UNIWERSYTET HUMANISTYCZNO-PRZYRODNICZY IM. JANA DŁUGOSZA W CZĘSTOCHOWIE
Gubernaculum et Administratio 2(22)/2020, s. 29–36

http://dx.doi.org/10.16926/gea.2020.02.08

Maria A. KAPUSTINA
Faculty of Law
Saint Petersburg State University
e-mail: m.kapustina@spbu.ru; mkapustina@list.ru

The Principle of Legal Certainty: whether there Can Be Gaps in the Public Law?

Summary

Legal regulation is caused by the necessity to provide legal order of social regulation. The legal order of regulation is provided by formal legal certainty of regulatory provisions (legal prescripts) and their legal substance. However, there exist relations, whose content, namely, subjective rights and juridical responsibilities of the parties are not strictly prescribed in the legislative norms. Because a legislator cannot foresee all the variety of social relations that may occur in real life and prescribe their formal and legal substance in corresponding legislative acts. In such cases, we usually talk about gaps in law, about the uncertainty of legal regulation. Gaps are taken for granted, considered as an obligatory element of any legal system. Nonetheless, whether there can be gaps in the public law, if in the public law sphere norms are created purposively? In public law, norms are created purposefully (with a goal in mind), public law institutions are artificially established and rationally modernized. The lack of a norm of a statute can mean the refusal of the legislator to legally regulate the question, at least at the moment. This is so-called in legal literature "qualified silence of the legislator" that should not be considered as a gap in law.

Keywords: Legal regulation, legal certainty, legislative norms, public law, gaps in law.

Introduction

Legal regulation is a variety of social regulation. It presupposes the regulating of individual behavior in social relations. Legal regulation is caused by the necessity to provide legal order, and stability (order) of social regulation. This is so that social relations, as well as the exercising of rights and duties by legal entities, would conform to requirements and allowances. These legal provisions are provided in legal norms.

In Russia, in legal studies, legal norms are studied in terms of the fact that legal norms, being expressed in the texts of juridical sources of law, regulate so-

cial relations in a formalized form[1]. From the point of view of the Russian normativism, the legal norms are general, i.e., not personified, and the rules they contain are repeated. This makes legal norms different from individual prescriptions, for example, expressed in juridical decisions. In juridical decisions a general rule of conduct is individualized with regard to a specific situation and an individual (person). Similarly, the term "norm" is used in natural science. For example, it is believed normal to sleep eight hours a day and work eight hours a day. However, these are general (averaged) rules, "averages" that may, and sometimes must (for medical reasons, for example) be changed for a particular person. For example, people of creative professions can sometimes stay awake for a long time in order to complete a project. It is "normal" for them or it is a "norm" of their lifestyle. However, people still can neither live without sleep nor work without rest. In this example, general rules (norms) are individualized according to the peculiarities of certain occupations.

Legal regulation (as a form of social regulation) is caused by the necessity to reconcile interests of different subjects and organize their relations. The goal is to establish the algorithm, clear and formally defined rules for different subjects' interaction[2]. The requirement of formal and legal certainty means the abstract, non-individualized nature of legal rules. Non-individualized, i.e. abstract rules for „individualized" persons. How to correlate in legal regulation the requirement of legal certainty and abstractness of legal norms? The legal norms are logical models of legal regulation of certain social relations. We can say, law as a system of non-individualized norms, abstract rules is a regulatory model[3] of legal regulation of social relations in general.

Modern social sciences and humanities, which comprise jurisprudence, distinguish two forms of regulative influence on a person's behavior and interactions, namely, autonomous and authoritative. Autonomous regulation means self-management (self-regulation, self-governance) relations between the parties. This type of regulation suggests formal equality and independence of the subjects of self-management (self-regulation). A contract and a juridical custom are legal forms of autonomous regulation (self-management). Specificity of self-governance (self-management) is that relationships are normalized during the course of interaction between the parties. The difference between contractual and autonomous regulation of relations is built upon the intentions of the parties in the pres-

---

[1] See, e.g.: S.S. Alekseev, *Voshozhdenie k pravu. Poiski i reshenija*, Moscow: Norma, 2002, pp. 102-103; V.S Nersesyants, *Obshchaya teriya prava i gosudarstva: uchebnik*, Moscow: Publishing group of INFRA-M-NORMA, 1999, p. 387; A.V Mitskevich, *Normy prava,* [in:] M.N. Marchenko (ed.), *Obshchaya teoriya gosudarstva i prava. Akademicheskiy*, Moscow 1998; M. Korelsky, V.D. Perevalov, *Theory of state and law*, Moscow, 1997, p. 275, etc.

