

ISSUES OF LEGAL REGULATION OF FILLING THE GAPS OF POSITIVE LAW IN THE REPUBLIC OF ARMENIA

Artur Vagharshyan¹

Positive law is realized in different ways in the Romance-Germanic legal traditions. As a result, law is realized in the behavior of actors of social relations, and the legal regulation reaches its objective. The positive legal regulation and the special form of positive legal norms – the implementation of law – have an important role in that process. The implementation of law is done strictly within the framework of and in accordance with the substantial and procedural positive norms. It means that the subject/actor of the law implementation finds the resolutions “not from the air”, but implements the specific norms of positive law upon the specific social relations or fact by adverting them. But sometimes the subject/agent of law implementation does not find a norm for the particular case. A problem arises, which is called a gap of law (or of legal regulation) in the science of law.

It is natural that the gaps of the positive law must not exclude the further activity of the legal regulation mechanism. The legalization of law must continue, and the legal regulation must achieve its goal. A question can arise here: how? While answering this question, we will explain` the concept of “gap of law” or “gap of legal regulation”.

When dealing with gap of law, one usually understands the whole or partial absence of legal regulation in such areas of social life which objectively demand regulation². This definition shows that the concept of “gap of law” concerns only the positive legal

¹ Doctor of Legal Sciences, Professor, Head of the Chair of Theory and History of State and Law of the Yerevan State University. E-mail: avagharshyan@ysu.am.

² General Theory of Law. A.S. Pigolkin (ed.), MGTU Publishing, Moscow, 1996, P. 276 [Общая теория права. Под ред. А.С. Пиголкина. М., Изд-во МГТУ им. Н.Э. Баумана, 1996, С. 276].

regulation. The law/right differentiated from law/positive law has no gap or cannot be in gap. That phenomenon can be non-realized in a whole or in all spheres for different reasons. In this regard one must agree with V.V. Lazarev's opinion: "[o]ne can speak about gaps only in regard of the positive law. Natural law cannot be open in its philosophical sense, it is without any gaps.³" So the concept of "gap of law" has positive-legal sense, it concerns only positive law or positive-legal regulation. Therefore, the ideas of those authors, who form that concept as "gap of legislation" and not gap of law, are well founded⁴. But as the concept of "legislation" creates some fields for disputes in the legal science, in our opinion, it will be better to use more capacious concept – "the gap of positive law".

The gap of positive law is a legal issue, and the concept reflecting that issue has a legal meaning. In V.I. Leushin's view: "[a] gap of legislation is the absence of a necessary concrete norm for regulation of a relation that is in the sphere of legal regulation⁵." This means that there is a gap in positive law only in the case when a certain relation is in the sphere of legal regulation and it must be regulated by legal means, but the concrete resolution for that relation is not covered by a positive legal source. Therefore, in its legal meaning, it can be regarded as a case of a gap when a certain social relation, while being all in the space of legal regulation, is not regulated by a specific legal norm as a result of different reasons. For this reason there is no legal gap in its legal meaning, when some spheres of relations are not covered by legal regulation. For example, as there are no norms in laws on love and friendly relations, we cannot insist that there is a gap in positive law as those relations are not in the space of legal regulation. So, the gap of positive law is the absence (whole or partial) of a concrete normative provision for the factual circumstances that are in the sphere of legal regulation. The

³ Theory of State and Law. G.N. Manov (ed.), Moscow, BEK 1995, P. 211. [Теория государства и права. Под ред. Г.Н. Манова. М., Изд. БЕК, 1995, С. 211].

⁴ Theory of State and Law. V.M. Korelsky and V.D. Perevalov (eds.), Moscow, 1997, P. 390. [Теория государства и права. Под ред. В.М. Корельского и В.Д. Перевалова. М., Издательская группа ИНФРА. М-НОРМА, 1997, С. 390].

⁵ *Ibid.*, P. 390.

problems of concretizing the essence of law and further realization of law, raised as a result of a gap of positive law, are solved by such ways of filling the gap as eliminating the gap through law-creation and overcoming the gap through analogy. The general way to fill the gap is law-creation, which means that the official state or local self-government bodies, who have such capacity, adopt the missing legal provision, order, norm, and implement it. The gap can be eliminated through law-creation. But the legal analogy, as another way of overcoming the gap of positive law, has also been developed in the theory of law and accepted by the legislation. Legal analogy does not eliminate the gap. It allows only overcoming the gap of positive law when dealing with a specific case. The best way to fill the gap of positive law is to eliminate it through law creation. However, one of the requirements of law implementation is operational efficiency. The elimination of a gap by law-creation, being a slow procedure, deprives the law implementation of its effectiveness. And the opportunity to overcome the gap of law through legal analogy defined by laws is to insure the efficiency and effectiveness of law-implementation. As a temporary measure of overcoming gaps of positive law, the legal analogy can be divided into two types: analogy of *lex* (analogy of statute) and analogy of *jus* (analogy of law). The analogy of *lex* can be seen when the case is solved on the ground of the nearest norm in the sense of the content: it means, law is implemented upon cases which are not regulated directly by a norm. If there is no such norm in case of a gap, the analogy of *jus* is applied. In this case the principles and common provisions of pan-legal, or a legal branch, or a legal institute are applied on the pending case. The pan-legal, branch or institutional principles are developed and founded in the general theory of law, the theory of positive law. They are partially defined in legislation and partially not. The contents of some of the defined ones are presented, while the others are not. This means that the theory of law (doctrine) is recognized as a source of the acting law in the sphere of implementing the analogy of law. For example, the RA Civil Code only numbers the principles of civil law without stipulating their content. Therefore, the science

