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THE PRINCIPLE OF LEGALITY AND THE PROVISION "THE JUDGE IS SUBJECT TO THE LAW" IN THE CONTEXT OF THE DOCTRINE OF THE DEVELOPMENT OF LAW CONTRA LEGEM

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The research subject. This study focuses on the correlation between the doctrine of development of law contra legem and the principle of legality, with a specific emphasis on the position that "judge submits to the law".

The purpose of the research. The objective of this research is to examine the compatibility of the doctrine of development of law contra legem with the principle of legality and evaluate the applicability of the "fourteen-year-old child" formula in assessing legislative regulations.

Methodology. This research utilizes a legal analysis and conceptual examination of the doctrine of development of law contra legem and the principle of legality. It also involves a comparative analysis of legal principles within the post-Soviet context.

Main results of the research. The analysis reveals that strict adherence to the principle of legality may not always align with societal interests. The doctrine of development of law contra legem provides an exception to the principle, allowing judges to evaluate and challenge the illogicality or unfairness of legislative regulations. The "fourteen-year-old child" formula, with its low standards for determining such flaws, safeguards judicial independence and shields judges from potential political pressures.

Scope of application. The findings of this research can be applied within the legal framework, particularly in post-Soviet jurisdictions, where the interplay between the principle of legality and the doctrine of development of law contra legem is of significant relevance.

Conclusion. The strict fulfillment of the requirements of the law (legality) is not a goal, but a means of ensuring the certainty and stability of the rule of law, the harmonization of public life. Based on the doctrine of the development of law contra legem, the communication of the post-Soviet judge and legislator should be viewed from the perspective of a three-layered relationship of "subordination – cooperation – opposition".

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1. Introduction

1.1. General Provisions

Within the framework of the doctrine of legal development contra legem, in the examination of the principle of legality and the stipulation that "the judge is subject to the law," the terminology "judge of a post-Soviet state (post-Soviet judge)" will be employed. This term is intended to refer to judges in those post-Soviet states whose political systems continue to uphold stringent etatist and legist approaches to law.

This article refrains from examining the institutional framework for the application of the doctrine of legal development contrary to the law. Therefore, it is crucial not to interpret the encompassing term "post-Soviet judge" as suggesting that every instance of judges is encompassed by this doctrine; this is a matter that necessitates separate discussion.

1.2 The Principle of Legality and the Provision "The Judge Acts in Accordance with the Law" in the RA Constitution

The Republic of Armenia (RA) Constitution of 2015 establishes the principles of legality and independence of the judiciary. In accordance with Article 6, Part 1 (Principle of Legality) of the RA Constitution: "State bodies, local self-government bodies, and officials are authorized to perform only those actions for which they are empowered by the Constitution or laws." This provision applies to all state bodies, and in relation to judges, the RA Constitution explicitly emphasizes their independence and adherence to the laws. Specifically, Article 162(1) of the RA Constitution declares: "In the Republic of Armenia, justice is administered solely by courts—**in accordance with the Constitution and laws.**" Furthermore, Article 164(1) underscores that "a judge in the exercise of justice shall be independent, impartial, and shall act only **in accordance with the Constitution and laws**."

Article 6 of the Constitutional Law "Judicial Code of the Republic of Armenia" stipulates that justice shall be administered in accordance with the Constitution and laws, while Article 7(2) under the heading "Independence of Courts" reiterates that a court shall hear and decide a case or issue in accordance with the Constitution and the law.

What is the reason behind the state (political power) emphasizing multiple times in relation to the judges themselves that they act in accordance with the law? Political power, even in articles concerning the principle of the independence of the judge, consistently reminds that the judge, while independent, is dependent on the law. In essence, this implies dependence on the will of the political power itself (as the law serves as a means of codifying the will of political power). Meanwhile, it has been deemed sufficient for other state bodies to declare once that they are authorized to perform only those acts for which they are empowered by the Constitution or laws.

