

Critical remarks concerning the theory of general principles of law and its methodological implications

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Abstract

In the Latvian discourse of the theory of law and legal practice, there is a set of influential ideas that constitute a theory of general principles of law. This article aims to offer some critical remarks on the aforementioned theory and to explore some resulting methodological implications. In this article, two main research methods are used: the descriptive and the deductive methods. The examination of the theory resulted in the conclusion that it is self-contradictory to assert that the basic norm (a democratic state based on the Rule of Law) can determine the entire content of the legal system. Following are some methodological implications: First, instead of asserting that all legal methods are general principles of law, one should adopt a more general norm that is flexible enough and avoids contradictions between different obligations to use legal methods, i.e. the principle of reasonable application of legal norms. Second, the interpretation of written legal norms and the concretisation of unwritten ones cannot coexist if the basic norm determines the entire content of the legal system because of the postulate which asserts that writing down unwritten legal norms in a normative act does not change its unwritten nature.

Keywords

general principles of law* legal method's* legal theory

INTRODUCTION

In the Latvian discourse of theory of law and legal practice (Rezevska, 2014), there is a set of influential ideas concerning general principles of law. This theory is proposed, explicated and defended in the scientific publications of Professor Rezevska. It is important to note that the scope of this theory is ambitious. Although it is good to create ambitious theories that aim to coherently encompass most or all elements of a legal arrangement, it is difficult to do so because complicated theories may have unintended implications.

This article aims to offer some critical remarks on the aforementioned theory of general principles of law and explore some methodological implications of the critical remarks.

To achieve this aim, the following objectives are put forth: First, describe and critically evaluate the contested parts of the theory of general principles of law proposed by Professor Rezevska. Second, describe some methodological implications in light of the critical evaluation. Third, offer some possible amendments to the aforementioned theory regarding legal methods.

In this article, two main research methods are used: the descriptive and the deductive methods. The descriptive and deductive methods are used to reconstruct and critique the

contested parts of Professor Rezevska's theory of general principles of law, i.e. to elucidate and explicate the ideas and assumptions that are at the core of the contested part of the aforementioned theory and show how these ideas and assumptions may conflict with one another.

RESEARCH RESULTS AND DISCUSSION

Description and critique of the contested part of the theory of general principles of law

Because of the ambitious scope of the theory of general principles of law put forth by Professor Rezevska, the following will mainly be a partial description of the contested part of the theory.

In the legal arrangement of Latvia (and other Member States of the European Union) (Rezevska, 2022), there is a basic norm: 'democratic state based on the Rule of Law' (Rezevska, 2019: 300). From this basic norm, one can derive general principles of law (Rezevska, 2015). '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' (Rezevska, 2017: 236). Notice that general principles of law can be used to settle all

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disputes. Furthermore, it is asserted that general principles of law determine the 'content of all written legal norms of the given legal arrangement, as well as setting the limits for the legislators discretion' (Rezevska, 2020: 330). If the content of all written legal norms is determined, then what discretion does the legislator have? The legislator has no say when it comes to the content of legal norms, i.e. the role of the legislator is to write down legal norms, but the content of these norms is determined by the general principles of law (Rezevska, 2015). In a democratic state based on the Rule of Law, the ideal legislator is omniscient, not omnipotent, with respect to the content of the law (Rezevska, 2015). Norms of the legal system are objective, i.e. even if the legislator did not write them down, they exist at an 'unwritten normative level' (Rezevska, 2015: 146). It is further asserted that, from the basic norm, one can deductively derive a complete legal system (Rezevska, 2011, 2015).

From these statements, one must conclude that the basic norm determines the entire content of the legal system.

The strongest objection to such a theoretical construction comes from the fact that it is self-contradictory. To prove this, one must investigate an integral part of the stated basic norm (a democratic state based on the Rule of Law), i.e. the notion of democracy.

Although the notion of 'democracy' is an essentially contested concept (Gallie, 1955), one can argue that there are some essential elements. The notion of effective participation formulated by Robert Dahl implies one of them.

'Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome. They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another'. (Dahl, 1989: 109.)

