 The Constitution of the Republic of Croatia, Chapter VIII.

36 The Constitution of the Republic of Poland, Chapter XII.

37 The Constitution of Romania, Title VII.

38 The Constitution of the Republic of Serbia, Part Nine.

39 The Constitution of the Republic of Slovenia, Chapter IX.

40 For the details on the legislative process, see the chapter on the legislative power in this handbook.

41 The Constitution of the Czech Republic, Art. 112.

42 Ústavní pořádek České republiky.

43 The Constitution of the Czech Republic, Art. 2(2).

44 The Constitution of the Czech Republic, Art. 9(1).

The Romanian constitution also allows the parliament to adopt constitutional acts<sup>45</sup> that can only aim to modify the constitution. Furthermore, the Slovak constitution also recognises the concept of constitutional act,<sup>46</sup> whereby the National Council of the Slovak Republic can approve the treaties on a union of the Slovak Republic with other states and the repudiation of such treaties by constitutional law. In Croatia, the laws on equality and on the protection of the rights of minorities as well as on the Constitutional Court are considered a constitutional act or acts with constitutional force.<sup>47</sup> In Serbia, a constitutional act can only be adopted for the enforcement of the amendments to the constitution.<sup>48</sup> In Slovenia, a “constitutional act shall be passed in order to implement this Constitution and to ensure transition to the application of the provisions of this Constitution”.<sup>49</sup> Amendments to the constitution are also made in the form of constitutional acts.<sup>50</sup>

In addition to the previously mentioned constitutional acts, the Romanian constitution also regulates the so-called organic act and ordinary act and exhaustively defines the issues to be regulated by the former.<sup>51</sup> Accordingly,<sup>52</sup> an organic act regulates the issues of major importance to the state, including state borders, Romanian citizenship, the state coat of arms and seal, the general legal status of property and inheritance, the organisation and holding of referendums, criminal offences, penalties and the execution of sentences, the organisation and functioning of the Superior Council of Magistracy, the courts of law, the public ministry, and the Court of Audit, the rights of individuals affected by the action of the authorities, national defence, the organisation, functioning and financing of political parties, and the structure of government bodies. Ordinary acts shall regulate all other areas that are not covered by organic acts, and they cannot change or modify hierarchically higher norms, that is, organic acts or the constitution.<sup>53</sup>

In Croatia, it is also necessary to regulate certain areas such as the rights of national minorities, other fundamental rights and freedoms or the electoral system through organic acts.<sup>54</sup> In addition, the Hungarian Basic Law defines and uses the

45 The Constitution of Romania, Art. 73(1)–(2).

46 The Constitution of the Slovak Republic, Art. 86 b).

47 The Constitution of the Republic of Croatia, Arts. 15 and 127.

48 The Constitution of the Republic of Serbia, Art. 205.

49 The Constitution of the Republic of Slovenia, Art. 174.

50 See e.g., Constitutional Act Amending Chapter I and Arts. 47 and 68 of the Constitution of the Republic of Slovenia (UZ3a, 47, 68); Constitutional Act Amending Art. 14 of the Constitution of the Republic of Slovenia, 15 June 2004 (Official Gazette of the Republic of Slovenia, No. 69/04); Constitutional Act Amending Art. 80 of the Constitution of the Republic of Slovenia, 25 July 2000 (Official Gazette of the Republic of Slovenia No. 66/00).

51 The Constitution of Romania, Art. 73(3).

52 See <https://n-lex.europa.eu/n-lex/info/info-ro/index>.

53 Organic laws shall be passed by the majority vote of the members of each Chamber. Ordinary laws shall be passed by the majority vote of the members present in each Chamber. The Constitution of Romania, Art. 76(1)–(2).

54 The Constitution of the Republic of Croatia, Art. 83.

concept of the cardinal act; accordingly,<sup>55</sup> cardinal acts shall be acts, the adoption and amendment of which requires the votes of two-thirds of the members of the National Assembly present. Cardinal acts regulate, among others, the protection of families,<sup>56</sup> the establishment of religious communities<sup>57</sup> or the detailed rules for the operation and management of parties.<sup>58</sup>

### ***2.3. Generally binding legal norms adopted by the executive and the heads of independent regulatory organs***

In each country, below the hierarchical level of legislative acts are legal norms that provide generally binding provisions for the citizens. For these general legal norms, the legal systems of the examined countries use different expressions,<sup>59</sup> and they are adopted by the executive as well as by the heads of independent regulatory organs. Within these sources, one can differentiate between legislative and general competences.