[2] See: A.I. Prigozhin, *Sovremennaya sotsiologia organizatsij*, Moscow, 1995; M.I. Bobneva, *Sotsialnye normy i regulyatsiya povedeniy*, Moscow 1978; B.S. Ukraintsev, *Osobennosti samoupravlyaemykh system*, Moscow, 1970.

[3] See: V.S. Nersesyants, *Obshchaya teoriya prava I gosudarstva*, Moscow 1999, p. 388.

ence (or absence) of the aim to normalize their relationships. Discussion, elaboration, reconciliation of stipulations of a contract is rational, and in a number of cases controlled by specified norms (for instance, civil law). It is aimed at establishing rules of interaction between the parties/members[4]. Formation of juridical custom is usually of a spontaneous and inordinate character[5].

Authoritative regulation is characterized by focused regulation by the subject of authoritative powers[6]. Public law is a sphere of Governmental and legislative regulation. It has an authoritative nature. Public law regulation is understood, first and foremost, as a form of imperative legal influence (impact). This regulation is defined as an aggregate of obligatory statutory orders issued by an agency of a state power or regulatory body, whose aim is to coordinate a particular domain of social relations.

1. Russian legislative system of certain spheres of social relations

In Russian legislative system, federal and regional governance of certain spheres of social relations is performed by commissioned bodies of executive power (authorities of the people of the Russian Federation), having expertise in a particular type of relations. They perform the functions of regulating bodies at federal and regional levels correspondingly. For example, federal regulating agency in the sphere of National Health Care is the Ministry of Healthcare and Social Development of the Russian Federation. This Ministry works out and realizes governmental policy and normative legal regulation in the sphere of health care. Federal regulating agency in this sphere in St. Petersburg is the Health Care Committee. We must take into account these authorities have necessary expertise in the Health Care sphere, aren't we? And their activities is purposefully, regulation with a goal in mind.

Legal order also means legal, as well as formally legal, certainty of legal regulation, the formal legal certainty of regulatory provisions (legal prescripts), and their legal substance. Public law regulation is seen mainly as organized (structured), systemic, purposeful and focused impact on behavior, enterprise, and social relations between legal entities. And Public law is a result of systemic (coherent) legal regulation by experienced authorities. Nevertheless, a legislator cannot foresee all the variety of social relations that may occur in real life and prescribe corresponding legislative acts. That is why there exist relations, whose content, namely, subjective rights and juridical responsibilities of the parties are

---

[4] M.A. Ermolina, M.A. Kapustina, *Pravovoe regulirovanie i pravovoe vozdejstvie: rol zakonodatelya*, "Eurasian Law Journal" 2016, no. 1 (92), p. 341.

[5] About spontaneous legal regultion see: F.A. von Hayek, *Pravo, zakonodatel'stvo i svoboda: Sovremennoe ponimanie liberal'nykh principov spravedlivosti i politiki*, Moscow 2006, pp. 54–61.

[6] See: M.A. Kapustina, *Teoriya publichnogo pravootnosheniya: perspektivy izbavleniya ot civilisticheskoj dogmatiki*, "Pravovedenie" 2011, no. 2, pp. 244–261.

not strictly prescribed in the legislative norms. Such a situation is usually called a lacuna in law (effective legislation).

However, one should admit that in legal literature there is no consensus of opinion about the question of the definition of the concept of gap in legal regulation. In particular, it is not correct to confuse the notion of a gap in a statute and the abstractiveness of a normative prescript of a statute. This is because the legislative technique is developing from casuistical prescripts in detail regulating a particular question to abstract, normative regulation. As a result, in a norm stated in an abstract way, for example, in a permissive rule, the law enforcer can spot a gap of the legislator who has not thoroughly regulated the right of the party to legal relations.

Another example: Russian criminal law prohibits "production, storage or transportation for the purpose of selling or selling goods and products, performing works or providing services that do not meet *the safety requirements of consumers' life or health*, as well as illegally issuing or using *an official document* certifying the compliance of the specified goods, works or services with *safety requirements*"[7]. It appears that the existence of this legal prohibition is sufficient for the right application of a mandatory provision and there is no gap in law in this case. Probably, in such cases such a hard-to-define measurable quality of a judge as professionalism should act.