The ability of citizens to affect the final outcome, e.g. the content of laws that exist in the legal system, is essential. This element of democracy (in a restrictive sense) is partially encompassed in the notion of substantive legitimation, i.e. 'the content of the actions of the state power must be encompassed in the political will of the people expressed in elections or national referendums' (Grigore-Băra et al., 2014: 181.).

This is not to say that there are no restrictions on the ability of citizens to realise their political preferences. One can grant that a modern understanding of democracy implies some conceptually necessary conditions, i.e. basic rights, legal certainty, division of power, freedom of opinion, etc. (Peczenik, 1989), restrict the legislator. However it is inconceivable that general principles of law contained in the notion of democracy contradict a part of its essence.

So if the basic norm simultaneously implies that (i) citizens

can affect the content of laws (p) and (ii) it is not the case that citizens can affect the content of laws (~p), then there is an unreconcilable contradiction (p and ~p) in the theory of general principles of law.

To summarise, a democracy where the basic norm determines the entire content of the legal system is a democracy in name only.

IMPLICATIONS FOR LEGAL METHODS

Interpretation and concretisation

When it comes to ascertaining the meaning of legal norms, two legal methods are proposed in the theory of general principles of law, which are interpretation of written legal norms and concretisation of unwritten legal norms (Rezevska, 2015, 2020). Determining when to use interpretation or concretisation is not an easy task because of some possible inconsistencies in the theory of general principles of law.

- From the basic norm, one can deductively derive a complete legal system (Rezevska, 2015).
- Norms of the legal system are objective, i.e. even if the legislator did not write them down, they exist on an 'unwritten normative level' (Rezevska, 2015: 146).
- The theory is based on a hyletic (Rezevska, 2011, 2015) ontology of norms, i.e. 'legal norms are conceptual units which exist irrespective of language, but can be expressed linguistically' (Rezevska, 2022: 163).
- Even if the legislator attempts to write down a general principle of law in a normative act, one must use concretisation to ascertain its meaning, because such attempts do not change the unwritten nature of general principles of law (Rezevska, 2015), e.g. concretisation is used to ascertain the meaning of basic rights written down in the Constitution of the Republic of Latvia.

The first three assertions indicate the existence of an unwritten legal system that contains unwritten legal norms at all levels of generality characteristic of legal norms. The fourth assertion implies that referencing an unwritten legal norm in a normative act does not deprive it of its unwritten nature. Consequently, every valid legal norm written down in a normative act is an unwritten legal norm and its content must be ascertained by concretisation. This conclusion is not compatible with other parts of the theory of general principles of law.

'Law, which consists of unwritten legal norms in the form of general principles of law and, consequently, the written legal norms concretised from the general principles of law and adopted by the legislature'. (Rezevska, 2017: 75)

This quote implies that only general principles of law are unwritten legal norms and a legal norm is a written legal norm by virtue of being created with the use of concretisation,

i.e. concretisation of general principles of law produces written legal norms. From other publications, one can see that in addition to general principles of law, international and national customary laws (Rezevska, 2015) and basic norms are unwritten legal norms (Rezevska, 2022). The theory is further complicated by the introduction of the notion of a *full legal norm*, i.e. a norm that 'consists of written and unwritten part where the written part of the legal norm is subject to the unwritten part, which is determined by the basic norm of the legal arrangement' (Rezevska, 2012: 44).

The notion of a full legal norm contradicts the hyletic understanding of legal norms because the former has a written part but the latter is independent from language. Furthermore, the restricted set of what is an unwritten legal norm contradicts the first three assertions, which strongly imply the existence of a complete unwritten legal system that contains unwritten legal norms at all levels of generality characteristic of legal norms.

One possible solution that can salvage the distinction between written and unwritten legal norms is to modify them to conform with the critical remarks offered in the first part of this paper. Written legal norms are those norms that are linguistically posited in written form by an institution authorised to do so (e.g. the legislator or courts) and whose content is consistent with but not determined by the basic norm. Unwritten legal norms are legal norms whose content is determined by the basic norm, or norms of international or national customary law.

