

# An Introduction and Comparison to Czech Republic's and Brazil's Legal System and Customary Law

Nicolý Barradas <sup>a</sup>

<sup>a</sup> Escola Paulista de Política, Economia e Negócios, Universidade Federal de São Paulo (UNIFESP), Osasco, São Paulo, Brazil, nicolybarradas@gmail.com,.

**Abstract.** This article seeks to expose and reflect synthetically about Brazilian law sources, and compare it to Czech law sources, centering itself towards the analysis of the role of customary law in those countries. As well as providing a clear overall view on their legal system and general sources of law. The approach undertaken is a succinct qualitative analysis of how the legislative system of Czechia and, primarily, Brazil works. Nevertheless, noticing the fact that most of the subject of the sources is limited to questions about the law, customs, case law and doctrine, or even about which are the formal or material sources of law, it is endorsed that the way to approach this specific theme must be revised, as the topic brings more complex issues, which requires a deeper knowledge and investigation

**Keywords.** Czechia, Brazil, Customary Law, Legal System, Introduction, Comparison

## 1. Introduction

The discussion of what are the sources of law of any society, independent of their conjecture, embodies various dimensions, usually, opening a greater discussion than just understanding where the principal resources in the enforcement of regulating a certain territory, behaviour, and acts, as we comprehend it as the essence of law and its goal. The essence of law and its duties, it's also a wider debate in the academy, that comprehends the analysis of the concept of source of law. Both are used in different senses and perspectives, criticised and examined over years by various authors, however, throughout this article it will be defined by its most common perception.

It is important to recognize that over the years there was, certainly, a development of philosophical and theoretical discussions regarding sources of law in general. Also, with the growing societies of codified law and precedent in modern states replacing various other of its sources, generates a factor that constructs many differences among jurists regarding the concepts and what includes sources of law. [1].

Sources of law may vary by legal system and jurisdiction, usually because of the legislative history of the society it is comprehended or its territory. Commonly, the sources incorporate written statutes, case law, customary law, and administrative regulations [2].

Customary law specifically will be explained and

used as a main part of this discussion, as it materialises a very precise source of law that comprehends most of the countries and important international organisations, such as the United Nations for instance. According to author Jordan Paust the "Customary international law is one of the primary components of law in the international legal process, a dynamic process profoundly interconnected with our own domestic legal processes for at least the last 250 years" [2]. Parallel to that, it exposes a scope of legislation that can be intangible as it does not fit the formal norms and materials. Written statutes are laws passed by a legislative body, such as a parliament or congress. Case law, also known as common law, is based on judicial decisions and legal precedents. Administrative regulations are rules and regulations created by government agencies.

Brazil and Czech Republic, also referred to as Czechia, acquires most of those characteristics in its law sources, in conjunction with theoretically embracing those concepts. Both countries share common law structures regardless of their distance and historical differences. Simultaneously, over the last decade, both countries pragmatically initiated diverse cooperation relations, not only economically but also academically. Accordingly, to the yet exposed, it is important to define as the material for comparison in this discussion, specifically Czech Republic and Brazil, and their general source of law characteristics, as well as their legal system, focusing on one important and notably relevant source, that is customary law, above mentioned.

## 2. Methodology

The approach undertaken is a succinct but concrete bibliographical analysis, supported by academic literature, news and online websites, mostly contemporaneously dated. Overall, to provide a qualitative research and display of how the legal systems of Czechia and, primarily, Brazil works. After comprehending the selected bibliography, it was conceivable to expose the content of the texts that served as a basis and also criticise it and compare it to different logics and authors. Making it possible to describe the main similarities and divergences through the arguments exposed.

## 3. Brazilian's source of law

Particularly, Customary law is commonly a term used to refer to unwritten legal norms and practices that have been developed over time in specific communities or regions. The hierarchy and weight given to each source of law depends on the legal system and jurisdiction. The Brazilian legal system i.e., is majorly conducted by governmental institutions. The federal government is divided into three branches, such as executive, legislative and judiciary. It is also a fact that the country follows the civil law tradition where rules are written. Codes and statutes are passed by Congress. Courts apply them to support their decisions [3].

Very similarly to other American countries, being the most substantial embodiment of this the United States of America's legislative system. Brazil's judiciary has two different sets of courts: federal and state courts, being the Supreme Federal Court, the highest court of its legal system. The federal organisation of justice as well as the jurisdiction of federal courts are established in the federal Constitution [3].

Brazilian law follows decisions issued by the Supreme Federal Court named "súmulas vinculantes" (in English: binding precedents). They reiterated judicial decisions on constitutional matters and have a binding effect at the federal and state levels stated at article 103 [3]. In order to discuss a case before the Supreme Federal Court, it has to raise a relevant constitutional question with general and significant repercussions (i.e. great impact in the socioeconomic arena).