E. Tsytelman a hundred years ago[8] drew attention the impropriety of the substitutions of notions of gaps in legal regulation and the abstractedness of normative regulation. In support of this, E. Tsytelman referred to relatively defined sanctions of criminal law establishing the statutory cap and floor of punishment. And nobody calls such criminal law norms as containing gaps. Real gaps requiring filling can be detected in a situation when there is not even abstract law for the case. The checklists of evidence that were once distinguished in the Arbitral Procedural Code of the Russian Federation the checklist was open-ended and contained the words "… other papers and materials" and in the Civil Procedure Code of the Russian Federation (the checklist was limiting) can serve as examples of real gaps. And this lead to the ambiguity (gap) of the legal status of new sources of information such as audio and video records in a civil trial. In modern Russian Public law a real gap is seen in the lack of legal regulation of the issue if a foetus can be an object of criminal-legal defense[9].

---

[7] Art. 238 of Criminal Code of RF. Russian family law can serve as an example. It formalizes parental duties to bring up their children but does not state concrete ways and methods of upbringing. It appears that the existence of the legal prohibition of certain methods of upbringing is sufficient for the right application of a mandatory provision and there is no gap in law in this case. Probably, in such cases such a hard-to-define measurable quality of a judge as professionalism should act.

[8] See: E. Tsytelman, *Probely v prave prech' proiznesennaya pri vstuplenii v dolzhnost' rektora Reinskogo universiteta im. Fridrikha Wilgelma v Bonne 18 oktyabrya 1902*, "Russian Annual of Law Theory" 2010, no. 3, pp. 624–625.

[9] See, for example, A.V. Maleshina, *Ugolovno-pravovaya okhrana "budushchey zhizni"*, "Pravovedenie" 2011, no. 3, pp. 140–151; G.B. Romanovskiy, *Pravovoe regulirovanie biomeditsinskikh tekhnologiy*, "Pravovedenie" 2011, no. 4, pp. 112–118.

Most strikingly, gaps become apparent where existing legal norms make provisions for the necessity of certain actions but do not establish the order or the form of performing the actions, and do not settle a date or the amount of the recovery of the penalty. Similar technical gaps, according to many jurists, interfere with law application and require correction. They create legal ambiguity in the question about the way, the form and the date of the realization of legislative rule from the standpoint of the legislator[10].

Legislative policy assumes a combination of stability and consistency of legal regulation, its flexibility and correspondence to the vital conditions concrete society[11]. In particular, with respect to principle of legal certainty, attention must be given to issues of specialization (differentiation) of legal regulation and positive discrimination, for example in providing privileges to particular groups of subjects of law.

2. Gaps in the law and their types

Gaps are taken for granted, considered as an obligatory element of any legal system. It is right to bear in mind that the problems of gap identification and gap overcoming fell traditionally within the scope of legal dogmatism and legal positivism. They are considered meaningless due to the absence of gaps in law as such, according to some adherents of the western European variant of positivist law comprehension. G. Kelsen, for example, believed that the question about gap filling does not exist in principle, for there are no gaps in positive law[12]. He came to this conclusion having analyzed two types of gaps in law: "due gaps" and, so called, "technical gaps". For example, in the case when the legislator has set the requirements for an election but has not regulated its procedure. According to G. Kelsen in the situation of "technical gaps" there is no gap in the positive law; since if the legislator has not set the procedure of the election any procedure will be legally valid.

The first type of gap he denied under the principle "everything is permitted unless it is not prohibited by law". The law application decision can always be made on the ground of legal norm. Only in one case does the norm directly establish an obligation (positive regulation). In the other case the norm does not establish an obligation, i.e. "determines" the freedom from obligation (negative regulation)[13]. According to G. Kelsen, by defining the latter case as a gap in law, the law enforcer states that the legislator had not provided for this case, otherwise,

---

[10] See: M.A. Kapustina, *Konstitutsionno-pravovoe regulirovanie: ustanovlenie I vospolnenie probelov v prave*, Mocsow 2014, pp. 59–60.

[11] See: R.K. Narits, *Voprosu o modernizatsii gosudarstvenno-organizovannykh pravovykh sistem i o znachenii pravovykh printsipov v evropeizatsii Evropy*, "Pravovedenie" 2014, no. 6(317), pp. 206–217.

