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THE LAW-MAKING PRINCIPLES FOR DEVELOPING THE CIVIL LAW LEGAL SYSTEM

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ABSTRACT

Law-making principles of civil law form a collection of guidelines, directives and legal regulations pertaining to enacting normative acts in a particular country. The civil law legal system is characterised by the supremacy of statutory law, which results in a formalised character of principles pertaining to the formulation of legal norms' texts as well as them coming into force, being changed or repealed. The above principles refer to norms set by domestic entities as well as external entities, in instances of international law or European law being incorporated into the domestic legal framework. Apart from rules of normative character, praxeological principles which ought to be applied by a rational lawmaker should be taken into account. However, it is only the combination of the law-making principles with the axiological model which ensures the development of a hierarchical, non-contradictory and comprehensive legal system.

A system is defined as a whole composed of elements interrelated with one another in accordance with particular principles. A legal system constitutes one of the systems functioning in our surrounding reality. It is a collection of general and abstract norms outlined in normative acts which are ordered and interrelated and enforced in a particular country at a particular time.[1]

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One of the main classifications of legal systems is the division into the civil and common law systems.

Civil law is applied in France, Switzerland, Germany, the Netherlands, Italy, Scandinavia and Poland, among others. It emerged on the basis of Roman law and legal positivism, which presupposes the supremacy of statutory law over natural law. The following constitute the stipulations of the civil law legal system:

a) The principle of statutory law's dominant position as the source of law;
b) Prohibition of passing law by tribunals which, at the same time, enforce it, interpret it but do not enact it;
c) Minimisation of the significance of other forms of law: custom law, natural law;
d) Law's rationality, non-contradiction of legal norms, and lack of legal loopholes;
e) The code as the perfect form of statutory law, which regulates a particular sphere of social life in a comprehensive and exhaustive manner.

The common law legal system is based on the following stipulations:

a) it constitutes a mosaic of statutory law, judicial law, also known as case law, custom law, and equity;
b) Statutory law holds the supremacy but not exclusiveness;
c) The significance of tribunals formulating general and abstract principles of proceeding, which may form a basis for further verdicts;
d) The legal system in force in a particular society is not fully cohesive, rational and contains loopholes. As a consequence, private conversations, which replace codification, play a more significant role. However, the way the law functions is fundamental.

Moreover, dissimilarities within the framework of the above-mentioned systems can be found. For example, such differences can be observed between the British and American or French and German legal systems.[2]

[1] T. Stawecki, P. Winczorek, Wstęp do prawoznawstwa, Warszawa 2002, p. 109-110.
[2] T. Stawecki, P. Winczorek, *op. cit.*, pp. 114-116.

The objective of the paper is to establish the law-making principles for the development of a legal system, their significance and consequences of their application in the formation of the civil law legal system.

The fundamental stipulation of civil law is that it ought to be hierarchical, comprehensive and non-contradictory.

The hierarchical structure of a legal system denotes that norms set by the entity positioned higher in the hierarchy possess greater significance. Norms set by entities occupying lower positions in the hierarchy cannot contradict norms of greater significance.[3]

The system's comprehensiveness denotes that it ought to regulate issues which are significant and should be regulated by law. In instances where it can be rationally stated that the system lacks regulations, an unintentional omission on the part of the lawmaker, the existence of a legal loophole is acknowledged. The evaluation if such occurrence ensues from the conscious negligence on the part of the lawmaker, or if it is indeed a legal loophole, is based upon the following premises: the familiarity with the positive law, and knowledge of axiological preferences and intended objectives of the lawmaker expressed in other legal acts or reconstructed by the doctrine. If the analysis of the premises indicates that it is improbable that a rational lawmaker would leave a particular state of affairs out of the legal system, the existence of a legal loophole is acknowledged.[4]

A legal loophole can emerge in the following conditions:

a) The lawmaker has not completed the legislative process despite their declaration to do so, e.g. no secondary legislation has been passed to an act, despite the existence of blanket provisions obliging the proper entity to undertake such action;
b) Despite the legislative process running its course, no norms defining a particular issue can be set, e.g. an entity emerges, but its full competencies have not been established.

