Legal analogy as a tool of overcoming gaps in the legislation

Аналогія права як засіб подолання прогалин у законодавстві

Yuriy Matat

Key words:

gap in legislation, legal analogy, principles of law, law enforcement.

Ключові слова:

прогалина в законодавстві, аналогія права, принципи права, правозастосування.

Gaps in legislation are traditionally regarded in the legal science as one of the most common types of law defects. The presence of gaps undermines the internal consistency of the legal system and, as a result, causes failures in the legal regulation. Therefore, the effectiveness of the latter depends first of all on bringing the gaps as one of the defects in the legislation to a minimum level, on how quickly they can be overcome in the process of implementing the provisions of law. This gives grounds to assert the relevance and expediency of scientific development of ways to overcome gaps in legislation in the law enforcement process, one of which is the institution of the legal analogy.

When overcoming gaps in the legislation, especially when there is not even a similar rule fixed in the latter, the legal analogy can be applied, i.e. a case or separate legal issue is decided on the basis of principles, general foundations and meaning of the law. The legal analogy is applied in cases where, firstly, there is no rule that would directly stipulate the regulation of this issue, and secondly, there is no rule that would provide for such case (that is, the analogy of law is impossible).

In general, in the history of the domestic legal thought, the issue of distinguishing the legal analogy and the analogy of law has become debatable. So, S.I. Vilnianskyi rightly saw the admissibility of analogies in civil law, pointing out that before applying the legal analogy, it is necessary to apply the analogy of law[1]. Therefore, the legal analogy was allowed on the grounds that not all cases can be stipulated in the law, while the court is obliged to resolve any case. I.B. Novytskyi recognized the difference between the legal analogy and the analogy of law, according to whom, no matter how difficult it was to derive the general principles of legislation, this operation is nevertheless easier than deciding whether the circumstances of the disputed case are quite similar to those, provided for by that separate norm, which they seek to apply by analogy[2]. Therefore, instead of questionably finding facts that fall under the analogy of law, one should directly apply the legal analogy. This, according to I.B. Novytskyi, will make impossible the erroneous application of the analogy of law.

The supporters of another point of view according to whom there are no fundamental differences between the analogy of law and the legal analogy, include, in particular, Ye.V. Vaskovskyi, who argued that, by its logical nature, the legal analogy is identical to the analogy of law and differs from the latter only in the larger scope of the material over which it operates. Considering the essence of the legal analogy, Ye.V. Vaskovskyi reduced it to the fact that in the absence of a ready-made norm in the legislation that could be applied to a particular case, a new norm concerning a homogeneous case is derived from the norms already available, and then this new norm applies by analogy to a non-statutory case[3].

Moreover, the filed-specific literature describes a slightly different approach to the definition of the legal analogy, which supporters (namely, E.Sh. Kemularia) argue that this institution has no direct relation to the analogy (if by that in the literal sense of the word we mean the comparison of two close and equivalent in im-

[1] Vilnianskyi S.I. The Importance of Logic in the Application of Legal Norms. Scientific Notes of the Kharkov Institute of Law named after L.M. Kahanovich. 1948. Issue 3. P. 105.

[2] Novitsky I.B. Sources of Soviet Civil Law. Moscow: Yuridicheskaya literatura, 1959. P. 120, 124.

[3] Vaskovskyi Ye.V. Civilistic Methodology. Part 1: The Doctrine of the Interpretation and Application of Civil Laws. Odesa: "Ekonomicheskaia" Printing House, 1901. P. 268.

portance and location of objects). In the case of analogies, there are no such equivalent objects for comparison. So, unlike the analogy of law, in case of the legal analogy, the legal evaluation of the disputed legal relationship does not take the form of inference by analogy, but the form of syllogism, the great premise of which is the specific provision of general principles of legislation. The application of the legal analogy is undoubtedly characterized by a more creative character than the application of the law by analogy, since the law-enforcer must find some general legal principle to which the "legal consequence adapts"[4] rather than a norm. The established norm will reflect the general idea that underlies the relevant laws. This will be the disclosure of the legal principle intended to play the role of a large premise in a conclusion by analogy.