In addition to the general legislative powers of the parliament, other institutions of the public administration may exceptionally play a role in this area. While in the socialist legal system, it was common for the collective parliamentary presidents or the body of the heads of state to exercise the parliament's legislative power between two sessions when the parliament was only convened for a few days each year, this extraordinary or supplementary legislation is only allowed under 'exceptional' circumstances.<sup>60</sup> The Czech constitution provides this competence to the Senate: if the Chamber of Deputies is dissolved, the Senate shall be empowered to adopt legislative measures concerning matters which cannot be delayed and which would otherwise require the adoption of a statute.<sup>61</sup> Only the government may submit proposals for such legislative measures to the Senate, and some important pieces of legislation, such as the election law and budget, are excluded from this right of initiation. These acts must be confirmed immediately by the Chamber of Deputies once it has regained its decision-making capacity; otherwise, they will be repealed.

The situation is different in Croatia<sup>62</sup> and Romania,<sup>63</sup> where, based on the French model, the parliament may pass an individualised special law with a predetermined temporal scope, enabling the government to issue ordinances in fields outside the scope of organic acts. In Romania, the government is often empowered to adopt ordinances before the adjournment of the session until the next one.<sup>64</sup> The regulatory areas that are excluded from this type of rulemaking – such as those of fundamental

55 The Fundamental Law of Hungary, Art. T)(4).

56 The Fundamental Law of Hungary, Art. L)(3).

57 The Fundamental Law of Hungary, Art. VII (2).

58 The Fundamental Law of Hungary, Art. VIII (4).

59 Decrees, regulations.

60 Küpper and Szabó, 2016, p. 47.

61 The Constitution of the Czech Republic, Art. 33.

62 The Constitution of the Republic of Croatia, Art. 88.

63 The Constitution of Romania, Art. 115(1).

64 Veress, 2004, cited in Küpper and Szabó, 2016, p. 47.

rights and the right to vote – are regulated by the constitution or organic acts in both countries. The empowering act requires a simple majority since it cannot empower the adoption of a legislative act that requires a higher proportion of votes. In Romania, the parliament can decide in the enabling law whether the ordinances shall be submitted to the parliament for approval.<sup>65</sup> Besides this type of ordinance, the government in Romania can adopt emergency ordinances (*ordonanța de urgență*) in exceptional cases without specific empowerment if it justifies the emergency status – albeit the concept of emergency has no constitutional definition. With regards to the emergency ordinances, the government has the power to regulate the area of organic acts with some limitations; they cannot affect, among others, the legal status of the basic institutions of the state, the constitutional rights, freedoms and obligations or the right to vote. Such an emergency ordinance shall only come into force after it has been submitted for debate to the Chamber having the competence to notify it. It can be either approved or rejected; however, in other cases, such as the Hungarian Basic Law, based on the negative historical experiences, the constitution – except for the special legal order or the state of national crisis – does not allow the government to adopt a legal norm that has legislative force.<sup>66</sup>

Regulations adopted under legislative competence shall be distinguished from legal norms adopted under general competence, and they are always situated below the legislative act in the hierarchy of sources of law. However, differences exist among the countries in terms of who is empowered to adopt such source of law. In the framework of the public administration/central administration, the government, the prime minister and the ministers have such rights in each of the countries examined. In addition, the rulemaking powers of assigned independent agencies are also recognised in several countries.<sup>67</sup>

For example, in Slovenia, according to the relevant act, the government may issue decrees.<sup>68</sup> The Slovenian constitution also includes the category of ‘Decrees with the Force of Law’. If the National Assembly is unable to convene due to a state of emergency or war, the president of the Republic of Slovenia may, on the proposal of the government, issue decrees with the force of law.<sup>69</sup>

In Poland, regulations<sup>70</sup> are executive acts passed by bodies authorised by statutes: the president,<sup>71</sup> the Council of Ministers,<sup>72</sup> the prime minister<sup>73</sup> and a minister.<sup>74</sup> The Constitution of Poland describes the presidential regulation with the force of law,

65 The Constitution of Romania, Art. 115(3).

66 Drinóczi, 2015, pp. 19–31.

67 Slovak Republic, Czech Republic, Romania.

68 Government of the Republic of Slovenia Act, Art. 21.

69 Such decrees may, in exception, restrict individual rights and fundamental freedoms as provided by Art. 16 of this constitution. The Constitution of the Republic of Slovenia, Art. 108.