When it comes to Brazil's sources of law, the most important is the federal constitution of 1988 and largely recognized as the primary law material for enforcing legislation into Brazilian society. However, that concept of sources is not always strict and varies a lot, principally in Latin America's reality. It is debated between authors that, in order to understand Brazilian sources, it is precise to subdivide them into formal, through which the law is manifested, and material – the social aspect of it, that

provides the content of those forms of manifestation [4].

For Miguel Reale, an important Brazilian law philosopher, the sources of law would be only the formal ones, since the identification of material sources, which do not have a normative character, would be within the scope of Legal Sociology, and not within the Science of Law. As we mentioned above, customary law is one of the main characteristics in sources of law and, in fact, contributes a lot to Brazil's legal system [4]. Affirming that law material that does not have any sort of normative character is not defined as a source of law still is a strong and debatable statement.

Mainly, when it comes to Brazil's conditions, specifically, according to some contemporary socialist that are active in the field of Law Sciences, there is a different construction of informal customs surrounding marginalised and dangerous areas, commanded by Latin American criminal organisations, that over time are becoming more active in the legislative system and socially accepted through their own legal norms.

One of the most evident examples of this phenomenon is the largely accessed and followed statute of the Primeiro Comando da Capital (PCC), nowadays, the biggest criminal organisation in South America. A lot of Brazilian authors still debate whether its statute has become under the scope of different actors, an actual material of sources of law, but what it is clear is that when the Brazilian state was unable to constitute a universal source of regulation, the formal law left a breach that is now filled by informal instances [5].

One of the most famous laws created by PCC is largely followed by the population who lives in marginalised areas of São Paulo in Brazil, and it established what should be socially accepted behaviour for those who live in areas that the organisation acts:

"The party (PCC) does not admit lies, cheating, envy, lies and selfishness, as well as personal interests. [...] We are all for one and one for all. The price for treason is death and the other actions enlisted will be punished according to their due penalty in the disciplinary regime of our party." [6]

Most of the research involving this phenomenon and their relationship with Brazilian customary law is still in development and it could assess several different discussions regarding the constitutions of these criminal organisation's statutes, their legal value, the ways their law enforcement is practised and principally the Brazilian government's relation to those parallel sources of law. Which would not be analysed in this article. In virtue of our customary law discussion being purposely solely an introduction.

It is known that Brazil's legal system is historically, predominantly written, with the law (in its wide concept) as the main source. Notwithstanding this

reality, this observation does not rule out the possibility of there being unwritten legal rules, whose creation process, unlike written rules, does not operate in an institutionalised manner, but, on the contrary, through the interference of society itself. Thus, the customary law, having even preceded the written law itself, acts contemporarily as an authentic formal subsidiary source, as widely recognized by the doctrine. It should be emphasised that the legal custom is not to be confused with the rules of social behaviour (rules of good manners, courtesy, hygiene, social usages, etc.), the main distinction lies in the mandatory force and legal necessity, aspects found only in the custom [7].

1.

#### **4. Czech Republic's sources of law**

As mentioned, the concept of sources of law in Latin America vary by country, but typically include written constitutions, codes, case law, and customary law. Once again, it needs to be exposed that here we referred to custom as the oldest source of law and basically consisted of usage and habits engaged over years, and it should be followed by any part of the community or whole community [7].

These norms and practices are often based on local customs, traditions, and beliefs, and are recognized and enforced by the community itself. However, as said before, customary law is not recognized as a formal source of law in many Latin American countries, including Brazil. Despite that, it is a fact that often, customary law is used in conjunction with formal legal systems to resolve disputes and provide justice in certain areas. Those concepts of unwritten legal norms and practice, in conjunction with the enforcement of the community, are conventionally welcomed to Brazilian society.

This characteristic is similar in Europe, as customary law has no legal status in most European countries, including the Czech Republic. Only written law, such as statutes adopted by the Parliament and regulations adopted by the Government and administrative authorities, are recognized as a formal source of law [8]. However, customary law may be considered as one of the factors taken into account in the interpretation of written law in Czechia. Also a similarity when it is compared to Brazil. Especially in cases where the written law is unclear or incomplete, customary law has shown an active part in legal decision making in Central Europe.

It is important to highlight the fact that the Czech Republic is a landlocked country. Located in Central Europe, Czechia's territory has changed a lot over the centuries but historically shares borders with four other countries: Germany, Poland, Slovakia and Austria. That itself provides a background geographically distinct over Brazil's territory that somehow has transgressed geopolitics and affected their enforcement of law and legal customs. It is also notable to assume that being a member of the

European Union (EU) and NATO, provides a series of common norms that must be followed, in some way more critically than their own internal legal system, usually regulated by the European parliament [9]. Those organisations play a significant influence on their courts and legislative system. Thus, the Czechia's constitution gives a clear view on the importance of those different systems to their legislation by mentioning those organisations and the commitment of their government in their first chapter, as they determine that "the Czech Republic shall observe its obligations resulting from international law" [10].