The definition of the legal analogy as "the resolution of a case based on the general principles and meaning of legislation" seems to proceeds purely from positivistic positions. However, as V.H. Rotan rightly notes, it makes a certain sense, because in connection with the normative consolidation of the principle of the rule of law in part 1 of Article 8 of the Constitution of Ukraine and Article 6 of the Code of Administrative Justice of Ukraine, the legislation system is supplemented with the foundations contained in this principle. These principles can now also be applied in the legal analogy, even if the latter was understood as the solution of a case based on the general principles and meaning of legislation (rather than the law). Only taking into account the need to overcome the tradition of positivism, which is especially relevant for the post-Soviet countries, in particular, for Ukraine, science should nevertheless insist on applying, by the legal analogy, the principles of law rather than legal principles[5].

With due regard to the above, it becomes necessary to determine the order of application of phenomena that are used in the legal analogy. So, first of all, it is advisable to apply normatively fixed common fundamentals (principles), general fundamentals (principles) arising from acts of legislation, and finally the legal principles (natural law)[6]. The application of the latter is justified by the fact that the judiciary power in its activities is connected not only with the principles enshrined in the laws and the laws themselves, but also with the so-called "unwritten principles", which may not be fixed directly in laws, since they reflect the fundamental values of the legal system. This feature is noted by J.L. Bergel, who points out that the general principles of law are the provisions (rules) of objective law that may or may not be embodied in the texts of normative acts, but are necessarily applied in judicial practice and are of a sufficiently general nature[7]. The general principles of law, both in theory and in practice, mean the basic principles, the provisions of law, which determine its social essence. The principles include such categories as justice, equality, humanism, etc. Moreover, the last place in the above list of ideas of natural law should not be perceived as an understatement of the regulatory meaning of these ideas. As V.H. Rotan notes, this can be interpreted in such a way that these ideas have the last word. After all, what is established by law needs to be properly studied in the process of law enforcement, but it does not need to be applied, because at the final stage of the interpretation of legislative acts, the results can be revised due to the discrepancy between these results and the rule of law[8]. This approach is shared by S.S. Alekseev, who argues that in the legal analogy the principles (both general legal and sectoral) perform a directly regulating function and act as a single regulatory and legal basis for an enforcement decision[9].

Characterizing the nature of the legal analogy, we should agree with I.V. Spasybo-Fateieva, who states that the legal analogy requires the application of a norm that is not similar to the principle embodied in it, but with the borrowing of the essence of the issue, the selection of a more abstract principle for its solution – the

---

[4] Shershenevych H.F. General Theory of Law: Textbook: in 2 vol. (as edited in 1910–1912). Moscow: Judicial College of Moscow State University, 1995. Vol. 2. Issue 2, 3, 4. P. 320.

[5] Scientific and Practical Comments to the Civil Law of Ukraine: in 4 vol. / V.H. Rotan, A.H. Yarema, V.V. Krivenko et al.; ed. by V.H. Rotan. Kyiv: Yurydychna Knyha; Sevastopol: Institue of Leagl Research, 2008. Vol. 4: Methodology of interpretation of normative legal acts of Ukraine. P. 772–773.

[6] Scientific and Practical Comments to the Civil Law of Ukraine: in 4 vol. / V.H. Rotan, A.H. Yarema, V.V. Krivenko et al.; ed. by V.H. Rotan. Kyiv: Yurydychna Knyha; Sevastopol: Institue of Leagl Research, 2008. Vol. 4: Methodology of interpretation of normative legal acts of Ukraine. P. 774.

[7] Bergel J.L. General Theory of Law / transl. from French by G.V. Churshukova. Moscow: Nota Bene, 2000. P. 168–172.