For this solution to work, the concretisation of unwritten legal norms must result in a written legal norm and the content of the written legal norm must not be determined by the unwritten legal norm. The former criterion is asserted in the theory of general principles of law (Rezevska, 2015) and adopted by some authors in the larger theoretical discourse (Sniedzīte, 2010). The latter is true if one accepts that 'determined' means 'derived with necessity by deductive inferences'. This is compatible with the description of concretisation, i.e. concretisation is not simply deductive because it develops further meaning (Rezevska, 2015). Deductive logic does not develop further meaning, i.e. it can only express the content present in the premises (Apsalons, 2011).

Law-analogy

The second methodological implication of the objection described in the first part of this paper concerns the further development of law. When it comes to legal analogy, one can distinguish between statutory analogy and law-analogy (Peczenik, 1989). The latter type of legal analogy is of particular interest because of its connection with general principles of law. An explanation of legal analogy consistent with the thesis that the content of written legal norms is determined by general principles of law proposed by Professor Rezevska (2015), i.e. from several written legal norms that regulate similar

situations, a principle of law is discovered that regulates a new situation that was not in the scope of the written legal norms. The discovered norm is a general principle of law (Rezevska, 2015). In light of the aforementioned objections, this may or may not be the case.

If the basic norm and general principles of law do not determine the entire content of the legal system, then it is important to differentiate between two types of situations. First, the content of a written legal norm does not contradict general principles of law but is not determined by it, i.e. general principles of law act as a normative 'scaffolding' that gives the legislator a wide degree of freedom when it comes to the content of the written legal norms. Second, the content of a written legal norm is determined by general principles of law, e.g. if a general principle of law generally prohibits unjustified discrimination based on sex, race and religion, then it is reasonable to say that such a principle determines the content of laws that prohibit such discrimination in particular conditions of application. For instance, there are norms in the labour law that prevent such discrimination when it comes to the right to work, fair, safe and healthy working conditions and fair remuneration (Darba likums, 2001).

Consequently, if the content of the written legal norms used in law-analogy is not determined by general principles of law, then the discovered general norm is not a general principle of law. This distinction matters because it is asserted that written legal norms are subordinate to unwritten legal norms (general principles of law), and the legislature cannot affect these general principles of law by creating written norms that contradict them (Rezevska, 2022). So once a general principle of law is discovered, it 'remains' in the legal system. The same is not the case if the discovered legal norm is not a general principle of law.

The doctrine of *stare decisis* does not hold in the legal arrangement of Latvia and a judge must overrule previous precedent if it is not compatible with the new factual or legal circumstances (Krūkle, 2022). The following example will help to illustrate how this may play out when the overruled norm was discovered with law-analogy.

If several legal norms in the legal system permit a party to a long-term contract (e.g. employment contract, commercial agent contract) to terminate the contract based on important reasons, then it is possible to argue that there is a general norm that permits such an action for all long-term contracts (Kalniņš, 2003). If, at a later date, the legislator decides to disrupt the underlying pattern that the law-analogy depended on, then a judge must not use the previously discovered legal norm.

To summarise, one must differentiate between different types of legal norms that may result from the use of law-analogy in order to understand under what conditions the discovered norm is applicable in future cases. If the discovered norm is

not a general principle of law, then a judge in a future case must check if there still exists an underlying pattern that the law-analogy is based on or provide sufficient justification for the existence of the norm, e.g. prove that there are other norms that establish the same pattern.

The scope of the legal system determined by general principles of law

In the theory of general principles of law, it is asserted that there are three groups of general principles of law:

1. principles that identify the highest values of a legal arrangement (e.g. basic rights);
2. principles that define the structure of a legal arrangement (e.g. the principle of separation of power);
3. legal methods (Rezevska, 2015, 2022).

If the use or the way one engages with the results of legal methods partially depends on whether the content of a legal norm is determined by a general principle of law, then it is important to examine the parts of the legal system that might be determined by general principles of law. Thus, it is necessary to critically examine problematic elements of the aforementioned groups of general principles of law and understand how they determine, via deductive logic, the content of the legal system.

