QUESTIONING THE ISSUE OF INTERPRETATION PRIORITY (LAW AS SYSTEM OF PRINCIPLES AND RULES)

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Abstract: *The central contentual characteristic of the legal principle is that it is a value measure directing the definition (creation) of legal rules as to their contents, the understanding of the rules, and the manner of their application. In relation to legal rules, the fundamental difference between the two categories is that the principles are operationalised and applied via legal rules. Legal principles live through the rules, which are the reasons for decisions in concrete cases. A new case can be resolved by a new operationalisation of legal principles or by analogous application of precedents if in their essential elements the new cases correspond to cases that have already been decided. The task of legal argumentation is to give the ground and the direction where one must go. If such direction is not available, one gets lost in the woods.*

1. Law as system of principles and rules

It is rather too narrow to study law just as a system of rules. If law is looked upon in a dynamic manner and one is also interested in how the rules can be unterstood, how they come into existence and how they are applied, it is inevitable to consider, in addition to the rules, also legal principles.

The relationship of legal principles and legal rules is not one of a greater or lesser importance. It is in their nature that they are connected. To paraphrase Kant[1], the principles without rules are empty as to their content and the rules without principles are blind because they do not tell us in which direction to go. We may be doing an injustice to the rules, especially to the constitutional and legal ones, if we see them as normative messages that are always of secondary importance with respect to the principles. The principles are often contained in the general provisions of the constitution, the statutes and other general legal acts, but may also be the result of generalisations and abstractions carried out with respect to the rules.

The principles and the rules are an interpretation whole that cannot be mechanically divided into two parts. There are differences between the two forms of manifestation of normativity, yet these are by no means so big that the boundary line between them were impenetrable. It is in the nature of principles (e.g. constitutional principles) that they also give direction concerning the content of legal acts (e.g. statutes), and it is in the nature of rules that they are not a pre-chiselled totality of meanings. The rules are a result of the understanding of legal acts and this understanding is also influenced by legal principles.

[1] See Immanuel Kant: Kritik der reinen Vernunft.. Frankfurt am Main 1990: "Gedanken ohne Inhalt sind leer, Anschauungen ohne Begriffe sind blind" (98; B 74, 75).

2. The issue of distinction of terms

It is more or less generally accepted that the rules tell what *type of behaviour and conduct relates* to a normative state of affairs. If, for the needs of this paper, I remain on the abstract-regulating (e.g. constitutional and statutory) level, it holds true that a legal rule expresses the type of behaviour and conduct that shall arise if one finds oneself in an anticipated (abstract) normative state of affairs. The normative state of affairs foresees the factual elements, in which the legal subjects have appropriate permissions, commands and prohibitions, if the anticipated factual elements actually arise.

This is the first possibility of behaviour and conduct. It lies within the logic of law that a general legal act (e.g. a constitution or a statute) must also foresee the second posibility of behaviour. It is characteristic of it that the general legal act describes a secondary normative state of affairs (legal violation), which is a negation of the primary possibility of behaviour and conduct, as well as the legal consequence to follow the legal violation.

The normative message contained in the general and abstract legal rule is expressed in an "all-or-nothing fashion" (Dworkin)[2] (e.g.: Act in accordance with the primary possibility of behaviour: Do not insult anybody!, otherwise a sanction will be imposed upon you). In contrast to the rule, a principle directly only expresses "the basis, criterion and the regulating reason"[3], which is stated in a more or less intensive manner. It is of special importance that the legal principle is neither directly applicable nor definite to such an extent that it would exclude evaluation and assessment.

The essential contentual characteristic of the legal principle is, as already indicated, that it is a *value measure directing the definition of legal rules as to their contents, the understanding of the rules, and the manner of their application.*[4] In relation to legal rules, the fundamental difference is that the principles are operationalised and applied **via** legal rules. The principles (e.g the principle of the state governed by the rule of law) influence the rules in that they are the starting points for the formation of general legal acts (e.g. statutes). Further, the principles are leant on when interpreting the statutes and establishing which legal rules are contained in them in a more or less definite manner. And last but not least, the principles give directions how to apply the rules. A classic example is the principle of loyalty and good faith in civil law and law of obligations. Even the most definite legal rules cannot foresee all factual elements where the rules are applied. It is the role of the principle to help determining more precisely what the content of rule should be with respect to concrete factual elements.