The above loopholes are characterised as structural loopholes. Apart from these, axiological loopholes may emerge, which, according to a part of the doctrine, are apparent and exist only in the imagination of people evaluating the law, and constitute their postulates as regards the essence of

[3] Ibidem, p. 111.
[4] Ibidem, pp. 123-124.

the enforced law. In addition, some representatives of the doctrine indicate the existence of logical loopholes, which emerge in cases of norms' contradiction. In such instances, the state of "legal vacuum" occurs. This, however, can be remedied by the application of conflict of law rules. Structural loopholes may be eliminated by lawmakers themselves, by means of passing law, as well as by means of argumentum a simili (an argument drawn from a similar case), also known as inference by analogy i.e. per analogiam.[5]

A non-contradictory legal system denotes that norms comprising the system ought not contradict one another as regards logic, axiology and praxeology. Should contradictions in the system arise, conflict of law rules are applied in order to eliminate these. The first conflict of law rule, pertaining to the hierarchical order of norms, stipulates that a superior hierarchical legal norm repeals an inferior norm in the hierarchy *(Lex superior derogate legi inferiori)*. A further rule pertains to the timeframe and states that a posterior norm repeals a prior one *(Lex posteriori derogate legi priori)*. Should a contradiction arise between two normative acts of equal rank, the ruling ought to be in favour of the posterior act. The final rule, pertaining to the scope of content-related order, stipulates that a special norm repeals a general one *(Lex specialis derogate legi generali)* if the norms have been set at the same time. Should the time of such two norms coming to force be different, the rule stipulating that the posterior act does not repeal a prior special act is applied *(Lex posterior generalis non derogate legi priori speciali)*.[6]

The above-mentioned features ensure the cohesion of legal regulations, legal reliability and unequivocal understanding of legal norms. The features ought to be reflected in any legal system. However, they will be preserved in a different manner and various legal instruments will be applied in order for the features to be realised. Undeniably, non-contradiction of legal norms ought to be featured in any legal system. However, rules and legal means applied in order to eliminate contradictions will vary. The application of a legal system's comprehensiveness will be different in civil law due to the key role of statutory law and formalised law-making procedure. On the other hand, in common law, the variety of sources of law results in a greater flexibility in law-making and its application. In the civil

[5] T. Stawecki, P. Winczorek, *op. cit.*, pp. 124-126, 169.

[6] J. Krukowski, *Wstęp do nauki o państwie i prawie*, Lublin 2004, p. 127.

law legal system, with its formalised and specific system of sources of law, the position of a particular legal norm in a system of norms will not be debatable as much as in the common law legal system, where, apart from statutory law, judicial law, custom law and equity are in force. The law-making principles ought to take into account and apply the above features.

The law-making principles do not possess a single, precisely defined significance. Usually, the principles refer to directives, which are not unanimous in character, and define the objectives of legislative activities, organisation of legislative works, rules for formulating the texts of normative acts, etc.[7] They ought to have a universal character, which means that:

a) their text and application must refer, in the same scope, to the whole legal system, regardless of the object of regulations,
b) are binding for law-making entities,
c) ought to be clearly stated in the legal text.

The objective of the law-making principles is the following:

1. The adequacy of statutory law as regards political, economic and social conditions.
2. Maximisation of social effectiveness of law associated with the society's respect for it and approval of legal solutions;
3. Rationalisation of the legislative process based on uniform rules and regulations approved in a particular country.[8]

The law-making principles serve the purpose of systematisation of law, which entails ordering the legal material as regards its object, subject and hierarchic character of norms.[9]

The basis for the formulation of any kind of legal norms is a proper norm of competence. Legal norms granting particular entities competencies for setting or acknowledging general and abstract norms, constitute norms granting legislative competencies. Such competencies demand norms which will be set or legally acknowledged by an entity possessing a particular competence to be followed. These norms determine the type of course and scope a particular entity can set legal norms in. Therefore, it can

[7] S. Wronkowska, *Zasady tworzenia prawa*, [w:] *Zasady tworzenia prawa*, A. Michalska, S. Wronkowska, Poznań 1983, p. 55.

[8] Por. J. Bafia, *Zasady tworzenia prawa*, Warszawa 1980, p. 82.

[9] M. Borucka-Arctowa, J. Woleński, *Wstęp do prawoznawstwa*, Kraków 1997, p. 45.

be said that the norms determine the entities which possess particular legislative competencies as well as the scope of these competencies. Not every entity possesses legislative competencies and not every entity possessing these may set legal norms in any way and any scope.[10]As a consequence, any legal system ought to feature legislative principles. In the civil law legal system, they will be more formalised than in common law, which constitutes a mosaic of laws. Statutory law is based on clearly defined legal rules. Apart from statutory law, custom law is also in force, but is of lesser significance. This is a consequence of a long-term practice of people who believe these rules ought to be enforced. Furthermore, it must be acknowledged by the country. From the point of view of law's efficiency and achieving objectives by it, common law emerges in the bottom-up process, thus, due to social acceptance, the probability the norms will be respected is higher.