Legal methods as general principles of law

To be more precise, in regards to the claim that legal methods are general principles of law, one must distinguish an obligation to use legal methods and the legal methods themselves. To confuse these two notions would lead to a category error. Legal methods are techniques for resolving legal disputes (Melkisis, 2003), not norms that contain obligations to use these techniques. This holds true even if the legal norm contains a detailed description of the conditions under which the legal techniques must be used and a detailed explanation of the actions one must take to perform the technique.

It seems to be self-evident that the notion of democracy implies some obligations that guide those who apply legal norms (Viškere, 2013) because otherwise there is a risk that the will of the people will not be properly realised in the process of applying norms (Grigore-Băra et al., 2014). Consequently, it is reasonable to assume that there is at least one general principle of law that guides the aforementioned conduct.

There are two reasons why the level of generality of these unwritten legal norms should be higher than the level of separate obligations to use legal methods. First, in legal theory, one can find many obligations to use legal methods, but not all of them are mutually compatible. For instance, there are several legal principles with identical conditions of application:

1. legal norms should be interpreted in accordance with their social function;

2. legal norms should be interpreted in accordance with the lawgiver's will;

3. legal norms should be interpreted in accordance with their objective meaning;

4. legal norms should be interpreted in accordance with the requirements of life;

5. legal norms should be interpreted in accordance with the actual policy of the state (Peczenik, 1971; Rezevska, 2015).

It can't be the case that all of these obligations are general principles of law at the same time, because they may result in different interpretations of the legal norms. Such contradictions are unacceptable. Consequently, the set of general principles of law guiding the application of legal norms must be consistent (without contradictions) in two ways, (1) it must be consistent with other general principles of law in the set (if there are any) and (2) it must make it so that the final set of legal methods is consistent.

Second, our understanding of which legal methods are appropriate to use in the process of applying norms may change, e.g. a legal method may be disregarded or replaced. Thus, the set of general principles of law guiding the application of legal norms must be flexible enough to accommodate the development of legal methodology. Even if it is possible to derive previously undiscovered general principles of law and the content of these principles is dynamically changing (Rezevska, 2015), it is not flexible enough to account for the replacement or abandonment of obligations to use certain legal methods.

Compatible with the aforementioned criterion of flexibility and consistency is the principle of reasonable application of legal norms. It is suggested that such a principle can be derived from the principle of rule of law, which mandates that the application of legal norms is performed by using legal methods that are recognised in a democratic state (Viškere, 2013). The emphasis on 'reasonable' prevents contradictions in the set of legal methods, and the notion of 'recognition' implies flexibility because the set of recognised legal methods may change.

Basic rights as general principles of law

In the theory of general principles of law, it is strongly asserted that the legislator cannot affect general principles of law because one cannot use normative legal acts to affect unwritten legal norms that possess superior legal strength (Rezevska, 2015). If this postulate is absolute, then it is necessary to reconcile the postulate with the fact that the legislator routinely creates normative legal acts that infringe upon some of the highest values of the legal arrangement, i.e. basic rights.

It is clear that some basic rights are among the conceptually necessary conditions of a modern conception of democracy, e.g. freedom of speech (Peczenik, 1989). Thus, one can't just not include them among the general principles of law. One

solution is to identify and separate those elements of basic rights that are necessary according to the basic norm. The rest may be infringed upon by the legislator if it follows the principle of good legislation (Rezevska, 2020) and the limits imposed by the Constitution.

Deduction and general principles of law

In the theory of general principles of law, the connection between the basic norm, general principles of law, written legal norms on hand and deduction on the other hand is unclear. It is asserted that general principles of law are derived from the basic norm by the use of the deductive method or deductive process (Rezevska, 2015, 2020). No examples or explanations (e.g. rules of inference used) of this deductive derivation are given.

Some indications of what is meant by 'deductive logic' are found in the description of the method for discovering general principles of law from normative legal acts. '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' (Rezevska, 2020: 333). The description of deductive logic as capable of creatively arriving at new concepts is wrong. The exact opposite is true, i.e. the main drawback of deduction 'is that deductive reasoning does not allow you to learn anything new at all because all logical argument depends on assumptions or suppositions'. (Evans, 2005: 170). Thus, proponents of the theory of general principles of law must (if possible) amend the theory to reflect more creative modes of reasoning in regard to the discovery of general principles of law from normative legal acts.