Which in Central Europe, or for a matter fact, in countries that are members of NATO and EU, is a common act. Nevertheless, it must be exposed that the national legal systems are different even though Czechia has submitted itself to the EU legal system ever since 2004 [10]. That somehow makes the legal system become a "continental legal system", that historically leans towards the influence of Germanic legal culture.

The Germanic legal culture is historically and still, characterised by its emphasis on written law and codification, as well as its hierarchical system of legal sources. Over the years, this has been the strongest legal influence on Central Europe, evidently affecting Czechia's legislation. As the Germanic concept of sources of law basically employs the civil law concept it is not inaccurate to affirm that those have transgressed over to the Czech Republic's also because of geographical factors [11]. This affirmation does not, in any sort of way, neglect that there were other factors that benefited the entrance of the civil law system into Czechia.

It is necessary to point out, above what was mentioned so far, how overall the state power works, as does most of the legal system, and principally, the few acts that had the influence of customary law, has been in their recent history linked to their government legal system.

The state power, resembling Brazil, is divided into the three classical Montesquieu's powers: legislature, executive, and judiciary. Being the Czech parliament, the principal institution that leads most of the legal power centers around the legislative system [8]. Hence it can, again, be attested that customary law has no legal status whatsoever in the Czech Republic, and only written law is recognized as a formal source of law. That does not mean that it has no influence in their legal system, but it is clear that even because of their recent formation and legal system (although the territory of Czech Republic has centuries of history) that custom is also hard to define. Custom has to necessarily years to be formed and recognized. The fact that Czechia's current legal system, and the country itself, has only 3 decades [10]. In conjunction with their civil law system, evidently, the enforcement of law comes from a legal system that is based on written statutes rather than judicial decisions, which makes their

instrumentalization of their written law, probably, the principal materialisation of their customary law.

That causes a legal order that is hierarchically structured. The hierarchy is as it follows. At the top are the Constitution and the other constitutional acts; these carry the greatest legal authority and can be amended only by another constitutional act. Below these come the “ordinary acts”, the basis for implementing regulations, which carry the least legal weight. Provisions of lesser legal weight must comply with those which are higher in the legal hierarchy [12]. Legislation may be repealed or amended only by provisions of the same or greater legal weight. International agreements have special standing. As indicated above, they are part of the legal order and take precedence even over a constitutional act in the event of a conflict. In Czechia specifically, the international agreements have a major role in their legal system [8]. That consists of a form of customary law as international law, for many authors is constituted of customs.

This is the result of customs varying along different dimensions in the definition and origin of law itself. Those international actors, as NATO or EU, engage in discursive, practically concrete normatives, performing like individuals in an international legal system. In this sort of environment, that utilises interdependent law material, those customary norms are nurtured and sustained [13]. Putting that into perspective, the whole theme of approaching sources of law or the comparison of any countries approaching their sources must be strongly debated and even reformulated, as the theme brings much more complex issues [1]. Sources of law involves a whole wide range of questions, such as: what is the phenomenon of origin of law and its embodiment? What are the agents that produce the sources of law? How are they socially positioned? What and how is the recognition of the producing agents in the sources of law? What are the criteria for defining what is a legitimate source or not? It was mentioned in the beginning the existence of an entire statute that is followed by a peripheric and vulnerable group in Brazil, and most of its laws had these specific areas customs. That just exposes, once again, that what we are inclined to call customs come in a wide variety of forms. Moreover, paradigm cases of custom for some of us might be marginal for others as well as not fitting their history or perceptions. As well as the discussion surrounding the definition of sources, the etymology of the words and the investigation over the acts of enforcement and interpreting law, as well as comparing two very distinct countries, even after all their systematic similarities. [12].

## 5. Conclusion

The results of this study allow us to understand, on an overall point of view, Brazil has a civil law legal system, theoretically similar to that of the Czech Republic. As mentioned, the law is based on written

statutes rather than judicial decisions, and customary law has no legal status. That does not mean that customary law, as explained, does not have an important role in the legal system and judicial decision making in both countries.

All in all, Brazil and Czechia are intrinsically distinctive countries even though they share similarities. The comparison between their customary law, and primarily their sources of law, is inevitably connected to the discussion of several authors and the history of both legal systems. As well as the discussion surrounding the definition of sources, the etymology of the words and the investigation over the acts of enforcement and interpreting law. Brazil and Czechia do not share similar historical discussions and even similar territory, or same economical status, which are factors that absolutely interfere into a deep and broad analysis and comparison. The subject of the sources is also a discussion that theoretically is attached to diverse questions about case law, doctrine, customs and even law's nature and duty, in that way, it is profoundly endorsed that this research purpose is solely an introduction to this theme. Along with that, as the topic requires a wider investigation and reflection, it is greatly endorsed to approach this topic in a revised and critical way, as well as, employing the facts exposed so far as a must to any research that comprehends the comparison of both those countries' sources of law.

