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DERIVING AND CONCRETIZATION OF THE PRINCIPLE OF GOOD LEGISLATION

Summary

This article deals with the issue of the emergence of "new" general principles of law, the methods of their derivation and concretization. The author defends the position that general principles of law are derived from the Basic Norm – the democratic rule-of-law-based state – proclaimed by the Sovereign (the people). Yet, the pivotal role in the finding of the contents of the general principles of law belongs to the courts and especially the constitutional courts. General principle of law – principle of good legislation – derived and formulated as generally biding legal norm with its specific content and limits for the first time within the European legal space by the Constitutional Court of the Republic of Latvia is taken as an example for the hypothesis that concretization of a general principle of law is strongly connected with the legal reason of those who apply the law in a given legal arrangement.

Keywords: general principles of law, method of finding the content of the general principle of law, the principle of good legislation, case law of the Constitutional Court of the Republic of Latvia

Introduction

Legal arrangement of Latvia belongs to the Continental European legal system. It is based on Western legal culture with a prevailing meaning of law founded in natural law doctrine and noticeably strong doctrine on general principles of law derived from the Basic norm – democratic state based on the Rule of Law – which is proclaimed by the Sovereign – the people of Latvia. According to the doctrine of the general principles of law, elaborated by the legal science and implemented by the courts and especially by the Constitutional Court of the Republic of Latvia (hereinafter – the Court), general principles of law are recognized as an unwritten, directly applicable legal norms in the hierarchy of legal norms prevailing over all written legal norms, thus determining the content of all written legal norms of the given legal arrangement, as well as setting the limits for the legislators discretion.

The aim of the current article is to prove that the courts and especially – constitutional courts are the main actors in the for a of finding the developing legal contents of the general principles of law on the basis of the example in the case law of the Court. The author analyses the sources of deriving of general principles of law, and as the possible methods of concretization of the contents of these principles on the basis of the case law for the Court, namely, the deriving and concretisation of the principle of good legislation. The Court's case law is unique

in this regard within the European legal space[1] as it is for the first time when this principle is formulated as a general principle of law – a generally binding legal norm prevailing over all of the written legal norms – with concrete content and limits of its scope. Comparative, systemic, inductive and deductive scientific methods are used in elaboration of this article.

1. Deriving of the general principles of law

In democratic state based on the Rule of Law the true source of legal norms is a sovereign – the people. Consequently, the sovereign is the source of a basic norm, and its content represents the sovereign's will. Sovereign's will, in other words, defines the content of the basic norm, it speaks to the type of country in which the sovereign wishes to live. The basic norm is an unwritten norm – the act of the sovereign's will, which subsequently transforms into normative legal acts adopted by the state institutions, which all comply with the will of the sovereign – the basic norm. When the sovereign's will is formulated in a basic norm, the legal arrangement of the relevant country is governed by principles which emanate from that norm. In the case of a democratic country based on the Rule of Law, these become general principles of law. General principles of law define the content and structural elements of the relevant country – the norms which must exist in the legal arrangement so as to settle all disputes that may emerge. General principles of law are unwritten, real and directly applicable legal norms consisting of legal content and legal consequences and having a generally binding effect.[2] These principles can be divided into three groups in terms of what they address: they include all human rights norms; those which define the structure of the legal arrangement and the legal system – for example, sources of law, the hierarchy of legal norms, the principle of the separation of power; and they also include all legal methods – interpretation methods, collision norms, methods of argumentation, etc.[3]

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[1] European Union, its Member States, as well other democratic rule-of-law-based states under different common forums of course have paid close attention to the necessity to improve the quality of the legislative process under better law-making, good regulation programs (see, for example: Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law–Making of 13 April 2016, L123/1; Rule of law checklist of European Commission for Democracy through Law (Venice Commission) of 11–12 March 2016. Available at: https://www.venice.coe.int [last viewed December 9, 2019]; OECD Recommendation of the Council on Regulatory Policy and Governance of 22 March 2012. Available at: https://www.oecd.org/gov/regulatory–policy/49990817.pdf [last viewed December 8, 2019]; OECD Guiding Principles for Regulatory Quality and Performance of 2005. Available at: https://www.oecd.org/fr/reformereg/34976533.pdf [last viewed December 9, 2019]), but the principle of good legislation was not yet formulated as one of the general principles of law.

[2] Compare: Rezevska D. Constitutional Court as a Protector of the Basic Norm and General Principles of Law. In: A Quarter of a Century of Constitutionalism. International Conference Materials Bucharest, 24–25 May 2017. Bucharest: Hamangiu Publishing House, 2018, pp. 220–221.

[3] Rezevska D. Vispārējo tiesību principu nozīme un piemērošana [The Meaning and Application of General Principles of Law]. Rīga: D. Rezevskas izd., 2015, pp. 31–32.