The frequent use of the phrase "the judge acts in accordance with the law" in legal texts suggests that political power, subtly expressed through the statement "the judge depends only on the law," aims to induce a sense of inertia in the judge. This tactic is employed to prevent the judge from challenging the blatant illogicality or injustice of political power, even when it reaches extremes or fanaticism. The intention is for the judge to perceive such matters as beyond their authority, ensuring that the judge never entertains the idea of examining compliance with the regulation of the law, established by a body with a primary mandate. Judges, guided by legal principles, including axioms and maxims, would typically refrain from acting contrary to a specific provision of the law, especially in cases of glaring inconsistencies.

Simultaneously, political power has successfully cultivated a mindset in post-Soviet judges wherein opposing a legal provision, even one starkly at odds with legal principles, is viewed as an unforgivable "sin" — an act of defiance against the people and the elected authority.

This underscores the political power's relentless effort to sever the judge from its inherent and ontological foundation: the law, encompassing principles, legal axioms, and maxims.[1]

1.3 "Let the world perish, but the law triumphs" or "Let the law lose, but the world does not perish"

[1] In this article, minor distinctions between these concepts are deemed inconsequential.

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The formalistic rigor of adhering to the law is vividly illustrated in the age-old legal maxim "Pereat mundus et fiat justitia (Let the world perish, but let justice be done)," which emphasizes the strict fulfillment of positive law requirements, irrespective of the practical consequences for society and the state.

While this legal maxim is commonly understood and interpreted in the context of positive law, it's noteworthy that the Latin formulation doesn't specifically mention "lex" but rather "justi." If one precisely interprets this maxim in the sense of "justi" (fairness, justice, right), it becomes paradoxical, as justice cannot impose demands whose fulfillment would "destroy the world."

This legal maxim holds practical significance primarily within the realm of positive law. The peril of "destroying the world" becomes apparent when there is excessive formalism in adhering to the laws established by the state, treating the law not as a means but as an end in itself. It is noteworthy that interpretations of this legal maxim often emphasize its association with the strict adherence to the requirements of positive law.

Steadfast compliance with the requirements of the law, often referred to as legality, is not an end in itself but rather a means to ensure the certainty and stability of law and order, fostering the harmonization of public life. This perspective has been articulated by various thinkers, including G. Hegel, who observed that "Good in the absence of law is not good. Similarly, law is not good in the absence of good: fiat justitia (let justice be done) should not have as its consequence pereat mundus (let the world perish)."[1,p.111].

This idea put forth by G. Hegel found further elaboration by the German scholar R. Iering. He delved deeper into the concept, highlighting instances where the state is confronted with a dilemma: whether to prioritize the law or the welfare of society. Iering critiqued the maxim "Let the world perish, but the law triumphs," expressing disapproval because it seems to imply that the world exists for the sake of the law, whereas in reality, the law exists for the sake of the world. In situations of conflict between the law and the world, Iering proposed a different rule: "pereat justitia, vivat mundus" (let justice perish, but let the world live) [3, p. 308].

R. Jhering raises the question of whether the state is obligated to honor the existing law in all cases and without exception. He then provides his own answer, stating without hesitation: "I do not hesitate to answer quite negatively" [3].

Over time, human thought has rephrased the maxim "Let the world perish, but the law triumphs" to evolve into the maxim "Let the law triumph so that the world may not perish."

In cases where the strict adherence to a formal legal requirement might lead to the potential "destruction" of the state and social system, the answer is clear: no formal requirement of the law should be upheld. The preservation of legality should be reevaluated when it not only fails to fulfill its intended purpose but, conversely, poses a threat of harm to society.

2. The principle of legality and the permissible exception thereto

2.1 General provisions

Approaches to the content of legality may vary among different legal systems. The understanding of legality can be influenced by the conceptualization of the term "law" within a particular legal framework. Regardless, the essence of legality remains consistent: the recipients of normative legal acts established by the state must strictly adhere to the requirements outlined in these acts.

