**2. The sources of law**

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1. **The main features of norms**

In order to analyze legal norms, we should first analyze their essential features and contents. First of all, we should ascertain if legal norms have specific “addressees” (and, if so, if such addressees may be grouped together and belong to specific categories). When we talk about “addressees” we consider the subjects falling under the application scope of a norm, as well as those who may be somewhat “touched” by the norm or may be requested to apply it.

In broad terms, legal norms may be “addressed” to:

1. All citizens (e.g. article 24 of the Italian Constitution, regarding fundamental freedoms, with particular reference to the right to sue other subjects before Court)
2. Some of the members of the community (e.g., article 38 of the Italian Constitution, regulating rights attached to handicapped persons or persons unable to perform any work activity)
3. Single individuals (e.g., decrees or administrative targeting individual persons)
4. Bodies, entities, or the like (e.g., 74 of the Italian Constitution, regulating relationships between the President and the Chambers of the Parliament)

Legal norms may also have no addressee at all (e.g., article 13 of the Italian Constitution, simply highlighting a general principle).

The main features of legal norms may be summarized as follows:

1. “***positività***” (the norm must be in force and effect)

- The norm must be able to express an interest/value, which is felt as existing by members of the community, or it must set up all conditions (bodies, procedures, etc.) to make sure that the relevant rule is effectively applied

- by contrast, if the norm is generally unobserved, this may mean that it does not express a real interest/value of the community

- the norm has to be *effective*

- text of the norm – actual content of the norm: any contrast?

1. “***coattività***” (enforceability)

- The legislator provides for **sanctions/fines**: the norm has to be applied irrespectively of the individual’s will or intentions

- **examples**: Art. 1516 of the Civil Code (rights of the purchaser); Art. 624 of the Criminal Code (theft)

- **Exception**: some norms are not “supported” by sanctions/fines (*e.g*., norms only setting forth the ultimate aim to be pursued). In some cases, norms do not set forth a sanction, but general aims or purposes to be pursued. This does not mean that norms belonging to the category in question are not “effective”. Example: Art. 4 Constitution (right to work), which does not lay down any specific sanction or fine, in case that it is not applied. Other examples are: article 1 of the Constitution and Article 769 of the Civil Code (definition of “gift”). Citizens (or addressees of the relevant norm, as the case may be) are anyway requested to conform and comply with the rule (although this is expressed by a general principle or a rule which is deprived of a specific sanction).

1. “***esteriorità***” (inherent to social life). The norm must be inherent to social life, in contrast with rules regarding each private individual (or affecting the individual conscience sphere) only – *e.g*., moral or religious norms.
2. “***generalità e astrattezza***” (general, not linked to specific situations/individuals)

- **Examples**: Art. 53 Constitution (stating the general duty to contribute to State expenses); Art. 575 Criminal Code (homicide); Art. 922 Civil Code (containing the legal definition of ownership and of the ways to acquire it); Art. 18 Code of Civil Procedure (regulating the procedure to be followed to identify the competent Court/Judge)

- **Exception**:

* special norms: norms which affect individuals belonging to specific categories of individuals, rather than to the generality of the community members
* exceptional norms: norms deviating or departing from a rule which is held to be “general” (e.g., the rule providing for the suspension of process delays from 1 August to 15 September)
* “*legge-provvedimento*”: norms which are addressed to specific individuals and which, therefore, are not general, or have not a general content. It is generally held that “*leggi provvedimento*” do not fall under the definition of legal norms (which are supposed to be always of a general nature). Such kind of “decisions” may be embedded in administrative orders or in ordinary laws. For instance, “*espropriazione”* (compulsory purchase) may be ordered either by operation of law or by means of an administrative decision. Practical implications may arise from the choice of the legal tool which is used (depending on the situation at stake, a different regime concerning challenges is applicable): in case that expropriation is ordered by means of ordinary law, the latter may be only challenged before the Constitutional Court (the affected person may file a complaint about formal defects or mistakes made by the legislator in the merits); by contrast, should expropriation be included in an administrative order, the latter may be attacked before the competent administrative Courts (*Tribunale Amministrativo Regionale*).