of civil law becomes a source of regulation for civil relations. The implementation spheres of analogy are under disputes in the theory of law. There are some theorists, who find the analogy is allowed everywhere if there is no special prohibition⁶. Other authors find the gaps of positive law to be filled by analogy only if it is directly allowed by law⁷. We find the last view right: filling the gaps of law through analogy can be done only in such spheres where a law/statute directly allows. And this position has a constitutional background. Filling the gaps of law through analogy is done in the process of law-implementation. The last one is a type of official activity. The second part of Article 5 of the RA Constitution provides: “[s]tate and local self-government bodies and public officials are competent to perform only such acts for which they are authorized under the Constitution or laws.” Therefore, if the possibility of applying analogy is not specifically defined by law, then it is prohibited. This logic shows that the applicability of analogy must be defined by law, based on special norms or principles of branches or institutions of laws (other normative legal acts), and not upon subjective evaluations, opinions, or upon discretion of state officials.

The institute of analogy is regulated by the legislation of the Republic of Armenia. But there are some shortcomings in that regulation. Article 88(1) of the Law of the Republic Armenia “On legal acts” (Application of the norms of legal acts by analogy) defines: [w]here the law or other legal acts do not expressly regulate the emerged relations, legal acts regulating similar relations may be applied to such relations only in cases provided for by law (analogy). This article has no efficiency. This article must not be defined in the Law “On legal acts“, as it points a specific law which must define the implementation of analogy. Therefore, analogy is a subject of

⁶ General Theory of Law and State. V.V. Lazarev (ed.), Moscow, 1994, P. 176. [Общая теория права и государства. Под ред. В.В. Лазарева. - М.: Изд-во Юрист, 1994, С. 176].

⁷ Комаров С.А., General Theory of State and Law. Moscow, 1997, P. 317. [Комаров С.А., Общая теория государств и права. М., Юрайт, 1997, С. 317].

regulation of that particular law. Besides this, by using the term – “legal act”, the article allows for the possibility of analogy of an individual legal act, which, in its sense, is nonsense.

Article 88(2) of the RA Law “On legal acts” defines that analogy may not be applied where it restricts the rights, freedoms of natural or legal persons or provides for a new obligation or liability for them, or makes stricter the coercive measures applied to natural persons and the procedure for their application, the procedure for paying taxes, duties and other mandatory payments by natural or legal persons, the conditions and procedure for exercising control and supervision over the activities of natural and legal persons. Bearing in mind the position of democracy and, of course, the verity, the implementation of analogy, in fact, is limited in the above-mentioned spheres. But a collision emerges between the solution given by the Law “On legal acts” and the regulation given by a legal branch. Article 9(3) of the Civil Code defines that the application by analogy of norms restricting civil rights and prescribing liability is not permitted.

It is obvious that legal analogy should not be applied in the fields of criminal law and administrative fees. This approach is coming from the fact that “similar” and “not similar” notions can be different for public officials, and the inferences vary from each other. This can lead to the jeopardy of arbitrariness⁸. Therefore, the application of analogy is inadmissible in the spheres of criminal and administrative responsibility from the legality point of view. Here we find the following rule: “There is no offense without law; thus, there are no punishment and penalty”. This rule is a safeguard for a person’s immunity and sustainability of legal regulation. The law-enforcing body cannot consider the absence of a norm of the legislation as a gap of positive law. This logic is based in the wording of the Article 5(2) of the RA Criminal Code, which prohibits application of analogy. As it concerns the Code on Administrative Offences, one cannot find such a rule there. However, it does not mean that the law enforcement authority can choose to

⁸ Komavrov S.A., *General Theory of State and Law*. Moscow, 1997, P. 315.

apply analogy when discovering any gap in law. The result of solving a case is the termination of that case. The above-mentioned gives us a ground to conclude that a law enforcement authority, when discovering an absence of a norm, must consider it either as legitimate, or as a real gap of law; and the only way to overcome it is through an appropriate norm.