The history of law reveals instances where the state has not consistently upheld the principle of legality. This extends beyond the violation of specific legal requirements by state entities to cases where the state, particularly in revolutionary contexts, officially permitted state bodies to act contrary to legislative prescriptions. For instance, following the October Revolution, the establishment of Soviet power, or the collapse of the Soviet Union, official documents sanctioned relevant state bodies and officials to deviate from the law in certain situations.

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2.2.Exception to the principle of legality

2.2.1 Principles of law and exceptions to it. The matter of exceptions to legal principles was thoroughly examined in the post-Soviet period [6, p. 139]. The acknowledgment that principles of law may entail exceptions is widely accepted [7, 8, 9]. However, the debate centers on whether all principles can have exceptions without any exclusions. Notably, there is particular interest among disputing parties regarding whether the principle of legality can accommodate exceptions or if any deviation from it should be strictly regarded as a violation of the law.

M. L. Davydova subscribes to the viewpoint that legal exceptions are not an inherent or obligatory characteristic of all legal principles. Some principles of law may legitimately include exceptions that effectively challenge the principle, while others may have no such exceptions at all [10].

This article brings attention to the interesting case where the author cites a criminal procedure provision as an example of a principle that supposedly does not allow for exceptions: "When administering justice in criminal cases, judges are independent and subject only to the Constitution of the Russian Federation and federal law (part 1 of Article 8.1. of the Criminal Procedure Code of the Russian Federation)." However, the author argues that the principle itself incorporates an exception. The phrase "the court is independent and subject to (...)" inherently contains an exception: while asserting judicial independence, it simultaneously introduces an exception by stating that judges are subject to the law.

In contrast to M. L. Davydova, S. Y. Soumenkov holds the belief that all principles of law inherently entail exceptions. He views the relationship between principles and exceptions as a dialectical unity [11, p.26].

According to Soumenkov, principles of law must have exceptions; otherwise, the potential for differentiated regulation of social relations would be impeded.

2.2.2 Failed attempts to establish an exception to the principle of legality. If exceptions are inherent in all principles of law, the crucial question arises: what constitutes an exception to the principle of legality? At first glance, positing an exception to the principle of legality may be seen as an acknowledgment that the law has been violated.

Even proponents of the idea that all principles of law have exceptions have encountered challenges in clearly and comprehensibly defining what exceptions to the principle of legality might ultimately entail. For instance, R. H. Yakupov merely suggests that expediency, or the discretion granted to state bodies by the law, is an integral part of the principle of legality [12, p. 62]. Does the author consider expediency as an exception to the principle of legality? This question cannot be definitively answered, as the cited work lacks sufficient clarity regarding his stance on this issue.

S. Y. Soumenkov observes, "Exceptions to the principle of legality are probable, but they have an a priori unlawful character, so even in terminological terms they are designated not as exceptions but as offenses. (...) At the same time, the problem of correlation between the principle of legality and exceptions is more complex than simply stating the fact of an offense" [11, p. 25].

This author, despite making a significant contribution to the study of legal exceptions, encounters difficulty in definitively answering the question of what type of exception is conceivable for the principle of legality. On one hand, he references an offense, but on the other hand, he rejects the notion that an offense can be considered a legal exception.

Another Russian author takes a valuable axiological perspective when considering the

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principle of legality and its exceptions. He raises the question of the values that underlie the imperative to comply with the law. He remarks, "(...) However, if the law really possessed absolute self-value, then its binding force would also be unconditional, and the principle of legality would know no exceptions. At the same time, for example, the Russian legal system provides for a whole range of cases when the law may quite legitimately not be enforced" [13, p. 105-106].

If we attempt to articulate a conceptual approach to the issue of exceptions to the principle of legality, it becomes evident that the only admissible exception to this principle is the doctrine of actions contrary to the law in situations of blatant inconsistency between legal principles (axioms, maxims) and specific legal regulations - the doctrine of development of law contra legem [14, p. 223, 15, 16, 17, 18, 19, 20, 21].