1. **“Sources of production” and “sources on production”**

Sources of law may be sorted by different categories, depending on their capacity to create new norms. In particular, we talk about “sources of production” when we want to refer to sources creating (or otherwise giving rise to) new norms. We talk about “sources on production” to define sources which do not give rise (as such) to new rules, but simply describe procedures and methods to create norms (and regulate bodies entrusted to create new norms). In a nutshell, “sources of production” provide answers to the question” what?”, while “sources on production” provide answers to the question “how?”. Examples of “sources on production” are the following:

* Article 70 of the Italian Constitution, establishing that both Chambers of the Parliament are entitled to participate to the proceeding creating laws;
* Article 72 of the Italian Constitution, setting out the main rules governing the proceeding which leads to the creation of laws.

In both cases, we are not dealing with norms which represent “sources of law”, but we may not justify the creation of new norms on the basis of the norms in discussion, since these only envisage the procedural aspects (these are “sources on production”).

1. **“Institutional” sources and “factual” sources**

Scholars usually refer to “Institutional” sources to describe the process of creating new norms by means of an expression of will by the competent authorities or bodies. In other words, when new norms are created by virtue of a formal decision, act or expression of will by the competent bodies, the relevant source falls under the definition of “institutional” sources. By contrast, new norms may be also created by virtue of a factual process, *e.g*. by virtue of custom or other sources other than an authority’s act or decision. Implementation of international treaties into the Italian legal order is also considered as a “factual” source of law, since it derives its legitimacy outside the scope of the domestic order.

The above distinction triggers important consequences from a legal point of view, since the Constitutional Court is entitled to review and issue judgements on matters involving “institutional” matters (while it is not where a “factual” source comes into play). As a consequence, subjects intending to claim invalidity of a legal act, claiming that a given source was improperly applied (or could not used as a legal ground to provide legitimacy to a rule), such claim may not be brought to the attention of the Constitutional Court only if the relevant sources is “institutional”.

1. **Direct and indirect sources**

Direct sources encompass sources which form part of the Italian domestic legal order, while indirect sources are those which derive their legitimacy from elements which are outside the scope of the domestic order (e.g., an international convention or treaty which is made applicable at a domestic level by virtue of a domestic order or implementation law).

1. **Summary of the system of sources**

- The Constitution is not formally mentioned among the sources of law. However, it forms undoubtedly part of the sources of law. The Constitution is ranked above all other sources of law (which derive their legitimacy from the Constitution). There could be no conflict between one of the subordinated sources and the Constitution.

- some sources are regulated by an “external” source: e.g., the internal regulation of the Constitutional Court. This regulates the internal functioning of the Court. Although this is based on article 137, paragraph 2 of the Constitution, it is enacted by virtue of an act of the Court itself. So, in a nutshell, the first-level source is the adopted by the Court, while the second-level source is the Constitution (which, as mentioned, refers to an “external” source, which has to supplement the rules contained in the Constitution).

- some sources are not expressly contemplated by the Constitution (*e.g*., military orders, EU-law sources, by-laws of non-territorial entities). This does not mean that these do not derive their legitimacy from the Constitution. The latter remains the primary source of legitimacy for all other sources of law.

- The Constitution does not contemplate custom (“*consuetudini”*) and mechanisms enabling implementation of foreign laws into Italian law. Although Article 10 of the Constitution endorse the “generally recognized principles of international law”, customs (both a domestic and international level) is not expressly recognized. However, according to scholars (and based on several decisions of Italian Courts), customs forms part of the Italian system of sources of law.

1. **Other sources of law**

* “Unclear” sources:

Regional laws

*Referendums* repealing existing norms (“*referendum abrogativo*”)

Decrees issued by the President of the Republic implementing the by-laws of certain specific Regions

* Examples of regulations relating to the internal functioning of public bodies

Each Chamber of the Parliament

Supreme Council of Magistrates

The Constitutional Court

National Council on Labour and Economy

The President of the Republic

* Custom (“*consuetudine*”)

As mentioned, the constitution contains a list of sources of law. Although custom is not included in such list, it is generally held that custom is a source of law. On the other hand, custom is explicitly mentioned as a source of law in the list in the “Preliminary provisions on law in general” (articles 1 and 8), which are embedded in the Civil Code. In essence, custom may be defined as a “factual” source of law.

Custom is defined as:

* “*contra legem*” if itis in conflict with an existing legal norm;
* “*secundum legem*” if it further confirms (and is in line with) an existing rule of law;
* “*praeter legem*” if it purports to set out a new rule, on a subject matter which is not yet regulated by any norm.