70 Rozporządzenie.

71 The Constitution of the Republic of Poland, Art. 142.

72 The Constitution of the Republic of Poland, Art. 146(4).

73 The Constitution of the Republic of Poland, Art. 148(3).

74 The Constitution of the Republic of Poland, Art. 149(2).

which can be issued during a period of martial law when the Sejm cannot convene. However, such regulations must be approved by the Sejm at its next sitting, and these regulations shall have the character of universally binding laws.<sup>75</sup> In Poland, a regulation can also be issued by the National Council of Radio Broadcasting and Television.<sup>76</sup>

In Slovakia and Hungary, the president of the central bank has this authority.<sup>77</sup> Furthermore, according to Hungarian Basic Law, the head of an independent regulatory organ shall issue decrees; no such decree shall conflict with any act, government decree, prime ministerial decree, ministerial decree or decree of the Governor of the Hungarian National Bank.

Such a general legal norm can typically be adopted to apply or enforce a law or in matters that are not regulated by legislative act. In contrast, in Romania, decisions shall be issued by the government to organise the execution of laws, while ordinances shall be issued under a special enabling law, within the limits and in conformity with the provisions thereof.<sup>78</sup>

#### ***2.4. The decrees of the local governments***

Within the hierarchy of the legal sources, decrees or regulations are typically followed by decrees of the local governments that are adopted based on the empowerment or authorisation of legislative acts. These acts regulate the areas of competence of local government bodies, and they only have a binding force within the administrative territory of the local government.<sup>79</sup> According to the Polish constitution, for example, “enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments”.<sup>80</sup> However, according to the Czech constitution, “representative bodies may, within the limits of their jurisdiction, issue generally binding ordinances.”<sup>81</sup> The Hungarian Basic Law similarly provides that “acting within their functions, local governments shall adopt local government decrees to regulate local social relations not regulated by an Act or on the basis of authorisation by an Act”. It also stipulates that “no local government decree shall conflict with any other law”.<sup>82</sup>

#### ***2.5. International treaties in the system of sources of law***

The sources of law in each state usually go beyond the borders of that state. Nowadays, it is not rare that agreements enter into force among states based on the rules

75 The Constitution of the Republic of Poland, Art. 234.

76 The Constitution of the Republic of Poland, Art. 213(2).

77 The Constitution of the Slovak Republic, Art. 56(1); The Fundamental Law of Hungary, Art. 41(5).

78 The Constitution of Romania, Art. 108.

79 See, e.g., The Constitution of the Czech Republic, Art. 104(3); The Fundamental Law of Hungary, Art. 32; The Constitution of the Slovak Republic, Art. 68.

80 The Constitution of the Republic of Poland, Art. 87(2).

81 The Constitution of the Czech Republic, Art. 104(3).

82 The Fundamental Law of Hungary, Art. 32(2)–(3).

of international law, whereby rights and duties arise for the parties, i.e. the states. The role that these international instruments play in the legal system of a given state should also be mentioned when discussing the hierarchy of the sources of law. The international treaties ratified by the national parliament are part of the legal system of a given state<sup>83</sup>; however, where can they be placed in the hierarchical system of sources of law?

In the Czech Republic, international conventions ratified by the parliament and thus binding on the country play a somewhat superior role over other legislation. If an international treaty's provision contradicts a piece of legislation, the international treaty must be applied.<sup>84</sup> It is also important to mention that the Constitutional Court of the Czech Republic has the power to review the compatibility of international treaties signed by the Czech Republic with the Czech constitutional order.<sup>85</sup> International agreements concluded in accordance with the constitution, ratified and subsequently promulgated by the parliament form an integral part of the legal order in Croatia as well, and they are situated above the legislative act in the hierarchy of the sources of law. The legislative act which is contrary to an international act is not applied; rather, the international act is applied directly, but the legislative act is not altered or repealed unless the parliament does it or the Constitutional Court abolishes the act in question.<sup>86</sup> Similarly, under the Polish<sup>87</sup> and Slovak<sup>88</sup> constitutions, the provision of a ratified international convention takes precedence over the legislative acts. The Constitution of Poland establishes a general rule in Art. 9, which states that the Republic of Poland shall respect international law binding on it. In the third chapter dedicated to the sources of law, the constitution mentions the ratified international agreements within the sources of universally binding law.<sup>89</sup> It also regulates the requirements of promulgation and ratification of different international agreements.<sup>90</sup>