Besides being regulated by the law on “Legal acts”, the analogy has been regulated also by other codes such as the Family Code, Labor Code, Civil Procedure Code, and the Civil Code. Some shortfalls can be found in each of them, and these need to be rectified in accordance with the legislative procedure. Thus, Article 5 of the RA Family Code, when defining the applicability of family and civil legislation in the procedure of analogy, uses the term “regulating identical [հույնսպիսի] relations”, which is wrong. The right term should be “similar [համանման]”. Besides this, while defining the analogy of law as through “gap of legislation”, it would be better to name it as analogy of the family legislation, but not analogy of law.

Article 10 of the RA Labor Code has used a more appropriate term than the Family Code – “similar”. But there is an essential collision between these two codes. Thus, the Labor Code defines that where the labor law is not directly regulated by the law, the norms of labor legislation (law analogy) regulating similar relationships are applied if it does not contradict their essence. One can conclude from this that a gap of law can be filled with norms of legislation. A question arises whether a gap of other regulatory legal acts (except law) can be filled with norms of the labor legislation, or not? The principle of legality gives directly a negative answer, which is not right. This means that the term “analogy of law” in the Labor Code must be renamed as “analogy of legislation”, and its definition must be clarified.

From this point of view, the Family Code has defined a more appropriate position. It has taken the concept of gap of “family legislation” and the opportunity to fill that gap by a “similar norm”. The Labor Code has not defined any hierarchy of sources and means of legal regulation.

There is a completely different definition of analogy given by the Article 10(3) of the RA Civil Procedure Code. One must say that it is irrelevant to have that article there. Anyway, it is apparent from the definition that it has a substantial, but not procedural meaning. This means that it is about applying substantial norms by analogy but not procedural norms. The article gives rise to misunderstandings in a way that a law enforcement authority can decide to apply a procedural norm by analogy. Besides this, here the point is the gap of law and other legal act, which can be filled also with norms of the law regulating similar relations. It means that the Civil Procedure Code sees the application of a norm of a similar law as the only way of filling “a gap of the legislation”. Application of the norms of other normative acts is prohibited. The existence of contradiction between the provisions of analogy of the Labor Code and the Family Code is obvious.

The legislative regulation of analogy given by Article 9 of the RA Civil Code is a better one in this context. The article, first of all, defines the hierarchy of legal sources and means regulating civil relations, where the analogies of *lex* and *jus* are the sixth and seventh. Second, the word “similar” is used here, which is more appropriate. Third, when there is a gap in law, and there is no agreement between the parties, nor there are customary business practices, then a law enforcement authority may apply legislative norms, provided that we understand the term “legislation” as it is defined in the RA Law “On legal acts”. But we have an essential contradiction between the RA Civil Code and the RA Law “On legal acts”. The Civil Code, while speaking about legislation, takes in mind only the integrity of laws containing norms of civil law (Article 1). But Article 4(1) of the Law “On legal acts” defines legislation as the Constitution and the laws of the Republic of Armenia, decrees and executive orders of the RA President, decisions of the RA Government and the decisions of the RA Prime Minister. Besides this, the restricted fields of applying analogy are also contradictory in the Civil Code and the Law “On legal acts”.

The legal analogy is an exceptional measure to fill the gaps of

law. Bearing in mind that fact, a set of requirements and conditions has been developed in the theory of law that ought to ensure its due application⁹. Those requirements and conditions ought to ensure the jus legality during analogy application and not to allow having an arbitrary resolution of a case. Let us try to represent the requirements and conditions for due application of analogy in a systemized way brought to the light by the theorists of law:

a) analogy is applicable if it is directly permitted by law, which is a constitutional requirement;

b) the situation asking for a regulation by analogy must have legal essence and require legal solution;

c) the law enforcement authority must be sure that the particular situation has not been regulated by law or has been regulated partially;

d) while applying norms of law by analogy one must bear in mind that the similarities must be in essential issues, and the difference - in particularity¹⁰;

e) the situations developed and applied by using analogy must not contradict any of acting commandments of law;

f) the law enforcement authority must provide a well-grounded explanation on causes of applying analogy.

The comparative analysis of the legislation of the Republic of Armenia and doctrinal provisions developed by theory of law for filling gaps in law, shows that the legislative regulation of analogy in the RA Law “On legal acts” and other codes has essential shortcomings, laps and contradictions. Thus, it is required to do a systemized review of the given acts, in the light of the theoretical provisions of legal dogmatics on analogy.

⁹ General Theory of Law and State. V.V. Lazarev (ed.), Moscow, 1994, P. 176; Theory of Law and State. N.I. Matuzov and A.V. Malko, Moscow 1999, pp. 423-424; Theory of Law and State. G.N. Manov (ed.), Moscow 1995, P. 212. [Под ред. Н.И. Матузова и А.В. Малько. М., Юристъ, 1999, С. 423-424; Теория государства и права. Под ред. Г.Н. Манова. М., Изд. БЕК, 1995, С. 212].

¹⁰ Mukhaev R.T. Theory of Law and State. Moscow 2001, P. 398 [Мухаев Р.Т., Теория государства и права. М., Издательство ПРИОР, 2001, С. 398].