The main features of “custom” may be summarized as follows. In order for custom to be held as existing (and as a valid source of law), it must materialize a uniform and constantly repeated behavior, held by the generality of members of the community. In other words, custom is spontaneously created by the members of the community, without the intervention of the public authorities, nor with the adoption of any formal act or regulation. In addition, all members of the community must see such behavior as somewhat compulsory and legally binding, and conforming to an existing principle of law (although it is not embedded in a formal norm): this is commonly known as “*opinio iuris ac necessitatis*”. Should people contravene to such customary rules, a reaction of the “community” is expected to arise, since the norm in questions is “felt” as binding and effective.

Customary rules are usually gathered in “registries” (*e.g*., those held by the local Chambers of Commerce), which, however, do not have any formal authority and do not represent, as such, a source of law. While custom is a source of law, registries are a mere tool to gather and collect customary rules and to make access to such rules easier to interpreters (by definition, custom is a non-written source of law). Therefore, in case that a dispute arises with respect to customary rules (and it is questioned whether a given custom actually exists), registry may be validly claimed as a basis to establish that such rules exist and are legally binding.

***Constitutional custom***. In specific circumstances, custom may also affect the Constitution (or the way it is interpreted). In such case, however, custom has specific features, which differ from those applicable to “general” custom: constitutional custom involves a limited number of subjects (rather than the generality of the members of the community), since it only involves public bodies/authorities (it may be possibly involve one single subject); the “underlying behavior” may be relevant even though it was repeated a few times; constitutional custom may be also “*contra constitutionem*” (if it gives rise to a rule which is in conflict with the Constitution, or supplements the contents of a rule contained in the Constitution). By way of example, we may refer to the creation of Ministries without power of expenditure or of Vice-President of the Council of Ministers (none of them is contemplated by the Constitution).

* Case law

In broad terms, the Italian legal system only contemplates “codified” sources of law, therefore factual or self-created law is generally irrelevant as source of law. However, case-law (although this belongs to “factual” sources of law) is extremely important, since the Courts’ decisions represent the actual application of law to practical situations.

In particular, in certain situations, norms needs to be interpreted and “oriented”, in order to make sure that they are applicable to the situations at hand. For instance, Art. 923 Civil Code regulates possession of abandoned goods. Such norm, however, may be applied only if “good”, “abandoned” and “possession” are properly identified and interpreted. To that purpose, Courts play their roles in interpreting and applying norms (specifying definitions and concepts lying behind them).

Then, the activity carried out by Courts essentially relate to interpretation of norms. In particular, if more than one norm seem applicable, Courts are in a position to identify the prevailing norm (or source of law). According to the criteria highlighted in paragraph 7 below, Courts select the prevailing norm, e.g. according to the relevant date of entry into force, or its hierarchical position in the whole legal order. Also, interpretation may be affected by subjective or variable factors, such as political, social or generally recognized cultural views, in a broad sense, which may be linked to a given cultural scenario (this may change from time to time, or depending on the geographical region which comes into play). In addition, interpretation may entail the need to define general concepts, such as “*diligence*”, “*public order*”, “*social benefit*”, etc. The Courts are required to focus their attention on the specific situation submitted to them and, at the same time, to apply (and interpret/specify) the general concepts embedded in the applicable norms.

In the light of the above, in a technical sense, case law is not a source of law, since Courts are not entitled to create law. In addition, However, it may be still be regarded as a source of law (in a broad sense), to the extent that we consider said activity of defining/better specifying the general concepts contained in the general norms.

The Courts’ decisions do not represent binding precedents (such as in common law systems). Each Court remains free to adopt the solution it retains as appropriate to solve the dispute, irrespective of the conclusions stated in decisions made by other Courts (even in similar cases), and irrespective of the hierarchical position of the Court issuing the prior decision. Pursuant to article 2909 Civil Code, the Court decisions bind all parties, their successor and assigns, as well as any third party (but it does not bind any other subject, including the other Courts, which may deal with similar cases).

By way of exception, pursuant to article 65 of the law regulating the Italian Court system, the Supreme Court plays a special role in “*ensuring unity and uniformity in the application of law*”. Although its decisions do not represent legally “*binding precedents*”, territorial Courts generally tend to consider (and possibly follow) the trends emerging from the Supreme Court’s decisions.

Last, under articles 113 and 114 of the Italian Code of Civil Procedure, the Courts may base their decisions on **“*equità*”** (*i.e*., they may decide the merits of a dispute in the light of a general principle of reasonableness and justice), to the extent that: (a) the parties involved in a dispute so request and the dispute relates to disposable rights; (b) the dispute value is lower than a threshold established by the law; (c) in the reasonable opinion of the Judge, the dispute could be not fairly and reasonably solved by simply applying the avaibale set of norms. If so, the Judge may somewhat “create” law, since the applicable rule may be created by the Judge to solve the dispute at hand.