Deduction is mentioned in a paraphrase of A. Peczinek's definition of a legal principle. i.e. 'several principles are principles of law, if it is possible to deduce from them written legal norms, that are in force'. (Rezevska, 2009: 29). The original is somewhat different.

'(C 2) A given list of principles is a list of principles of law if one can deduce from it, and from some additional true descriptive statements, a list of valid legal norms' (Peczinek, 1971: 31).

The addition of the statement 'and from some additional true descriptive statements' is important. A. Peczinek also does not give examples (Peczinek, 1971). It is conceivable that the following argument may be created from a principle (P1) and a true descriptive statement (P2).

P1. All persons who apply legal norms are persons who must apply legal norms reasonably.

P2. All judges are persons who apply legal norms.

C. All judges are persons who must apply legal norms reasonably.

It is important to note that this argument affects only the conditions of application, not the content of the legal consequences.

In deontic logic, there are patterns of deductive reasoning that affect the legal consequences. One axiom of the standard system of deontic logic states $Oa \rightarrow Pa$, i.e. if an action is obligatory, then it is permitted (Navarro and Rodriguez, 2014). For instance, if it is asserted that it is obligatory that legal norms are applied reasonably, then, together with the axiom of $Oa \rightarrow Pa$, one can deduce (via modus ponens) that it is permitted to apply legal norms reasonably.

There are different kinds of deontic logics. Classically, the main focus is on the logical relations between permissions, obligations and prohibitions (Navarro and Rodriguez, 2014). Others add supererogatory acts (Joerden, 2018). None of them can transform a legal principle in such a way that it results in a particularly interesting new legal norm.

In summary, deductions of this kind may be valid, but deductive logic in general and deontic logic in particular are not the kind of tools that can deductively derive the entire content of the legal system from the basic norm and general principles of law. The parts of the legal system that can be deductively derived are limited to formal transformations that do not explicate the content of the unwritten legal norms.

CONCLUSIONS

The critical analyses of the theory of general principles of law proposed by Professor D. Rezevska and the examination of the resulting methodological implications lead to several conclusions.

1. A theory where the basic norm (a democratic state based on the Rule of Law) and general principles of law derived from it determine the entire content of the legal system is self-contradictory because, in such a legal system, citizens can't affect the content of laws by democratic means.
2. Legal methods that are used to ascertain the meaning of legal norms (interpretation of written legal norms and concretisation of unwritten legal norms) cannot coexist if the basic norm determines the entire content of the legal system because of the postulate which asserts that writing down unwritten legal norms in a normative act does not change its unwritten nature.
3. To preserve the distinction between written and unwritten legal rules and the respective legal methods, one can adopt the following modifications to the theory of general principles of law. Written legal norms are those norms that are linguistically posited in written form by an institution authorised to do so (e.g. the legislator and courts) and whose content is consistent with but not determined by the basic norm. Unwritten legal norms are legal norms whose content is determined by the basic norm, or norms of international or national customary law.

4. One must differentiate between different types of legal norms that may result from the use of law-analogy in order to understand under what conditions the discovered norm is applicable in future cases. If the discovered norm is not a general principle of law, then a judge in a future case must check if there still exists the underlying pattern that the law-analogy was based on or provide sufficient justification for the existence of the norm, e.g. prove that there are other norms that establish the same pattern.

5. Instead of asserting that all legal methods are general principles of law, one should adopt a more general norm that is flexible enough and avoids contradictions between different obligations to use legal methods, i.e. the principle of reasonable application of legal norms.

6. If the legislator cannot affect unwritten legal norms, then in order to reconcile this postulate with the practice of creating laws that infringe upon basic rights, a demarcation must be created between rights that are necessary according to the basic norm and those that are not. The latter may be infringed upon by the legislator if it follows the principle of good legislation and the limits imposed by the constitution.

7. Deductive logic in general and deontic logic in particular are not the kinds of tools that can deductively derive the entire content of the legal system from the basic norms and general principles of law. The parts of the legal system that can be deductively derived are limited to formal transformations that do not explicate the content of the unwritten legal norms.

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