[8] Scientific and Practical Comments to the Civil Law of Ukraine: in 4 vol. / V.H. Rotan, A.H. Yarema, V.V. Krivenko et al.; ed. by V.H. Rotan. Kyiv: Yurydychna Knyha; Sevastopol: Institue of Leagl Research, 2008. Vol. 4: Methodology of interpretation of normative legal acts of Ukraine. P. 774.

[9] Alekseev S.S. General Theory of Law: Textbook. Moscow: TK "Velbi", Publishing House Prospekt, 2008. P. 553.

relevant principle of law, which justifies the decision of the court[10]. As noted in the Western legal literature, the principles represent the concretization of legal values in the legal system, mediate between legal values and positive law, serve as a basis for the creation of legal norms (they can be taken as a basis both for the legislator to create new rules of law, and for the court in the process of law enforcement)[11]. Moreover, the principles differ from the norms by the degree of generalization, they serve as a basis for the functioning of the norm and link the provisions of regulatory legal acts with the requirements of the legal system. Thus, according to R. Dworkin, the principles do not directly produce legal consequences, they determine the motive (reason) that provides arguments regarding a certain direction of decision making, but it does not necessarily lead to a definite result[12]. In turn, F. Jacobs points out that "the role of general principles of law cannot be defined abstractly, but only with reference to the results achieved in specific cases: to obtain practical significance, the study of such principles should be carried out in the context of results"[13].

Investigating the legal nature of the principles of law, S.P. Pohrebniak gives the main features that distinguish them from other rules of law: 1) the legal principles are a concentrated expression of the most important essential features and values inherent in a particular system of law. They can have a moral and ethical orientation, forming a universal dimension of law and its moral foundation, that is, they fulfill the axiological function of law. The other group consists of the principles that form the organizational and procedural basis of law, and are aimed at fulfilling the function of law as a social regulator; 2) the legal principles are characterized by the most general nature, thus implying the highest degree of their abstraction, and their normative content is revealed in the course of practical activities of various branches of state power. Moreover, the disclosure of their content is not the exclusive prerogative of legislative bodies, and an important role in this process is assigned to the courts, primarily the constitutional one; 3) the principles determine the content character of the system of law and the direction of its further development, thus fulfilling the system-forming, system-guiding and interpretative functions, and legal norms are usually only different manifestations of the principles, tools of their concretization. To fill gaps and overcome contradictions, they also perform a legal compensatory function; 4) in comparison with other legal norms, the legal principles are more stable, remain unchanged for a long time, but this does not interfere with the principles of evolving together with society; 5) as well as other legal norms, principles are fixed in external legal forms (sources)[14].

Proceeding from these signs of the principles of law, it can be concluded that their most complete disclosure is impossible outside the active creative activities of the judicial branch, which binds the norms of law to the up-to-date requirements of life and specific life situations through the principles of law, both through the disclosure of their additional content (concretization), and by formulating new principles. This, in particular, enables the courts to apply the law even in the absence of relevant legal norms[15]. In fact, this means that the courts in these cases follow the concept that the new rules of law that they apply are based not only on legal acts, but also on general principles of law.

Let's consider examples of application by courts of analogy of the right when overcoming available gaps in the legal regulation.

Thus, resolving the gap to the effect that the current Civil Procedural Code of Ukraine does not provide for the possibility of appeal against the ruling of the court on the issuance of the writ of execution based on the decision of the arbitral tribunal, the panel of judges of the Chamber of Civil Cases of the Supreme Specialized Court of Ukraine for the Review of Civil and Criminal Cases, based on the principles of the rule of law, the provisions of Articles 21, 22 of the Constitution of Ukraine on the inviolability of the constitutional rights of the individual, the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right of a person to have access to a court and a fair trial of hi/hers case by the court, and the provisions of the Civil Code and the Civil Procedural Code of Ukraine on the right of a person to judicial protection of civil rights and interests, priority of the individual's right to judicial protection of civil rights and interests,

[10] Spasybo-Fateieva I.V. Transcendental Judicial Mimicry or the Pprinciples of Law, Legal Analogy and Analogy of Law in Judicial Practice. Herald of the Academy of Legal Sciences of Ukraine. 2003. № 4(35). P. 142.