## 6. Acknowledgement

First, I'm a lifetime deeply indebted and thankful to Val and Patricia, for supporting my biggest dreams, beliefs and, of course, this paper. For more years than I could ever remember I have been affected by your endless support regarding my studies and my life. I can never stop thanking you both.

I also would like to thank my supervisor, Mr. Petr Osina, who has been throughout the writing process, ceaselessly encouraging and supportive regarding my ideas. I'd also like to extend my gratitude to my Brazilian friends, and the ones I met in Czechia, that became this very dysfunctional but necessary family to me!

Lastly, I cannot begin to express my thanks to my family, principally my father, who died a couple weeks before I began this project, and I know has somehow helped me write it. Also, my brother and my mom who have always cheered and supported me and principally pushed me to become a better person, And I promise to spend the rest of my life trying.

## 7. References

- [1] Armando Ribeiro, Fernando José. A teoria das fontes do direito revisitada: uma reflexão a partir do paradigma do estado democrático de direito. Available at:

[http://www.publicadireito.com.br/conpedi/ma-naus/arquivos/anais/salvador/fernando\\_jose\\_armando\\_ribeiro-1.pdf](http://www.publicadireito.com.br/conpedi/ma-naus/arquivos/anais/salvador/fernando_jose_armando_ribeiro-1.pdf)

The nature of customary law, Cambridge, 2007

- [2] Paust, Jordan J. Customary International Law: Its Nature, Sources and Status as Law of the United States, 12 MICH. J. INT'L L. 59 (1990). Available at: <https://repository.law.umich.edu/mjil/vol12/iss1/2>
- [3] Constitution of the Federative Republic of Brazil. 1988.
- [4] Lyra Tavares, Ana Lucia de. Contribuição do direito comparado às fontes do direito brasileiro, Prisma Jurídico, 2006. Available at: <https://periodicos.uninove.br/prisma/article/view/601/563>
- [5] Bravin Ponche, Steffhan. O discurso do poder paralelo: uma análise arqueogenealógica do estatuto do PCC. Tocantins, 2022
- [6] Primeiro Comando da Capital Facção PCC 1533. "Estatuto Do PCC — Primeiro Comando Da Capital 1997.", 12 May 2023, [faccapcc1533primeirocomandodacapital.org/regimentos/estatuto\\_faccap\\_pcc\\_1533\\_1997\\_primeiro\\_comando\\_da\\_capital/#:~:text=ESTATUTO%20DO%20P.C.C.,a%20opress%C3%A3o%20dentro%20da%20pris%C3%A3o](https://faccapcc1533primeirocomandodacapital.org/regimentos/estatuto_faccap_pcc_1533_1997_primeiro_comando_da_capital/#:~:text=ESTATUTO%20DO%20P.C.C.,a%20opress%C3%A3o%20dentro%20da%20pris%C3%A3o).
- [7] Lopes, Humberto Pascarelli. The Legal Custom as a Source of the Brazilian Law, Nº47 Vol. 1 (2018). Available at: <http://www.revistaintellectus.com.br/artigos/49.592.pdf>
- [8] "UPDATE: An Introduction to the Czech Legal System and Legal Resources Online" Globalex 2015, [www.nyulawglobal.org/globalex/Czech\\_Republic1.html](http://www.nyulawglobal.org/globalex/Czech_Republic1.html).
- [9] "Powers and Procedures." Powers and Procedures, [www.europarl.europa.eu/about-parliament/en/powers-and-procedures](http://www.europarl.europa.eu/about-parliament/en/powers-and-procedures).
- [10] Czech Republic Constitution, 1993.
- [11] Editors of Encyclopaedia Britannica. "Germanic Law Summary." Encyclopedia Britannica, [www.britannica.com/summary/Germanic-law](http://www.britannica.com/summary/Germanic-law)
- [12] "National Legislation: Czech Republic." European Justice, Sept. 2020, [e-justice.europa.eu/6/EN/national\\_legislation?CZ\\_ECH\\_REPUBLIC&member=1](http://e-justice.europa.eu/6/EN/national_legislation?CZ_ECH_REPUBLIC&member=1). Accessed 11 May 2023.
- [13] Perreau-Saussine, Amanda/ et al. (Eds.),
- [14] Reale, Miguel. Lições preliminares de direito. 5. ed. São Paulo, 1978.