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METHODS OF LEGAL REASONING IN THE CASE OF PRINCIPLED LEGISLATION

My argument is that modern legislator is not able to legislate through the all-or-nothing type rules. (Sieckmann, 2013, Flückiger, 2016) The norm type of modern posited legislation is most often posited legal principle, not a rule. (Dworkin, 1985 and Dworkin 1997;Alexy, 2000, 2002 and 2003;Sieckmann, 2009, 2016). By the term positing I refer here the established positive law – human made written legislation. I argue, that human made written legislation is posited law (legal positivism?), not moral norms.

Here my theoretical focus is on how to cope methodologically posited legal principles? How to "interpret" human made posited principled legislation? As a material of this paper I have used relevant legal literature, European Union legislation and case law. The structure of paper is:

- The concept of rules and principles as positive law norm models
- Principled legislation – posited goals and rights articulated by human made legal principles
- Absoluteness of posited rights – the role of discretionary power
- Balancing and proportionality principle as methods to apply posited legal principles

In legal context our purpose is to formulate a rule in the individual concrete case. Literal method or keeping in the wording as traditional interpretation methods do, are important but not usable in the modern law. For example, the article 1 of European Union General Data Protection Regulation (2016/679) states that
"1.This regulation lays down the rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data."

The principled legislation often speaks about rules. However, the recital part (4) of the Act states, that the right to the protection of personal data is not absolute right. It need to be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. The Act necessitates balancing and following the principle of proportionality. (Tushnet, 2018; Beck, 2012, Klatt, 2015; Sieckmann, 2016)

The most "rights" are not absolute rights. (Omega Spielhallen, Schmidberger) How to cope the modern posited law? What methods we need. Is there need to define the legal positivism in new way?

METHODS OF LEGAL REASONING IN THE CASE OF PRINCIPLED LEGISLATION

1 THE PROBLEM

I argue in this paper, that modern legislator is not able always to legislate through the all-or-nothing type rules. In literature it has been stated that legal principles do not contain definitive deontological propositions. They are prima facie norms that point to a direction and ultimately necessitate a weighing of interests. The principle of certainty, like other principles, does not tell definite answers. It serves one argument in legal reasoning with other principles, rules, facts and values.[1]

My theoretical focus is on the question, how to cope methodologically posited legal principles? How to "interpret" modern human made principled legislation?

By the term "posited" I mean here the established positive law – human made written legislation with words and texts, usually enacted by the Parliament but also adopted by international organization, like European Union legislator. I argue, that human made written legislation is posited law (legal positivism?), not moral norms.

As a material of this paper I have used relevant legal literature, European Union legislation and Union case law. European Union legislation, which is the product of the Union legislating process, is an important source of law in European Union nation states.

2 NORM TYPE AND NORM MODELS

Among others, Charles-Albert Morand has emphasized, the communication is one important framework where the legislation, given as legislative texts (encoded) and the application of law from the legal texts (decoded) must be considered.[2]

However, the norm type of modern posited legislation is most often posited legal principle, not a rule. Compared to the rules, the open principles often express goals, purposes and states of affairs in the future. Instead of "principles" the "rules" often define and express the very thing they regulate. Compared to the rules, the principles are different from the point of view their application and interpretation so that they are less-more type norms, so that rules primarily are

[1] Sieckmann, 2016, 349−352; Popelier, 2008, 61.

[2] Morand, 2000, 59−60.

exclusive and more exact and precise by their expression and concepts[3]. One definition says that bot the rule and principles are norms and they are normative on that ground that they both express what "ought" to do[4].

As norm types, the rules are conditional, all-or-nothing norms; the principles are norm types leaving room for various kinds of discretion.

The norm models are usually categorized: *action-norms, goal-norms and rights-based norms.* Action-norms most often regulate with the rules. We know well that the principles as norm type are typical to goal-norms. However, the norm type of most "rights" in legislation is principle, too. The most "rights" are not absolute rights.[5] The "rights" only seldom are absolute. The Court has solved in this respect conflicting interest, value pluralism and also filled gaps in European Union legal order. The known cases, in this respect, are *Omega Spelhallen* and *Schmidberger*[6]. The problem is, how to methodologically cope the modern principled posited law? What the methods mean in this situation?