Similarly, in Slovenia, laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia<sup>91</sup>; furthermore, laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general acts must also be in conformity with other ratified

83 See, e.g., The Fundamental Law of Hungary, Art. Q) (3); The Constitution of Romania, Art. 11(2).

84 The Constitution of the Czech Republic, Art. 10.

85 Czech Republic Constitutional Court Judgement 2008/11/26 – Pl. ÚS 19/08: Treaty of Lisbon I, [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Decisions/pdf/Pl%20US%2019-08.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%2019-08.pdf);

Czech Republic Constitutional Court Judgement 2009/11/03 – Pl. ÚS 29/09: Treaty of Lisbon II, [https://www.cvce.eu/content/publication/2013/10/22/c746a974-58eb-4907-b022-c9f486b6c3d2/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2013/10/22/c746a974-58eb-4907-b022-c9f486b6c3d2/publishable_en.pdf).

86 The Constitution of the Republic of Croatia, Art. 134.

87 The Constitution of the Republic of Poland, Art. 91.

88 The Constitution of the Slovak Republic, Art. 7(5).

89 The Constitution of the Republic of Poland, Art. 87.

90 The Constitution of the Republic of Poland, Arts. 88(3) and 89.

91 The Constitution of the Republic of Slovenia, Art. 8.

treaties.<sup>92</sup> According to the Slovenian Constitutional Court,<sup>93</sup> international treaties are superior to state law in the legal hierarchy of Slovenia.<sup>94</sup> According to the Serbian constitution, ratified international treaties and generally accepted rules of the international law shall be part of the legal system of the Republic of Serbia.<sup>95</sup> However, ratified international treaties may not be in non-compliance with the constitution. Laws and other general acts enacted in the Republic of Serbia may not be in non-compliance with the ratified international treaties and generally accepted rules of the international law.<sup>96</sup> In addition, a separate rule is laid down in the Romanian constitution with regards to international human rights treaties. It stipulates that

where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.<sup>97</sup>

### ***2.6. The EU law in the system of the sources of law***

The EU has established a new type of international relationship between states compared to the traditional agreements governed by international law. The founding treaties of the EU confer rights and obligations that directly affect the nationals of the contracting states. In addition to their own national legal systems, member states of the EU are also subject to its legal system; thus, they must allow and ensure the coexistence of the two legal systems in their respective jurisdiction.

Their membership in the EU and, consequently, the primacy of the application of EU law play a decisive role in assessing the hierarchy of the sources of law in the states examined in this volume. There can be no derogation in the case of two legal systems out of which one is the EU legal system – including EU law that takes precedence over the other, which in this case is the law of a member state.

In such a case, it does not matter which norm was created first because, if a conflict arises between a provision of an EU legislation and a provision of a national legal norm, the primacy of the EU law promptly settles the conflict.<sup>98</sup> If the domestic law conflicts with EU law, the latter shall apply. The recognition of such primacy does not require a ruling by the Court of Justice of the European Union nor by the constitutional court of a member state that would rule on this conflict. Every law enforcement authority has a duty to determine it and must act accordingly and where appropriate, disregarding the law of the member states and applying EU law instead. If the laws of

92 The Constitution of the Republic of Slovenia, Art. 153.

93 Ustavno sodišče.

94 National legislation, Slovenia: [shorturl.at/fmxHS](http://shorturl.at/fmxHS).

95 The Constitution of the Republic of Serbia, Art. 16.

96 The Constitution of the Republic of Serbia, Art. 194.

97 The Constitution of Romania, Art. 20.

98 Csink, Schanda and Varga, 2020, p. 887.

the member states do not align with EU law, then the member state might be liable before the Court of Justice of the European Union.<sup>99</sup>