2.3.3 The doctrine of law development contra legem as a permissible exception to the principle of legality. Within the Legist legal perspective, the principle of legality and the doctrine of law development contrary to law are seen as impermissibly contradictory. In this framework, any departure from the principle of legality is not categorized as legal development but as a mere violation of the law. On the other hand, within the broader legal understanding, the relationship between the principle of legality and the doctrine of law development contra legem can be examined through the lens of the "exclusionary principle," which has received doctrinal recognition.

The legality exception (contra legem doctrine) should be distinguished from opposition to a specific provision of law based on the contra legem doctrine. The latter cannot be characterized as an exception to a specific rule. An exception to the principle of legality is the doctrine of the development of law contra legem, whereby the court resists the regulation of a particular rule of law. Let's consider a legal system where the doctrine of the development of law contra legem, as an exception to the principle of legality, is generally accepted. If provision "X" of a law in that system is blatantly illogical or unjust, then the judge, relying on the doctrine of the development of law contra legem (a permissible exception to the principle of legality), opposes provision "X" of the law and acts based on the principle of law (deriving another rule from that principle). In this case, the judge does not make an exception to provision "X" of the law but acts contrary to it.

Is a post-Soviet judge psychologically ready to state directly in a judicial act that it is opposed to this or that provision of the law? Let us note in advance that the answer is negative.

3.Post-Soviet judge - potential recipient of the doctrine of development of law contra legem

3.1 General provisions

A post-Soviet judge is highly likely to refrain from explicitly stating in judicial acts that they are developing the law contrary to a legal provision. Instead, they tend to employ various formulations and strategies to obfuscate this reality. For instance, they might assert that they are revealing the true will of the legislator through interpretation or discuss an exception to the law, even when no such exception is explicitly provided by the law. However, openly acknowledging the act of developing the law contrary to its provisions is something a post-Soviet judge is unlikely to do. This approach characterizes the legal thinking of post-Soviet judges and is reflective of the legal education prevalent in the post-Soviet context.

A similar psychological approach, of course, with milder and more moderate manifestations, is characteristic of the courts of the Romano-Germanic system, when they carry out activities exta legem and contra legem, covered by various hypocritical formulations. In his time this circumstance was best described by S. I. Raevich[22, p. 73] .

A judge has two avenues to legally justify behavior that contradicts the requirements of the law: either by incorporating a "reasonable exception" not stipulated by law into an enforcement act or by invoking the doctrine of developing law contrary to law (contra legem). At first glance, the method of legal justification through a "reasonable exception" may seem more politically loyal or correct, as the post-Soviet judge, in terms of rhetoric, does not openly oppose the legislative (political) power endowed with a primary mandate. However, the inclusion of "reasonable exceptions" not explicitly outlined in the text of the law is often

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driven less by a commitment to political loyalty and more by the desire to maintain a safe distance from political power. While the courts' reliance on such arguments can be understood, it may not be accepted wholeheartedly, as it essentially serves as a means of disguising reality or a way of evading positive liability.

The most acceptable method to justify a judge's position contrary to a legal provision is through the doctrine of developing law contra legem. In this approach, the judge, guided by legal principles, acts lawfully, and in the judicial act concerning actions contrary to the law, writes about it directly—adopting the most honest and transparent stance.

If a post-Soviet judge chooses to deliberate on the application or non-application of the doctrine of developing law contra legem in a specific case, they should also clarify the essence of the constitutional norm "the judge acts in accordance with the law" for themselves. This involves a deep understanding of the constitutional mandate and the judge's role in interpreting and applying the law within the legal framework.

3.2 Communication of the post-Soviet judge with the Legislator: subordination - cooperation - opposition

Critics of the concept of judicial law note that it attempts to eliminate the principle "the judge is subject to the law" [23, p. 112]. In contrast, the doctrine of contra legem development of law does not seek to abolish the principle "the judge is subject to the law" but aims to interpret it in the context of the "principle-exception" rule.