[12] See: H. Kelsen, *General Theory of Law and State*, London 2009, pp. 146–149.

[13] Ibidem, pp. 147–148.

he would have made another rule. However, the law enforcer must apply the norms set by the legislator regardless of whether he considers them right or presupposes a mistake in them. This is because it is not possible for the legislator to define the credibility of the presupposition of the law enforcer about the mistake[14]. It should be mentioned that the German positivist Karl Bergbom also considered law as gapless, logically completed[15], and the British philosopher of law Joseph Raz denies the existence of "due gaps"[16].

The structure of a legal norm as a logical model of legal regulation of social relations cannot coincide to a full extent with the structure of a particular article or a clause of a legislative act[17]. Thus, the question about certainty or ambiguity of legal regulation and gaps in law cannot be resolved from the standpoint of a particular clause, article of a specific legislative act. It must be resolved in the context of the system of legal norms, legal principles, and legal practice. The peculiarity of legislative acts as a form of expression of legal norms lies in their structure. A legislative act can represent an interconnection of normative and sometimes non-normative prescripts arranged in articles, clauses, and paragraphs which are organized in it in a certain way and verbally expressed in a certain style. In order to spot (construct) the norm contained in the act it is necessary to "assemble" it from a whole range of legislative prescripts. Ultimately, it is this peculiarity of legislative acts that should provide for their systematic and hierarchical character.[18] In practice this peculiarity can lead to imaginary gaps (if, for example, the law enforcer cannot "assemble" a current legal rule due to a large amount of prescripts for the same question) or to real gaps (if, for example, the legislator has used a method of legislative technique such as a reference article of statute, yet the legislative act to which the article refers does not contain the sought after rule).

3. Conclusions

State-legal normative regulation presupposes a strict system of coordinated legal norms. The position of a legislative provision in the system of normative regulation is predefined by the interaction with and interdependence of legal norms on one another, legal institutions etc. General and special, substantive and procedural norms etc. can be examples. In some cases, normative regulation in general can interfere with the application of the legislative norm. This happens

[14] See: H. Kelsen, *Pure Theory of Law*, Berkeley 1970, pp. 243–244.

[15] The criticism of this K.Bergbom' standpoint see: G.F. Shershenevich, *Obshchaya teoriya prava*, Izdanie Br. Bashmakovykh 1910, pp. 744–745.

[16] J. Raz, *The Authority of Law. Essays in Law and Morality*, Hong Kong: Clarendon Press 1979, pp. 70–77.

[17] See: S.S. Alekseev, *Voshozhdenie k pravu. Poiski I resheniya*, Moscow 2002, pp. 97–98.

[18] See in more detail: M.A. Kapustina, *Deistvie yuridicheskikh norm vo vremeni*, Moscow 2001, pp. 24–25, 43–44.

when the formalization of a norm in the system is improper, in terms of legislative (law establishment) technique. Different state authorities often exercise normative regulation in the same spheres of social relations. The officials of the state authorities have to analyze the information about the regulation of particular relations in general, including legislative acts issued by other state bodies. Prior legal norms may conflict with junior norms if the previous norms have not been changed or repealed by the legislator. There is therefore another gap in legislation that must be detected and eliminated by the legislator in the law making process. This is the gap in so called operational norm of statute that establishes the period and the order of the operation of the norm in time, i.e. the date on which a legislative act (or a separate norm of statute) comes into effect and the date on which the legislative act (or its separate norm) loses effect.

So, whether there can be gaps in the public law, if in the public law sphere norms are created purposively (with a goal in mind)? Public law institutions are artificially (rationally) established and modernized. In public law, norms are created purposefully. The lack of a Public law norm can mean the refusal of the legislator to legally regulate the question, at least at the moment. This is so-called in legal literature "qualified silence of the legislator" that should not be considered as a gap and, consequently, in terms of the principle of legal certainty, law enforcer should not correct by analogy or another way of filling gaps in law. Nevertheless, if the legislator spots a gap in public law, he can eliminate it and formally and legally regulate individual behavior in social relations. The content of legal norms must be formally expressed and in this sense technically legal defined: in the legal prescripts (provisions) of articles and clauses of legislative acts.

Bibliography

Literature

Alekseev S.S., *Voshozhdenie k pravu. Poiski i reshenija*, Moscow 2002.