The Court in its case law follows exactly this theory of deriving of the general principles of law. However, it has developed its approach comparing with the early days of operation. Firstly, the Court derived general principles of law from the text of the Article 1 of the Constitution, which states: "Latvia is an independent democratic Republic."[4] Then, the Court continued to develop its approach and indicated that general principles of law are derived not from the text of the Article 1 of the Constitution, but rather from the notion of the democratic republic included in the Article 1.[5] The next step of the development of the approach was taken, when the Court reasoned that general principles of law emerge from the fundamental values established in the Article 1 of the Constitution.[6] Finally, in 2016, the Court evolved its approach, referring to the true source of the general principles of law – the Basic Norm proclaimed by the Sovereign, thus, the Court stated: "The principle of the protection of legitimate expectations **derived from the Basic Norm – democratic state based on the Rule of Law** [emphasis by the author], and embodied in the scope of Article 1 of the Constitution protects only those rights which are based on legal, justified and reasonable expectations, which are the core of this general principle of law."[7]

2. Methods of concretization of general principles of law

General principles of law as a generally binding source of law enter into force with the announcement of the Basic Norm – democratic state based of the Rule of Law – by the Sovereign, even if the Sovereign was not aware at that moment of all the general principles of law which derive from the Basic Norm. Although in a course time, following the development of the legal arrangement, more and more general principles of law "surface", and their contents become increasingly elaborate through concretization on a case by case basis primarily by the courts, but also by the legal science. For example, conflicts or collisions of general principles of law require further concretization of these principles. There are several reasons why these collisions are more noticeable in recent times. First of all, there is an increasing number of rights, both in terms of quantity and in terms of application by judges as they become richer and more sophisticated, deriving "sub-rights" that were not explicitly envisaged by the legislators. Secondly, increasing recognition of the horizontal effect of human rights – public authorities now have three responsibilities: 1) refrain from violating

[4] See for example: Judgement of the Constitutional Court of the Republic of Latvia in case No. 04–01(99) on April 20, 1999, para. 1.2.1. Available at: www.satv.tiesa.gov.lv [last viewed December 10, 2019].

[5] Judgement of the Constitutional Court of the Republic of Latvia in case No. 04–07(99) on March 24, 2000, para. 3. Available at: www.satv.tiesa.gov.lv [last viewed December 10, 2019].

[6] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2009–44–01 on March 15, 2010, para. 15. Available at: www.satv.tiesa.gov.lv [last viewed December 10, 2019].

[7] Decision of the Constitutional Court of the Republic of Latvia in case No. 2016–03–01 on October 21, 2016, para. 13. Available at: www.satv.tiesa.gov.lv [last viewed December 10, 2019].

human rights; 2) enforce human rights; 3) protect human rights against violations by third parties, including individuals.[8]

To establish the contents of the general principles of law, the method of concretization is used instead of the method of interpretation. Interpretation as a legal method belongs to a textual science, which means that the subject of the interpretation is a text – the text of a written legal norm, and the true content of a written legal norm can be detected using the four interpretation sub-methods: literal, systemic, historical and teleological. It also means that the limits of the interpretation method are set by the widest possible and the narrowest possible meanings of the words used to draft the text of a legal norm. General principles of law are unwritten legal norms, so their content cannot be found by interpretation, but by concretization, which is the legal method of finding the contents of the unwritten legal norms.[9] If the sub-methods of interpretation are mostly widely agreed upon within the Western legal culture generally narrowing down to the four above mentioned,[10] then sub-methods of concretization, as well as the sources used are not as explicitly and extensively described and analysed. The reason why the process of derivation and concretization of the general principles of law in legal science is still described in a very niggardly way, could be because it is essentially a process of further development of law based on common sense rather than a hermeneutic process, which is based upon a generally accepted methodology.

However, in legal literature one can find several steps of the doctrinal method leading to the discovery of general principles of law from the texts produced by the legislator – texts of written legal norms. The first step is to analyse the general legal provisions adopted by the legislator which are relevant to a particular are a of legal regulation in order to discover their common and homogeneous elements. Step two: excess, peculiarities, inconsistencies and legislative errors are eliminated. Step three: based on common and homogeneous conceptual elements, an abstract assumption or norm is filtered out. Step four: a higher degree of generality is sought in an attempt to discover the genus (class) to which homogeneous and common concepts belong. Step five: The basic principles thus obtained are the starting point for deduction. Several concepts are being developed. Logic performs a creative function. It creates new concepts that relate to new facts or unexpected elements of the case that have no similar. Step six: concepts derived from deduction are applied in two ways: 1) to clarify words or terms used by the legislator which were ambiguous or vague; this is achieved by elaborating concepts which are logical in accordance with the general principles of law of the legal arrangement; and 2) to provide a logically normative basis for a judgment which could not be based on any written legal provision.[11] This process of the discovery of a general principle of law is

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[8] Brems E. Conflicts Between Fundamental Rights. Antwerp, Oxford, Portland: Intersentia. 2008, p. 2

[9] Rezevska D. Vispārējo tiesību principu nozīme un piemērošana [The Meaning and Application of General Principles of Law]. Rīga: D. Rezevskas izd., 2015, pp. 99–100.