The statement that the rule is formed in an "all-or-nothing fashion" should not mislead. This statement must not be taken out of the context of the normative concretisation of the general legal act (e.g. statute). In the process of applying the statute and moving between the normative starting point and factual starting point as well as between the factual starting point and the normative starting point, one has to achieve the minor and major premises of the legal syllogism, which are connected by the middle term. The minor premise can only be subordinated to the major one when it is established that the concrete state of affairs is a case of the abstract (statutory) one at the concrete level. At this point it is acted in a certain way in an "all-or-nothing fashion". We have excluded all other possibilities and made up our minds to decide the matter. By subordinating the concrete state of affairs to the abstract one, we have enabled the ensuing of the legal consequence connected to the abstract (statutory) state of affairs.

If I should briefly sum up, I would say that the legal principles express the *goal* of legal regulation, define the *scope* (range) of meaning within which the rules should move, and at the same time possess the *weight* that aids in solving conflicts (collisions) between several rules (e.g. rights) by the element of weight.[5] All three

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2 Ronald Dworkin: Taking Rights Seriously. Cambridge 1978, 24.

3 Joseph Esser: Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. 2nd ed. Tübingen 1964, 51−52.

4 See Marijan Pavčnik: Interpretative Importance of Legal Principles for the Understanding of Legal Texts. *Archiv für Rechts- und Sozialphilosophie*, 101 (2015) 1, 53.

5 The importance of weight was insightfully discussed by Dworkin (Fn. 2, 14 ff.) and Robert Alexy (see e. g. Zum Begriff des Rechtsprinzips,. *Rechtstheorie*, Beiheft I, 1979, 59−87). Compare also with the standpoints advocated by Aharon Barak: 1. Purposive Interpretation in Law. Princeton, New Yersey 2005, and 2. Proportionality. Constitutional Rights and their limitations. Cambridge 2012.

characteristics of legal principles are very important from the interpretative point of view. The most particular characteristic is the one of weight, which is not possessed by the rules in themselves.

The fact that rules have *weight*[6] enables their sorting even when they belong to the same level in the hierarchy of general legal principles. This can be carried out in several ways. In the case of legal rules, eventually only one type of behaviour and conduct must be found for the concrete state of affairs being the object of legal decision. If two or more solutions are available, the one considered the most correct one has to be chosen (e.g. when deciding which kind of criminal offence is in question in a concrete case).

In the case of several legal principles, we are based on the one most intensively supporting the chosen type of behaviour and conduct (i.e. the abstract state of affairs with legal consequence). We can also be based on several principles at the same time if they are not mutually exclusive. Of course, it is also possible to consider one principle in a more intensive manner while other one(s) is (are) expressed in a more limited scope. Thus, the principle of the state governed by the rule of law and the subprinciples thereof will always be striven for and it will be endeavoured that the trust in law is suitably high, whereas the aspect of social state may be less intensive because it depends on the actual financial and economic capacities of the country.

A further feature of legal principles is that they are, as value measures, incorporated into legal rules (e.g. into particular basic rights) or that they back particular basic rights giving them an appropriate weight. The conflicts of this kind are resolved in such a way that the rights colliding with each other are harmonized. An ideal situation is when different rights exist side-by-side, it is, however, quite possible that one has to choose only one, the one having a greater weight in the concrete case. The measure of weight is *the contentual importance of the principle expressed by the rule (right)* (e. g. the priority of the protection of privacy over the freedom of expression[7])[8].

3. Definiteness of statutes as to their meaning

In one of the decisions of the Constitutional Court of the Republic of Slovenia one can read:

> "One of the principles of the state governed by the rule of law (Art. 2 of the Constitution) requires the provisions to be clear and definite so that the content and the intention of the norm can be established without any doubt. This applies to all provisions, but is of special importance for provisions containg legal norms defining the rights and obligations of legal subjects. Of course, the requirement for clearness and definiteness does not mean that the provisions have to be such as not to need any interpretation. To apply provisions always means to interpret them, and statutes, in the same way as all other provisions, are object of interpretation. From the point of view of legal safety, which is one of the principles of the state governed by the rule of law in Art. 2 of the Constitution, a provision becomes contentious when by applying the rules for the interpretation of legal norms one cannot achieve a clear content of the provision."[9]

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6 Cf. Robert Alexy: Theorie der Grundrechte. Frankfurt am Main 1986, 75–76: "Prinzipien sind demnach *Optimierungsgebote*, die dadurch charakterisiert sind, dass sie in unterschiedlichen Graden erfüllt werden können und dass das gebotene Maß ihrer Erfüllung nicht nur von den tatsächlichen, sondern auch von den rechtlichen Möglichkeiten abhängt. Der Bereich der rechtlichen Möglichkeiten wird durch gegenläufige Prinzipien und Regeln bestimmt."