Law-making is a term encompassing various activities. The process may occur as a result of rule-making or practice. The latter encompasses custom law where the country's entities rule on the basis of customary rules (the so-called sanctioning of customs) and developing precedents by ruling in a particular case, which lays the fundament for rulings in similar consecutive cases. The precedent is characteristic for the common law legal system.[11] In the civil law legal system, law-making will encompass primarily rule-making and sanctioning of customs.

Rule-making, in the strict sense, denotes the unilateral issue of a legislative act, which forms a subordinate relationship between the lawmaker and those who the rule is made for. The lawmaker is not dependent on the rule's addressees to consent to being bound by the act's norms, which must be sufficiently general and abstract. Another form of rule-making encompasses an agreement featured in the sphere of public international law.[12]

Rule-making is a formalised, prospective and constitutive action undertaken by public authorities.[13] The formalised character is manifested in the following:

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[10] S. Wronkowska, *Prawo i polityka prawa*, [w:] *Zasady tworzenia prawa*, A. Michalska, S. Wronkowska, Poznań 1983, p. 7, 16.

[11] J. Wróblewski, *Zasady tworzenia prawa*, Warszawa 1989, pp. 16-22.

[12] Ibidem, pp. 17-19.

[13] T. Stawecki, P. Winczorek, *op. cit.*, p. 133.

a) It is conducted by competent public authorities;
b) The authorities are subordinated to particular decision-making procedures;
c) Normative acts possess a form defined by law;
d) Normative acts come into force in a legally defined manner.

The prospective character of the rule-making act denotes that it is concerned with the future, which means that it regulates the situation in relation to an undefined number of cases (abstract character of the norm) and regarding particular addressees (general character of the norm). Prospectiveness denotes that law ought not be retroactive *(lex retro non agit)*.

Constitutiveness denotes that pursuant to the decision of a competent public authority, laws are introduced into the system or legal norms are removed from it.[14]

In democratic states under the rule of law where civil law is in force, fundamental principles of rule-making are adopted. The following can be counted among them:

1) Defining the catalogue and hierarchy of sources of law in the constitution;
2) Granting rule-making competencies to parliamentary bodies in order for laws which are the most superior in the hierarchy and possess the greatest legal power to be enacted;
3) Rule-making on the basis of defined procedures and modes;
4) Granting executive rule-making act authorization to the executive government;
5) Parliament's constitutional right to commit its legislative powers to executive bodies (delegated legislation). Further commitment of these powers is forbidden (no subdelegation);
6) As a rule, all normative acts to be made public;
7) Evaluation of constitutionality of normative acts inferior to the constitution.[15]

Co-rule-making may also be a form of rule-making. It entails cooperation of public bodies in order to regulate a particular issue.[16]

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[14] Ibidem, p. 133.
[15] T. Stawecki, P. Winczorek, *op. cit.*, pp. 135-136.
[16] A. Redelbach, *Wstęp do prawoznawstwa*, Toruń 2002, p. 178.

Proper legislation stipulates the existence of "ratio legis" i.e. the reason for setting a particular normative act. It results from the acknowledged idea of the lawmaker's rationality, and consequently, rational law-making, which means that objectives of the legal regulation ought to be achievable, and the cost of achieving these ought not exceed their value. In addition, adequate means for achieving the objectives ought to be determined.[17]

Law-making in the civil law legal system proceeds on the basis of the approved legislative drafting principles which are understood as a skill of deliberate, rational and knowledge-based formulation of legal regulations and normative acts. The legislative drafting principles also encompass the collection of guidelines addressing entities developing normative acts.[18] The legislative principles encompass two kinds of directives:

a) Directives defining the means for formulation and designation of legal regulations as well as their systematisation in normative acts;
b) Directives indicating the means for incorporation of new norms into the system, change the text of the norms already in force or means for elimination of legal norms from the system.[19]

Assuming that law results from the lawmaker's actions, it can be considered that they are a "rational lawmaker". The model of rational legislation relies upon the definition and analysis of fundamental issues to be ruled on by the lawmaker if their actions are to be of rational character.