* National labor agreements

Article 39 Constitution: agreements entered into by “registered” Unions **bind all persons belonging to the relevant category**.

Individual labor agreements bind the relevant parties only.

National agreements **may not be in contrast** with laws or general regulations (which, in turn, may not regulate matters covered by such agreements in details). **However, in certain matters, the intervention of the legislator is essential** (as stated by the Constitutional Court: *e.g*., minimum wages).

* The opinion of scholars (“doctrine”)

Scholars often provide their contributions to the evolution of law. In particular, such contribution often materializes in comments, remarks, criticisms, expression of expectations, suggestions, hints for the purpose of applying law. All of such comments is commonly known as “doctrine”.

From a merely technical, point of view, doctrine may not be regarded as a source of law. However, It may strongly influence the views taken by Courts and by other “players” (“indirect” application).

1. **Interaction among sources of law**

Sources of law may interact and conflicts might arise among them. Scholars identified the following criteria to solve conflicts:

- Hierarchy: according to the principle of hierarchy, a given source of law is held as prevailing over another, which is subordinated or ranked below the former. So, if a conflict arises between the acts in discussion, the norms deriving from the “higher” source of law prevails over the other.

- Chronology: if a conflict arises between two acts (one of which entered into force after the other), the one which entered into force first is held as prevailing.

- Segregation of powers: if a conflict arises between two acts regulating the same subject matter, the one which is issued by the “competent” authority prevails. For instance, if a subject matter falls within the scope of competence of the legislative power, and there is a conflict between an act of the Parliament and a Government regulation, the former may be held as prevailing (such conclusion, however, is subject to a scrutiny of the factual background, on a case-by-case basis, given that the Government is also entitled to exercise legislative powers, to the extent allowed by the Constitution).

1. **Deregulation**

The analysis on the sources of law should be also supplemented by a definition of “deregulation”. By virtue of second-level “deregulation” acts, previous norms are repealed, supplemented, integrated, restated or otherwise amended (possibly, by specifying the relevant date of entry into force). Deregulation acts (regulations) are usually issued by the Government (although they affect acts adopted by the Parliament). Deregulation may take place by any of the following acts (most of which are regulated by the Law no. 400/1988):

1.- Regulations repealing existing norms. Such regulations are issued by the President of the Republic, upon initiative of the Government, and in consultation with the Council of State. The regulations in discussion may not be adopted within the scope of the Parliament absolute reserved matters. Such regulations may repeal ordinary laws adopted by the Parliament, but may not be issued unless the Parliament enacts a “framework law”, authorizing the Government to repeal (by virtue of a formal act of the President of the Republic) obsolete norms and enact replacing norms.

2.- Regulations setting forth rules regarding the internal organization of single branches of the Government (*Ministeri*). Regulating the Ministries’ internal functioning is held as a “reserved matter” of the Government (in other words, the Parliament may not regulate such matters on its own initiative, in conflict with a Government regulation). Such regulations may depart from ordinary laws.

3.- Annual measures on deregulation. By 31 January each year, the Government is required to submit a draft law to the Parliament, highlighting norms to be repealed. Such norms must be related to the exercise of central and peripheral administrative powers. A formal opinion of the Council of State and of the competent Parliament commissions must be acquired by the Government to that effect. The Parliament then votes on the Government proposal.

4.- Regulations implementing EU law into Italian law. Implementation of EU law into Italian law may take place by virtue of Government regulations (rather than Parliament acts). See Chapter 5 for a complete analysis of this topic.

For the sake of completeness, with respect to the economic activities, the following distinction should be also drawn:

DEREGULATION: public bodies generally (and voluntarily) withdraw from the duty to regulate economic activities, leaving such task to private players. The overall “volume” of acts and regulations issued by public powers is reduced and private players are induced to take the initiative and self-regulate.

PRIVATIZATION: State dismisses its stake in a company, entity or economic activity (which is no longer held as strategic or involved on public-interest policies) in favor of another subject. The relevant activity, therefore, will be subject to the common rules of free market.

DEBUREAUCRATIZATION: public powers reduce the “volume” of formalities and actions to be accomplished by citizens and private players with respect to economic activities.