[10] See, for example: Peczenik A. On Law and Reason. Dordrecht, Boston, London: Kluwer Academic Publishers, 1989, pp. 379–391.

[11] Cueto-Rua J. C. Judicial Methods of Interpretation of the Law. Louisina: The Publications Institute Paul. M. Hebert Law Center, 1981, pp. 124–125.

different from the deriving of the general principles of law of the Basic Norm, which is a deductive process, as here an attempt is made to find the content inductively. This course would be more acceptable for the judge with the prevailing meaning of law based in legal positivism; however, if the result of the discovery is later verified according to the Basic Norm and is compatible with it – it could give some guidelines as to the contents of a general principle of law, as well.

The main methodological guideline that a judge should keep in mind when concretising the general principle of law is that those principles have to be oriented toward a reasonable and just solution. Reasonable and just solution is the one which corresponds to the Basic Norm. Moreover, in the determination of the contents of the relevant principle the method of comparison and typification ("belonging to the same type") is used when the case to be solved is compared with other similar cases, which have already been solved in the court practice based on certain principles. Thus, the relatively undetermined contents of the principles are constantly refined and concretised in the court practice with regard to definite cases or groups of cases, and resulting in an established system of sample judgments, which can cover any similar life situations in the future.

As it is analysed in legal doctrine, international courts and tribunals use two means to ascertain the content of the general principles of law: 1) using previous decisions; 2) in their absence, or if they choose not to rely on those decisions, with the help of comparative law, by appealing to legal doctrine, as well.[12] Comparative law method suggests to use the so-called "representative legal system" approach by applying principles of law which are common to the major legal systems of the world and are suitable for transposition into the international legal system. This process of transposition is inductive by its nature, where a principle found underlies rules in many national legal systems, while discounting the national differences of detail or procedure and isolating the basic uniform principle, which is common to all.[13]

Another method "finding the right – just and reasonable – answer for a case" is mentioned, as well – when judges turn to their intuition to determine general principles of law, and usually do not disclose the methods, by which they are discovered and concretised, and even rarely refer to comparative law research – normative acts, customary law or case law (judicial and administrative).[14]

The author of this article defends the view that judges refer to their legal reason to find the contents of the general principles of law. This is the reason why the personality of a judge, the previous life and professional experiences, legal consciousness, leading meaning of law possessed by a judge are some of the factors

[12] Fabian O. Raimondo. General Principles of Law in the Decisions of International Criminal Courts and Tribunals. Leiden: Martinus Nijhoff Publishers, 2008, p. 45; Redgwell Catherine. General Principles of International Law. In: Vogenauer S., Weatherill S. (eds.), General Principles of Law. European and Comparative Perspectives. Oxford and Portland: Hart Publishing, 2017, pp. 15–18.

[13] Redgwell C. General Principles of International Law. In: Vogenauer Stefan, Weatherill Stephen, (eds.), General Principles of Law. European and Comparative Perspectives. Oxford and Portland: Hart Publishing, 2017, p. 16.

[14] Fabian O. Raimondo. General Principles of Law in the Decisions of International Criminal Courts and Tribunals. Leiden: Martinus Nijhoff Publishers, 2008, p. 47.

which complement and fill the notion of legal reason. The previous development of legal arrangement, the sources of law – legally binding as normative legal acts or customary law – as well as supplementary – case law, doctrine, *travaux préparatoires* etc., are the starting points for the further development of the contents of general principles of law.[15]

3. The principle of good legislation as derived and concretized by the Court

One of the recently acknowledged general principles of law, which has found its refined concretization through the case law of the Constitutional Court of the Republic of Latvia is a principle of good legislation.

The development was gradual. First, on 12 April 2018, for the first time during its existence, the Court recognized the two laws contested in the case as not adopted in due process.[16] Both of these laws were declared incompatible with the Constitution. In this judgment, the Court has offered a view to the legislative process, which corresponds to the Basic Norm – democratic state based on the Rule of Law – but did not formulate the notion of the general principle of good legislation yet. The Court has based the assessment of such legislative process on the necessity to ensure justice. In its judgment, the Court highlights that "the main purpose of the law is to ensure justice." The Court also accentuates that "the legislative process [not only] must comply with the formal requirements laid down in regulatory enactments, but also has to promote the people's trust in the state and law." The Court emphasizes that the legislative process nowadays does not exist for the convenience of the legislator, but serves as an effective mechanism whereby public trust in adopted laws and the legislator itself can be promoted. The Court has pointed out that "the legislator must ensure a legislative process that promotes trust in the state and law, namely, the conviction that the chosen solution is fair". And the Court starts to outline the contents of the principle of good legislation: 1) the legislator has to provide proper analysis, as well as justification for the constitutionality of a possible regulation, *inter alia* in the context of the established case law of the Court in this matter; 2) in order to adopt a just legal norm, the legislator has to make such an assessment by itself, and not after but before any restriction on fundamental rights is imposed.[17]