3 THE NATURE OF DISCRETION

What kind of discretion we use in case of principled legislation? Methodologically the discretion is not based only on the words of legislative text. When we are interpreting, the problem is not linguistic, literal or semantic, in its nature. The discretion most often relates to the aims and means of the principled legislation, also to the rights. Instead of linguistic clarity we should pay attention to other aspects of normative clarity, meaning that the legislation is understandable and substantially sufficient[7].

From the point of view message-sending and communication there are problems. This means problems in the communication model of legislation as well in encoding as in decoding. Already Müller in his *Elemente einer Rechtssetzungslehre* (1999, 2nd ed. 2006) has stated that we are not any more linging in the law-giving state (*Rechtsetzungsstaat*) where the law-giver legislates generally applicable and abstract norms and they are executed and judged as the "the bouche de la loi". The modern law in *multifunctional* so, that law-making and law applying are merely functioning together.[8]

The uncertainty of European Union legislation may mean that there is not found legally predetermined answer from legislative materials. The problem is how to cope this kind of uncertainty that may have several categorised into three forms, linguistic uncertainty, normative uncertainty or epistemic uncertainty.

4 BALANCING AND PROPORTIONALITY PRINCIPLE AS METHODS TO APPLY POSITED LEGAL PRINCIPLES

In legal context we think that our purpose is to formulate *a rule* in the individual concrete case. Literal method or keeping in the wording as the traditional interpretation methods do, are important but not usable only in the modern law.

[3] Sieckmann, 2016, 369–370; Sieckmann, 2010, 75–77, the role of principles; Ávila, 2007, 11; Alexy, 1994, 72–73; Dworkin, 2001, 22–28, Dworkin, 1997, 22–31. Sieckmann, 1990, 53.

[4] Alexy, 2004, 45.

[5] Beck, 2012, 118, 139 and 155–157.

[6] C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, ECR 2004 I 09609 and C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österrreich, ECR 2003 I 05659.

[7] Flückiger—Grodecki, 2017, 53—55.

[8] Müller, 1999,5—8.

How we find/formulate *a rule* when the legislation we apply is principled? As we see, principled legislation speaks about "rules".

For example, the article 1 of European Union General Data Protection Regulation (2016/679) states that

"1.This regulation lays down the rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data."

So, the principled legislation speaks about "rules". What it means? Who makes the "rules"?

"The recital part (4) of the Act states, that the right to the protection of personal data is not absolute right. It needs to be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. The Act necessitates balancing and following the principle of proportionality."

Tushnet writes that balancing is subjective method of court to decide the outcome of the case. He defines that proportionality test provides a more structured form of analysis[9]. For example, the European Union Charter of Fundamental Rights has become more important basis of proportionality tests. The Union Court in its *Grand Chambre* case concluded that European Union legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of 7 article and 8 article and the article 52(1) of the Union Charter of Fundamental rights. The Union Court was in its reasoning emphasising the Union Charter 52 (1) with provision that

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by the law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

The Union Court of Justice stated the directive invalid.[10] This means that the provisions of the EU act are invalid and null in EU law. The Court of Justice stated that Union legislature was breaching the discretionary power which the following the proportionality principle necessitates[11].

CONCLUSIONS

The modern legislation is principled. In application phase the words and text of legislation are not necessarily dominant. However, the aims and means in legislations need to be balanced. The rights must meet the proportionality principle. Discretion is not linguistic or semantic, alone. Application of law must be interested in various kinds of case-law. In European Union case the Court may even invalidate the legal act in the case if it does not fulfil proportionality. So, it is one way and model how to settle the normative clarity of modern principled legislation.

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[9] Tushnet, 2018, 84–85.

[10] C-293/12 and C-592/12 Digital Rights Ireland Ltd. and Kärntner Landesregierung, Michael Seitlinger etc. European Court, Grand Chambre, 8 April 2014, EU:C:2014:238, para 69 and para 73.

[11] Joined cases C-293/12 ja C-592/12 Digital Rights Irealnd Ltd. v. Minister for Communications et. al and Kärntner Landesregierung, Michael Seitlinger ym., Grand Chamber, 8 April 2014, paras 18 and 26 and 27 both 46 and referred case-law both 69. ECHR-Court S ja Marper v Yhdistynyt Kuningaskunta, Grand Chamber, number 30562/04 and number 30566/04, CEDH 2008-V.

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