As a result, EU law and the national laws of the member states form two separate legal systems that have no derogating relation, which is why the concept of the hierarchical sources of law is not capable of dealing with the relation between EU law and the laws of the Member States. However, as a result of a country's accession to the EU, the law of the EU also becomes applicable. Unless a given constitution provides otherwise, the application of EU law is governed by the provision that relates to the international treaties; thus, the principle of the superiority of international law also prevails. This principle stipulates that if a rule of the law of the EU conflicts with a national rule of a member state, the provision of the law of the EU must be applied in a given case. This principle holds in the case where a national rule is in conflict with either the primary EU law (founding treaties and international treaties of the EU) or with secondary EU law (regulations, directives etc.). The constitutions of Croatia and Romania contain an explicit provision with regards to the application of EU law. The Croatian constitution contains a whole chapter on the EU, which states that the rights provided in EU law ought to be exercised in the same way as the rights under Croatian law, and it is the Croatian courts' duty to protect them.<sup>100</sup> The Romanian constitution has a separate title that deals with the Euro-Atlantic region. One of its provisions expressly establishes the primacy of the founding treaties and other binding regulations of EU law over the national legal rules that are in conflict with them.<sup>101</sup>

## 2.7. Legal sources

The regulatory system of each state has a database which provides information on the elements comprising the system of the sources of law, e.g. the collection of Croatian legislation<sup>102</sup> includes the legislative acts that are published in the official journal of the Republic of Croatia, *Narodne Novine*. This collection also includes other legal and political acts<sup>103</sup> if they have been published in the official journal. The database is part of the central register<sup>104</sup> of official documents of the Republic of Croatia. The Czech Republic provides access to the collection of legislative acts as well as of international treaties<sup>105</sup> through an application called '*Sbírka Zákonů*'.<sup>106</sup> In Hungary, the '*Nemzeti Jogszálytár*' (National Legislation Database)<sup>107</sup> is a legal search service that is free of charge and available to anyone. It is operated and maintained by the Magyar Közlöny

99 Consolidated Version of the Treaty on the Functioning of the European Union Arts. 258 and 260.

100 The Constitution of the Republic of Croatia, Art. 141c.

101 The Constitution of Romania, Art. 148(2).

102 See <https://n-lex.europa.eu/n-lex/info/info-hr/index>.

103 Such as resolutions and declarations by the Croatian Parliament, national strategies, annual state budgets, reports in the domain of the public authorities and their statutes.

104 See <https://sredisnjikatalogrh.gov.hr/>.

105 See <https://n-lex.europa.eu/n-lex/info/info-cz/index>.

106 See <https://aplikace.mvcr.cz/sbirka-zakonu/>.

107 See <https://njt.hu>.

Lap- és Könyvkiadó Kft.<sup>108</sup> In Poland, such online database is available on the website of the House of the Polish Parliament, the Sejm.<sup>109</sup> It provides regularly updated texts and bibliographic lists of the legal acts that are published in the official journal of the Republic of Poland<sup>110</sup> or by the Polish Observatory.<sup>111</sup> However, this database does not contain local government law or internal law.<sup>112</sup> The development of the Romanian legislation portal<sup>113</sup> was realised as part of the N-Lex project, co-financed by the European Social Fund under the Operational Programme for Administrative Capacity Building.<sup>114</sup> On the site of the National Assembly of the Republic of Serbia, access to the database of adapted legal sources is provided.<sup>115</sup> The Slov-Lex database of the Slovakian ministry of justice<sup>116</sup> provides wide access to the country's legal norms and legislative processes as well as to the case law of the national constitutional court and ordinary courts, among others. The portal also enables the public to acquaint itself with proposed bills and take an active role in the lawmaking process using commenting tools.<sup>117</sup> In Slovenia, the so-called PIS<sup>118</sup> is a free and open database about Slovenian and EU legislation, and it is operated by the Slovenian Government Office for Legislation. It can also be used to monitor the legislative process in Slovenia and to search the case law of Slovenian judiciary. It integrates more than 15 national public databases and enables the users to search the relevant legal information more effectively.<sup>119</sup>

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108 See <https://n-lex.europa.eu/n-lex/info/info-hu/index>.

109 Internetowy System Aktów Prawnych – ISAP.

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113 Portal Legislativ, see <http://legislatie.just.ro/>.

114 See <https://n-lex.europa.eu/n-lex/info/info-ro/index>.

115 See <http://www.parlament.gov.rs/acts/adopted-laws/adopted-laws.628.html>.

116 Slov-Lex – Legislative and Information Portal of the Ministry of Justice of the Slovak Republic, see <https://www.slov-lex.sk/web/en>.

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