The next step in concretization of the principle of good legislation was taken by the Court in the case, where the decision was delivered on 6 March 2019.[18]

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[15] Rezevska D. Vispārējo tiesību principu nozīme un piemērošana [The Meaning and Application of General Principles of Law]. Rīga: D. Rezevskas izd., 2015, p. 100.

[16] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2017–17–01 on April 125, 2018, paras 21.3., 22.2., 22.3. Available at: www.satv.tiesa.gov.lv [last viewed December 10, 2019].

[17] Ibid., para. 21.3. Available at: www.satv.tiesa.gov.lv [last viewed December 10, 2019].

[18] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2018–11–01 on March 6, 2019, Available at: www.satv.tiesa.gov.lv [last viewed December 10, 2019].

The Court for the first time formulates in the text of the judgment the principle of good legislation and displays that it has derived it from the Basic Norm and the principle of the Rule of Law.[19]

The Court concretizes the content of the principle of good legislation using different types of sources of law (generally binding (independent) sources, but mostly – supplementary) such as: 1) case law – of the Court itself, of the European Court of Justice, of the European Court of Human Rights, including dissenting opinion of the judges of this court; 2) legal doctrine – national and international doctrinal law works (commentaries of the Constitution of the Republic of Latvia, monographies, collected articles), recommendations of national and international bodies for improvement of legislative process (Constitutional Law Commission of the President of the Republic of Latvia, Venice Commission); 3) *travaux préparatoires* and 4) normative legal acts – national and European Union legal acts.[20]

It very precisely states the elements of the content of the principle of good legislation, namely, in order that the legislative process could be recognized as being in compliance with the principle of good legislation:

1) the legislator must assess the compliance of the envisaged legal norms with the legal norms of a higher legal force (including the legal norms of European Union and taking into account the principle of sincere cooperation it has to assess the compliance of the intended provisions also with that European Union law, which has entered into force but has not yet become applicable) and their compatibility with the legal system according to the principle of a rational legislator, as well as asses the compliance of the intended regulation to the established case law of the Court in the matter;
2) the intended legal framework should, where appropriate, be based on explanatory studies;
3) according to the principle of sustainable development the legislator in adopting legal norms, especially in cases where fundamental rights are restricted, has to base its decision on the social impact assessment study of the planned legal framework and consider the measures necessary for the implementation and enforcement of this legal framework;
4) the legislator has to assess the risks expressed by the specialists in the field and take timely actions to eliminate the possible risks;
5) the legislator must inform the public in a timely manner and appropriately about the intended legal framework, and as far as possible, directly or indirectly, involve public in the legislative process and have consultations with stakeholders;
6) it has to be made possible for the members of legislator to participate in an open debate;

[19] Ibid., para. 18.1. Available at: www.satv.tiesa.gov.lv [last viewed December 10, 2019].

[20] Judgement of the Constitutional Court of the Republic of Latvia in case No. 2018–11–01 on March 6, 2019, para. 18. Available at: www.satv.tiesa.gov.lv [last viewed December 10, 2019].

7) the objections about the draft expressed by the State President using the suspensive veto rights have to be considered in a manner which corresponds to the principle of interinstitutional loyalty and principle of *bona fide*.[21]

Furthermore, the Court stated that these requirements are the main, but not the only elements of the principle of good legislation derived from the principle of the Rule of Law. Among other things, they are of utmost importance, as they make it possible to understand why the restriction of fundamental rights set by the legislator in a democratic state based on the Rule of Law is permissible. These requirements must be respected in determining any restriction on fundamental rights.[22] As a result, the Court declared the contested legal norms as not adopted in due process and not according to the principle of good legislation, and thereby incompatible with the Constitution.

Conclusions

1. The Constitutional Court of the Republic of Latvia has derived a principle of good legislation from the Basic Norm – democratic rule-of-law-based state – as one of the general principles of law, and it has found its refined concretization through the case law of the Court.
2. Judges refer to their legal reason to find the true contents of the general principles of law. This is why the personality of a judge, the previous life and professional experiences, legal consciousness, leading meaning of law possessed by a judge are some of the factors which complement and fill the notion of legal reason.
3. The sources used to concretize the contents of general principles of law are both generally binding legal norms, as well as supplementary sources, but the latter are the key sources with the most influential character in this respect.

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