The model of rational legislation can be characterised by the following:

1) It is praxeological i.e. ought to include conditions for efficient operation. An efficient operation is the one which achieves its aim.
2) It pertains to any legislative actions regardless of the normative act's form, which ensures consistency of the system by generation of general and abstract norms.
3) It pertains to any legislative activities as regards the essence, thus is not limited to a particular branch of law.[20]

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[17] T. Stawecki, P. Winczorek, *op. cit.*, pp. 148-149.

[18] M. Błachut, W. Gromski, J. Kaczor, *Technika prawodawcza*, Warszawa 2004, p. 30.

[19] S. Wronkowska, M. Zieliński, *Problemy i zasady redagowania tekstów prawnych*, Warszawa 1993, p. 157. In Poland, the legislative drafting principles were defined in the Regulation of the Prime Minister of 20th June 2002 on „Legislative Drafting Principles" (Dz.U. [Journal of Laws] of 2002, No. 100, Item 908).

[20] J. Wróblewski, *op. cit.*, p. 49.

The model of rational law-making allows the ex-ante arrangements to be made as regards the efficiency of prospective legal solutions, and consequently, ensures efficient operation of law.[21]

The following stages of rational law-making can be enumerated:

1) Definition of objectives to be achieved in a particular field;
2) Determination of the catalogue of means for achieving the objectives;
3) Precise definition of objectives of a particular legislative act and determination of alternative ways of normalising the particular sphere of social relations;
4) Formulation of results and costs of each of the means of normalisation, and final decision-making;
5) Development of a legislative act's draft;
6) Enactment of the legislative act.[22]

According to the model of rational legislation, on the one hand, law is to constitute a response to the society's expectations, to order the reality, but on the other hand, it is to impose responsibilities and burdens, which enable the superior objectives of the country to be achieved. The model in the above shape is formalised and defined by provisions of law.

The law-making process ought to be also based on an axiological system which:

a) Is comprehensive i.e. defines the essence of all evaluations applied by the lawmaker;
b) Is open i.e. may be expanded with new evaluations according to the approved rules and in a manner which does not violate the system's features;
c) Is non-contradictory i.e. values do not contradict one another and their application does not generate conflicts;
d) It establishes a hierarchy between the evaluations, and criteria enabling them to be ordered in the approved hierarchy;

[21] H. Izdebski, *Elementy teorii i filozofii prawa*, Warszawa 2011, p. 296.

[22] S. Wronkowska, *Model racjonalnego tworzenia prawa*, [w:] *Zasady tworzenia prawa*, A. Michalska, S. Wronkowska, Poznań 1983, p. 39.

e) All elements assessing the legislation process are arranged so that in case of a conflict of evaluations, the hierarchically superior evaluation is preferred.

An axiological system is the one which evolves through legislative decisions.[23] Therefore, the lawmaker who changes their objectives in each consecutively passed normative act is not rational, even though the permanence of objectives to be achieved by a particular normative act cannot be presupposed. As a consequence, the requirement for a relative steadiness of objectives, which ought to be long-term, should be taken into account. Such activity is inseparably associated with the development of general and abstract norms. A rational legislator does not develop ad hoc legal rules in order to reach short-term objectives exclusively. It is only in unique circumstances that they enact normative acts for particular situations. However, this is also done with the general objective in the perspective. The relative stability of objectives reflects the stability of law's axiology, which determines not only the selection of objectives but also the choice of means for achieving these. The objective, which the lawmaker sets, ought to be defined sufficiently enough, keeping in mind the choice of means for achieving them.[24] Legal measures constitute a collection of potential solutions the lawmaker selects in order to achieve their objective or objectives of the developed regulation. The selection is based upon the efficiency and economy criterion as well as upon the compatibility with the value system and social policy.[25] Legal regulations may directly indicate the type of legal measures to be applied by the entity. A selection of a legal measure by the entity is also possible i.e. the entity exercises its discretionary powers granted in the particular regulation. Making use of the discretionary powers prerogative denotes the fact that the entity may take particular actions, thus making a selection, but only among the legal means indicated in the particular regulation. Therefore, the selection will never be unrestricted. The entity will always act within the bounds of the granted competencies.

Next, the lawmaker selects the form of the developed regulation. Their role comes down to the selection of a particular branch of law for

[23] J. Wróblewski, *op. cit.*, pp. 100-101.

[24] Ibidem, pp. 54-55.