[11] Shevchuk S.V. Judicial Law-Making: World Experience and Perspectives in Ukraine. Kyiv: Abstract, 2007. P. 288.

[12] Dworkin R. Taking Rights Seriously / transl. from English by A. Frolkin. Kyiv: Osvnovy, 2000. P. 24.

[13] Shevchuk S.V. Judicial Law-Making: World Experience and Perspectives in Ukraine. Kyiv: Abstract, 2007. P. 288.

[14] Pohrebniak S.P. The Implementation of the Principles of Law in Legal Acts. Herald of the Academy of Legal Sciences of Ukraine. 2006. № 2(45). P. 21–32.

[15] Hartley T.K. The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community. Moscow: Zakon i Pravo, 1998. P. 143–145.

including by appealing against actions and decisions. Thus, on the basis of the application of the legal analogy, the court came to the conclusion that the determination of the competent court to issue an enforcement document for the execution of the decision of the arbitral tribunal is subject to appeal[16].

Another example of the application of the legal analogy may be the determination of the Supreme Specialized Court of Ukraine for the consideration of civil and criminal cases dated 21 December 2011 in case № 6-44753cv11[17]. In this case, the judicial panel, considering the cassation appeal against the ruling of the court of first instance (upheld by the appellate court), which according to the current version of the Criminal Procedural Code of Ukraine, was not subject to appeal, concluded that the lack of legislative consolidation of the possibility of a cassation appeal against such determinations is not an obstacle to their revision in cassation. Moreover, the judicial panel proceeded from the fact that the main principle of legal proceedings, enshrined in the Constitution of Ukraine, is the legality and in accordance with the Law of Ukraine "On the Judicial Organization and Status of Judges", the court, administering justice on the principles of the rule of law, ensures the protection of human and citizen rights and freedoms guaranteed by the Constitution of Ukraine and laws of Ukraine, the rights and legitimate interests of society and the state. Based on this, the court concluded that the prohibition of cassation review concerns only decisions made by the court within the limits of its powers. Consequently, having established that when issuing the determinations appealed, both the first court and the appellate court, acted contrary to the rules of procedural law and beyond its procedural powers, the Supreme Specialized Court of Ukraine for the Review of Civil and Criminal Cases, in spite of the absence of legislative fixation of the possibility of cassation appeal of such determinations, opened the cassation proceedings on the case and satisfied the cassation appeal.

Thus, as can be noted, the court case was decided, in particular, based on the rule of law. In general, it should be noted that this principle or the basic principles that make up its content are often applied in the legal analogy, if the relevant relations on the part of legislation are not regulated and there is no law that can be applied to these relations in the manner analogous to the law. This is justified, first of all, by the fact that the principle of the rule of law is considered as a derivative of all general principles of law, as a value-based fusion of these ideas[18].

On the basis of the foregoing, it can be stated that when gaps are eliminated by the legal analogy, the principles have a direct regulatory impact on public relations, determining the overall legal settlement of the relationship and being the legal basis on which a particular rule for overcoming the gap is formed. Moreover, the application of the institution of the legal analogy provides for mandatory compliance with the requirements of legality, presupposing the existence of a justified motivation for the adoption of an appropriate decision, indicating the legal basis for applying the analogy.

Summary

The article explores the nature of the institution of the legal analogy as well as its importance for overcoming gaps in the legislation in the law enforcement process. In particular, the conditions and grounds for applying the legal analogy are analyzed; the order of application of the phenomena that are used in the legal analogy is examined; this institution is distinguished from adjacent legal phenomena.