As previously mentioned, the RA Constitution underscores several times that a judge (court) shall administer justice in accordance with the law (Article 162(1), Article 164(1) of the RA Constitution). In the light of the doctrine of development of law contra legem, these constitutional provisions should be understood as follows.

First, the judge *complies* with the legislator if their will, as formulated by the law, is sufficiently correct (in accordance with the principles of law, minimum logic, and justice);

Secondly, the judge *collaborates* with the legislator if their will is expressed in evaluative legal concepts or if a legislative gap is present (by rules of interpretation or based on analogy, the judge identifies the legislator's intent);

Third, the judge *opposes* the legislator if their will, as formulated by the law, is blatantly illogical or unjust (going to the point of madness or mutilation). In the case of such opposition, the judge develops the law contrary to the law (doctrine of contra legem development of law), i.e., an exception is made to the general constitutional rule.

Even a post-Soviet judge should not succumb to the blatant illogic and injustice of political power or collaborate with such illogic and injustice. A judge, by virtue of their nature, cannot be deemed a perpetuator of the absurdity (madness) or brutality of political power. A judge would forfeit their essence and devolve into a mad or raving individual if they unquestioningly yield to the madness of political power or cooperate with the ravings of political authority.

Indeed, it is true that the judge is a component of the state mechanism and is subject to the general laws governing this entity. However, by virtue of their essence, the judge must "detach" from the body of the "Leviathan" that has transformed into a monstrous entity. This is nothing short of a "separation for salvation." The court would forfeit its inherent essence—the essence of one who acts based on common sense or minimum justice—if it fails to dissociate itself from the body of "Leviathan" that has descended into madness or monstrosity.

The separation of the judge from the body of "Leviathan," i.e., the judge's action contrary to the specific provision of the law adopted by "Leviathan," is legitimized precisely by the principles of law that concentrate on the axiological side of justice. Those who argue that "justice should be the meaning-forming core of the whole legislative provision of the mechanism of justice" [24, p.47] are correct.

Considering the peculiarities of the development of judicial law in the Soviet and post-Soviet states, we cannot overlook the issue of existential importance for the personality and family of the judge who has separated from the body of "Leviathan." The infrequent activity of a post-Soviet

judge, as a rule, has elicited and continues to elicit the anger and crude reaction of political power, which can confront the judge with an existential choice: to adhere to the principles of law contrary to the regulation of the law or to oppose the principles of law, preserving the blatantly unlawful law and ensuring the safety of oneself and one's family, including financial security based on the judge's salary.

To alleviate this situation, it is crucial to comprehend the formula upon which a post-Soviet judge must rely when deciding whether to oppose political power (the political will formulated by the law) and develop the law contrary to the law. This decision-making process should be undertaken in a manner that avoids fateful consequences for the judge and their family. The criterion for determining the blatant illogicality and injustice of the law is encapsulated in the "fourteen-year-old child" formula.

3.3 The "Fourteen-Year-Old Child" Formula

If a post-Soviet judge possesses the courage to develop the law against the will of political power, they should propose a formula for addressing the blatant illogic or unfairness of legislative regulation. This formula should serve as the basis for their decision, aiming to mitigate or neutralize the "anger" of political power and the associated risks.

The judge is faced with the will of political power as articulated by the law, grounded in principles of law. The content of these principles can be evaluated using the "reasonable person standard," assessing whether the average person deems the regulation of the law to be blatantly illogical or unjust. However, in post-Soviet states where statism still prevails, the blatant illogic or injustice of the law's regulation, even according to the "reasonable person standard," can lead to tragic consequences for the judge. Consequently, judges may find themselves compelled to lower the standard.

In situations where the development of the law contrary to the law is anticipated to face significant opposition from political power, a post-Soviet judge may evaluate the illogic or blatant unfairness of statutory regulation using the "fourteen-year-old child" formula. In other words, a judge may act contrary to the prescription of the law if they are convinced that their decision reflects a simple truth accessible even to a fourteen-year-old—a truth that would garner unequivocal public acceptance.