7 The particular examples are mostly taken from Slovenian law and Slovenian legal practice.

8 In the "smoking" case [U-I-218/07 (OdlUS (Decisions of the Constitutional Court of the Republic of Slovenia) XVIII, 12)], the Constitutional Court decided in a well-reasoned manner that the prohibition of smoking in indoor public places was "an interference with the general right to act freely (Art. 35 of the Constitution of the Republic of Slovenia)." Nevertheless, it is not an inadmissible interference "as only in such manner can the constitutionally admissible aim pursued by the legislature be effectively achieved, i.e. the protection of employed persons and all persons against the adverse effects of second-hand smoking and environmental tobacco smoke." – In the case of a conflict between two (basic) rights, it is inevitably necessary to weigh them against each other. This test should clarify "those constitutionally decisive circumstances that tipped the scales in favour of one or the other right. Otherwise one of the rights in collision is attributed an absolute effect" (Up-444/09 of the Constitutional Court of the Republic of Slovenia). The main thing is that such weighing test is carried out and that an adequate solution is reached on the basis of its result.

9 U-I-32/02 (OdlUS XII/2, 71).

The stated point of view is very frequently expressed in constitutional court practice.[10] The heart of its meaning refers to the fact that statutes (as the prototype of general legal acts) have to be linguistically clear (definitive) to such an extent that the legal rule and its meaning can be definably established on their basis. The provision of the statutes may be more or less certain, yet the *conditio sine qua non* is that a legal act must be definable as to its meaning.

The statute is, as it is well known, always subject to interpretation. Interpretation also takes place when the legal act is clear as to its meaning and one is not even aware of interpreting it because one acts, at least to a certain extent, automatically.

The interpretation must never be completely automatic, though in practice there are often cases that are, to a certain extent, solved in a routine manner. A good lawyer never completely yields to routine because he always decides with a shadow of doubt that the case before him can be at least slightly different from the cases already solved or that the views on the understanding of the statutes have changed. The changes and developments of legal practice with time are a phenomenon that certainly must not be overlooked.

The substantiation of the interpretative decision must also be certain just to the extent that the legal rule on which it is based is clearly explained as to its meaning. It is not sufficient to just say that the statutes (or any other legal acts) are all right because they can be interpreted by the established methods of interpretation. If starting from the classic theory of *von Savigny*, these methods are the linguistic, logical, systematic, historical and teleological interpretations. Further, it is known from the methology of legal valuation that the interpretation methods themselves are open as to their meaning and that the relations between them can be contentious as well. The matter may become even more entangled if, in addition to the classic methods, also other interpretation arguments, e.g. the argument of the nature of things (Germ. Natur der Sache), of the typical case and of judicial precedent are considered or a legal gap can be observed, where the arguments of analogy and teleological reduction are applied.

An essential component part of the substantiation is also the role and influence that legal principles exercise on the meaning of legal rules. This role and influence are often not sufficiently considered and emphasized. It does not lie within the power of the principles to have a watertight effect and to be a kind of *deus ex machina*, yet it does lie within their power to direct on the right path. Essential elements of the right path are the goal (e.g. decent life[11] or loyalty and good faith in obligational relationships[12]) to be strived for and the value scope (e.g. the range of incapacity benefits) that must not be overstepped by the meaning of the legal rule. The goal and the value scope are connected as to their contents and are just two different sides of the same complex of problems. The awareness of this dimension of legal principles results in substantiating with regard to the contents and in avoiding arbitrariness that often clings to the assertion "exactly like that" and claims that legal provisions are clear and cannot be shaken in their perfection, not even by the context of deciding.

4. Instead of conclusion

The dividing line between legal principles and legal rules is often rather porous. Open questions may be easier resolved if one is aware of the interpretation priority which, as a rule, lies with the principles. It is also of major importance to follow the established court practice. Any deviation from it must be substantiated and it must be explicitly stated why the practice has had to be altered. The aspects of the principles that have been dealt with above may make this operation somewhat easier.[13]

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10 See e. g. U-I-98/02; U-I-29/04 (OdlUS XIV, 64); U-I-66/08 (OdlUS XVII, 73); U-I-297/08; U-I-123/11 and U-I-28/16 (OdlUS XXI, 25).

11 The decision about the extent of execution on convicts' earnings says that also a convict must be left "a certain amount of money at free disposal in order to satisfy the needs the satisfying of which allows him decent life" (U-I-66/93 of the Constitutional Court of the Republic of Slovenia).

12 Thus, the Obligation Code requires that rights shall be executed in accordance with the basic principles of the Code (a typical example is the principle of loyalty and good faith) and with their intention (Art. 7/1).

13 Cf. Pavčnik (Fn. 4), 52–59.