Анотація

У статті досліджується природа інституту аналогії права, а також його значення для подолання прогалин у законодавстві в процесі здійснення правозастосовної діяльності. Зокрема, проаналізовано умови й підстави застосування аналогії права, розглянуто порядок застосування явищ, які використовуються під час аналогії права, та проведено відмежування зазначеного інституту від суміжних правових явищ.

[16] The determination of the Supreme Specialized Court of Ukraine for the Review of Civil and Criminal Cases dated November 9, 2011 in case № 6-23699cv11. URL: http://www.reyestr.court.gov.ua/Review/19512819.

[17] The determination of the Supreme Specialized Court of Ukraine for the Review of Civil and Criminal Cases dated December 21, 2011 in case № 6-44753cv11. URL: http://www.reyestr.court.gov.ua/Review/21117266.

[18] Pohrebniak S.P. The Fundamental Principle of Law (Content Characteristic): Monograph. Kharkiv: Pravo, 2008. P. 38.

Literature:

1. Alekseev S.S. General Theory of Law: Textbook. Moscow: TK "Velbi", Publishing House Prospekt, 2008. 576 p.
2. Bergel J.L. General Theory of Law / transl. from French by G.V. Churshukova. Moscow: Nota Bene, 2000. 576 p.
3. Vaskovskyi Ye.V. Civilistic Methodology. Part 1: The Doctrine of the Interpretation and Application of Civil Laws. Odesa: "Ekonomicheskaia" Printing House, 1901. 400 p.
4. Vilnianskyi S.I. The Importance of Logic in the Application of Legal Norms. Scientific Notes of the Kharkov Institute of Law named after L.M. Kahanovich. 1948. Issue 3. P. 77–110.
5. Dworkin R. Taking Rights Seriously / transl. from English by A. Frolkin. Kyiv: Osvnovy, 2000. 519 p.
6. Scientific and Practical Comments to the Civil Law of Ukraine: in 4 vol. / V.H. Rotan, A.H. Yarema, V.V. Krivenko et al.; ed. by V.H. Rotan. Kyiv: Yurydychna Knyha; Sevastopol: Institue of Leagl Research, 2008. Vol. 4: Methodology of interpretation of normative legal acts of Ukraine. 847 p.
7. Novitsky I.B. Sources of Soviet Civil Law. Moscow: Yuridicheskaya literatura, 1959. 162 p.
8. The determination of the Supreme Specialized Court of Ukraine for the Review of Civil and Criminal Cases dated November 9, 2011 in case № 6-23699cv11. URL: http://www.reyestr.court.gov.ua/Review/19512819.
9. The determination of the Supreme Specialized Court of Ukraine for the Review of Civil and Criminal Cases dated December 21, 2011 in case № 6-44753cv11. URL: http://www.reyestr.court.gov.ua/Review/21117266.
10. Pohrebniak S.P. The Fundamental Principle of Law (Content Characteristic): Monograph. Kharkiv: Pravo, 2008. 240 p.
11. Pohrebniak S.P. The Implementation of the Principles of Law in Legal Acts. Herald of the Academy of Legal Sciences of Ukraine. 2006. № 2(45). P. 21–32.
12. Spasybo-Fateieva I.V. Transcendental Judicial Mimicry or the Pprinciples of Law, Legal Analogy and Analogy of Law in Judicial Practice. Herald of the Academy of Legal Sciences of Ukraine. 2003. № 4(35). P. 139–149.
13. Hartley T.K. The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community. Moscow: Zakon i Pravo, 1998. 703 p.
14. Shevchuk S.V. Judicial Law-Making: World Experience and Perspectives in Ukraine. Kyiv: Abstract, 2007. 640 p.
15. Shershenevych H.F. General Theory of Law: Textbook: in 2 vol. (as edited in 1910–1912). Moscow: Judicial College of Moscow State University, 1995. Vol. 2. Issue 2, 3, 4. 362 p.

Yuriy Matat,
Candidate of Juridical Sciences,
Assistant of the Theory and Philosophy of Law Department
of Yaroslav Mudryi National Law University