Bobneva M.I., *Sotsialnye normy i regulyatsiya povedeniy*, Moscow 1978.

Ermolina M.A., Kapustina M.A., *Pravovoe regulirovanie i pravovoe vozdejstvie: rol zakonodatelya*, "Eurasian Law Journal" 2016, no. 1.

Hayek F.A., *Pravo, zakonodatel'stvo i svoboda: Sovremennoe ponimanie liberal'nykh principov spravedlivosti i polityki*, Moscow: IRISEN 2006.

Kapustina M.A., *Deistvie yuridicheskikh norm vo vremeni*, Moscow 2001.

Kapustina M.A., *Konstitutsionno-pravovoe regulirovanie: ustanovlenie I vospolnenie probelov v prave*, Moscow 2014.

Kapustina M.A., *Teoriya publichnogo pravootnosheniya: perspektivy izbavleniya ot civilisticheskoj dogmatiki*, "Pravovedenie" 2011, no. 2.

Kelsen H., *General Theory of Law and State*, London 2009.

Kelsen H., *Pure Theory of Law*, Berkeley: California University Press 1970.

Nersesyants V.S., *Obshchaya teriya prava i gosudarstva: uchebnik*, Moscow: Publishing group of INFRA-M-NORMA 1999.
Maleshina A.V., *Ugolovno-pravovaya okhrana "budushchey zhizni"*, "Pravovedenie" 2011, no 3.
Mitskevich A.V., *Normy prava*, [in:] M.N. Marchenko (ed.), *Obshchaya teoriya gosudarstva i prava*, Moscow 1998.
Narits R.K., *Voprosu o modernizatsii gosudarstvenno-organizovannykh pravovykh sistem i o znachenii pravovykh printsipov v evropeizatsii Evropy*, "Pravovedenie" 2014, no. 6.
Perevalov V.D., *Normy prava. Teoriya gosudarstva i prava*, Moscow 1997.
Prigozhin A.I., *Sovremennaya sotsiologia organizatsij*, Moscow 1995.
Raz J., *The Authority of Law. Essays in Law and Morality*, Hong Kong: Clarendon Press, 1979.
Romanovskiy G.B., *Pravovoe regulirovanie biomeditsinskikh tekhnologiy*, "Pravovedenie" 2011, no 4.
Shershenevich G.F., *Obshchaya teoriya prava*, Moscow 1910.
Tsytelman E., *Probely v prave prech' proiznesennaya pri vstuplenii v dolzhnost' rektora Reinskogo universiteta im. Fridrikha Wilgelma v Bonne 18 oktyabrya 1902*, "Russian Annual of Law Theory" 2010, no 3.
Ukraintsev B.S., *Osobennosti samoupravlyaemykh system*, Moscow 1970.

Acts of law

Criminal Code of the Russian Federation, 1996.

Zasada pewności prawnej: czy w prawie publicznym mogą być luki prawne?

Streszczenie

Regulacja prawna wynika z konieczności zapewnienia porządku prawnego regulacji społecznej. Porządek prawny regulacji zapewnia formalna pewność prawa przepisów regulacyjnych (przepisy prawne) oraz ich treść prawna. Istnieją jednak relacje, których treść, a mianowicie prawa podmiotowe i odpowiedzialność prawna stron, nie są ściśle określone w normach legislacyjnych. Prawodawca nie jest w stanie przewidzieć całej różnorodności stosunków społecznych, jakie mogą zaistnieć w życiu codziennym, ani w odpowiednich aktach ustawodawczych określić ich treści formalno-prawnej. W takich przypadkach najczęściej mówimy o lukach prawnych, o niepewności regulacji prawnych. Luki są oczywiste, uważane za obowiązkowy element każdego systemu prawnego. Czy jednak mogą istnieć luki w prawie publicznym, skoro w sferze publicznej normy tworzone są celowo? W prawie publicznym normy tworzone są celowo (mając na uwadze cel), instytucje prawa publicznego są sztucznie ustanawiane i racjonalnie modernizowane. Brak normy w ustawie może oznaczać odmowę ustawodawcy, przynajmniej w danym momencie, do prawnego uregulowania tej kwestii. Jest to w literaturze prawniczej tzw. „kwalifikowane milczenie ustawodawcy", której nie należy traktować jako luki prawnej.

Słowa kluczowe: regulacja prawna, pewność prawa, normy prawne, prawo publiczne, luki prawne.