9 IMPLEMENTATION OF LAW

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

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

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

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

9.1 Performance of Rights and Fulfilment of Obligations

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

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

9.2 Creation of Legal Relations

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

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

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

Specific legal relations contain:

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

9.2.1 Subject of Legal Relation

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

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

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

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

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

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

Legal personality includes:

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

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

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

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

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

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

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

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

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

This capacity can be:

1. full
2. limited.

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

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

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

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

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

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

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

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

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

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

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

9.2.2 Object of Legal Relation

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

Objects of legal relations can be:

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

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

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

9.2.3 Content of Legal Relation

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

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

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

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

9.3 Legal Liability[121]

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

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

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

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

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

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

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

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

9.4 Application of Law

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

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

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

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

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

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

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

disputes and conflict in already existing legal relations.

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

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

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

Ad 1. Ascertaining the Issue of Facts

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

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

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

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

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

Ad 2. Identification of Statutory Merit (Subsumption)

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

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

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

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

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

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

Ad 3. Issue of Individual Legal Act (Decision)

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

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

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

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

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

Individual legal act consists of three basic parts:

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