For a judge to ascertain whether a statutory regulation is blatantly illogical or unfair using the "fourteen-year-old child" formula, they can engage in discussions based on empirical research methodology, in a non-procedural manner, with children who have reached the age of fourteen. If the child's solutions and approaches to the problem align with the idea behind the legislative regulation, the judge can confidently characterize the regulation as "egregiously illogical or unfair." Following the doctrine of the development of law contrary to the law, the judge may then oppose the will of political authority.

In terms of the application of the "fourteen-year-old child" formula, the following circumstances should be considered:

Firstly, the "fourteen-year-old child" formula cannot be applied to a complex legal issue because, in such cases, it is the complexity of the case, not the illogic or unfairness of the legislative rule, that may be egregious.

Secondly, the low standard of the "fourteen-year-old child" formula relieves the post-Soviet judge from engaging in complex debates on the moral and philosophical justifications of legislative provisions. The post-Soviet judge does not, and perhaps cannot, delve into the moral and philosophical depths of legislative regulation.

The requirements of the "fourteen-year-old child" formula are so minimal that a post-Soviet judge, acting on its basis, may not feel burdened by the excessive responsibility imposed by the doctrine of developing the law contrary to the law. Unlike the "judge-philosopher Hercules" mentioned by R. Dvorkin [25, pp.450-456], post-Soviet judges do not possess such superpowers. Interestingly, Armenian judges have occasionally remarked that legal scholars demand heroism from them, emphasizing that they are judges, not heroes.

The requirements of the "fourteen-year-old child" formula are so modest that neither superhuman ability nor heroism is demanded of a post-Soviet judge when faced with the blatant illogic

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or unfairness of the law's regulation. Acting on the basis of jus (principles of law), a judge fulfills justitia (justiciability) as a natural outcome of their role—this doesn't entail superhuman ability or heroism. Indeed, it requires courage to act against a blatantly illogical or unjust regulation of the law. The post-Soviet judge is called upon to have the courage to confront political power, develop the law against the law, and uphold the essence of justice (justitia). This requirement is essential for the professional dignity of a judge.

Indeed, it is not an act of heroism for a judge to oppose political authority and its regulation of a blatantly illogical or unjust law. This might occur, for instance, when political authority, through law, prohibits a broadcaster from airing profanity on live television under any circumstance. Similarly, it may involve demanding a business entity to pay a government fee for an activity that the same political authority has temporarily prohibited due to a pandemic, or requiring the election commission to store ballots in a safe when the sheer number of ballots exceeds the safe's physical capacity, is apparent even to a fourteen-year-old child. In such situations, the judge is simply upholding the principles of justice and fairness in the face of inconsistent or unreasonable legal provisions.

In the scenario where a mother establishes a general rule for her fourteen-year-old children to return home from the yard by 8:00 p.m. (the old rule) and subsequently informs them that the new rule is to return home by 7:00 p.m., a child would naturally recognize that they should adhere to the new, later rule, returning home before 7:00 p.m. Drawing a parallel, the Armenian judge faced a situation where the legislator's regulation, to the point of madness, dictated a preference for the old law in the event of a contradiction between the old and new laws. In this case, the Armenian judge simply complied and adhered to the legislator's seemingly illogical stance from 2002 to 2021 [26].

If a judge, using the "fourteen-year-old child" formula, deems a legal provision to be blatantly illogical or unjust, political power, even endowed with minimal reason and morality, would have no choice but to acknowledge the glaring error in its legislative will.

4.Conclusions

Strict adherence to the requirements of the law (legality) is not an end in itself but rather a means to ensure the certainty and stability of law and order, fostering the harmonization of public life.

In accordance with the doctrine of law development contra legem, the interaction between the post-Soviet judge and the legislator should be viewed through the lens of three-layer relations: "subordination - cooperation - opposition."

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