[25] Ibidem, pp. 61-62.

the regulation, positioning the particular act in the hierarchy, and then framing the issue into legal regulations in accordance with the legislative principles. Associating the draft of the normative act with the particular branch of law entails legal consequences and the application of a suitable conceptual apparatus. The freedom of choice as regards the rank of the legal regulation depends on the legislative procedures in force. The rank of the regulation is significant from the point of view of law's functioning and its interpretation.

The development of a legal text is influenced by numerous factors. The chief factor among these encompasses regulations defining legislative drafting principles, which, apart from the properties of the legal regulation, take into account the distribution of legislative competencies in the country.[26]

Law-making is based upon legal norms, which grant particular entities competencies for setting or acknowledging general and abstract norms. The norms are defined as legislative competencies granting norms. They require that norms which have been set or approved by law by the entity holding a particular competence, and pertain to particular issues, are respected. The granting norms determine the mode and scope of issues, as well as the type of entity which possesses competencies for setting legal norms i.e. they define entities holding legislative competencies and the scope of these.[27]

A particular regulation comes into force only when it has been adopted. If a normative act is not made public, no legal effects are produced. A properly proclaimed normative act becomes a contribution to a particular country's legal framework in a given timeframe.

The text of the proclaimed normative act becomes official. Moreover, in case of such act being proclaimed, the notion of ignorance of law is adopted i.e. every addressee is offered an opportunity to familiarise themselves with the text.[28]

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[26] J. Wróblewski, *op. cit.*, pp. 62-64.

[27] S. Wronkowska, *Prawo i polityka prawa*, [w:] *Zasady tworzenia prawa*, A. Michalska, S. Wronkowska, Poznań 1993, p. 7.

[28] A. Korybski, L. Leszczyński, A. Pieniążek, *Wstęp do prawoznawstwa*, Lublin 2003, p. 95.

Inaccuracy in the development of legal regulations, excessive number of cross-referencing provisions lead to the emergence of difficulties in interpretation and can even result in the application of a particular regulation becoming impossible. When setting a particular normative act, the lawmaker ought to take into account the fact that they will contribute to the existing legal system. Legal norms coming into force pursuant to a particular normative act complement the existing ones and produce legal effects on the basis of other normative acts and remain in relation with these. Therefore, legal norms are inter-related. Such inter-relation is significant in case of assigning competencies to particular entities, developing legal relationships between them, and generating systems of competencies. In order to maintain hierarchic character, comprehensiveness and non-contradictoriness of a legal system, the legislative process ought to respect rules set by the lawmaker.

Law-making principles ought to take into consideration instances in which the domestic legal system may be complemented with regulations originating from outside the authorised domestic entities, this being a consequence of membership in particular structures or a result of international agreements. In such cases, legal regulations designed by other countries or structures are proclaimed and approved.[29] Consequently, the country is obliged to set and implement procedures enabling efficient application and compliance with these regulations.[30] Incorporation of international law's norms into the domestic legal system is conducted in the ratification procedure, which results in a particular country becoming bound by a given international agreement in internal and external relations. The European Union law is characterised by the autonomy of the legal framework, direct efficiency and supremacy of the European law. It does not, however, denote that the European law was imposed upon the member states. It emerges in the process of acknowledgement or is set in cooperation with the member states. As a consequence, legal regulations originating from external sources come into force in the member state.[31]

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[29] A. Łopatka, *Prawoznawstwo. Wprowadzenie*, Warszawa 2002, p. 161.

[30] A. Redelbach*, op.cit*., p. 192.

[31] A. Jamróz, *Wprowadzenie do prawoznawstwa*, Warszawa 2011, p. 217, 221, 223.

To sum up, the form and substance of law-making principles results from the approved political system of a particular country. The principles ought to exhibit formalised character, which means that in a democratic state under the rule of law enforcing the civil law legal system, the principles ought to be defined in a normative act of the highest legal power. Such rank will only highlight their legal significance, ensure permanence and stability of the legal system. The application of the rules may be regulated in normative acts ranking as primary or secondary legislation e.g. statute.

Legal systems change in the process of enacting new normative acts. Legal regulations ought to reflect changes occurring in social, economic and political life. Owing to clearly defined and permanent law-making principles, the legal system ought to be comprehensive and non-contradictory. However, the fact that no legal system is perfect ought to be kept in mind. Therefore, the domestic legislation ought to include rules, which will eliminate issues with interpretation, should these emerge.

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