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Some considerations on the principles of law

General considerations about principles in science and philosophy

In philosophy and, in general, in science, the principle has a theoretical and explanatory value because it is meant to synthesize and express the bases and unity of human existence, of existence in general and of knowledge in their diversity of manifestation. The discovery and affirmation of principles in any science gives certainty to knowledge, both by expressing the *prime element*, which exists by itself, without needing to be deduced or demonstrated, and by achieving system cohesion, without which knowledge and scientific creation would not exist.

The principle has multiple significations in philosophy and science, but for our scientific approach, we retain that of: "fundamental element, idea, basic law on which it is established a scientific theory, a political or legal system, a norm of conduct or the totality of the laws and basic notions of a discipline"[1]. The common place of the meanings of the term of principle is represented by the *essence*, an important category for philosophy, as well as for the law.

[1] *Dicţionar explicativ al limbii române*, Socialist Republic of Romania Publ.-house, Bucharest 1975, p.744.

The principle represents *the given as such*, which can have a double meaning: a) that of what exists before any knowledge as aprioristic feature and ground for science; b) theoretical and resulting element of synthesis of phenomenal diversity for reality of any kind. The distinction, but also the relation between "given" and "built" are important to understand the nature of the principles in science and especially in law. In his paper *Science et technique en droit positif*, published in the beginning of the 20th century, Francois Geny[2] analyses for the first time the relation between science and legal technique starting from two concepts: "the given" and "the built". According to Geny, a thing is "given" when it exists as an object outside of man's productive activity. In this meaning, the author distinguishes four categories: the real given; the historical given; the rational given and the ideal given. From the perspective of our research subject we are interested only in two categories, namely "the rational given" which consists of those principles which result from the consideration to be given to man and human relations and "the ideal given" through which a dynamic element is established, respectively the moral and spiritual aspirations of a particular civilization.

A thing is "built" when it is created by man, as for instance a reasoning, a legal norm etc. "The given" is relative in the meaning that it is influenced by "the built", by the human activity. Regarding "the given", the man's attitude consists in knowing it with the help of science. Concerning "the built", the man is by hypothesis the builder, he can make art or technique in this sense. The area of the built expands over the social and political order as well. The question is whether the law is "given", an object of science, in other words of ascertainment and registration, or is it "constructed", a technical work? From a historical perspective, the law is "given", object of science, as it appears the old law, the national or international contemporary law. However, the elaboration of positive law presupposes "a construction" and in this sense the legal rules are the work of technology.

This distinction has been noted in the legal literature, according to which science investigates the social climate that requires a certain legal norm, and the technique aims at the ways in which the legislator transposes into practice, "builds" the legal rules. It was also underlined the relativity of this distinction, taking into consideration that the legal technique also implies a creation, a scientific activity[3]. Therefore, the principles represent "the given" as ideal or ground for science and "the built" for the situation

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[2] Ion Craiovan in the monography *Introducere în filosofia dreptului*, All Beck, Bucharest 1998, p. 63.

[3] J. Dabin, *Théorie générale du Droit*, Bruylant, Bruxelles 1953, p. 118–159.

in which are drafted or transposed in a human construction, including by legal norms.

A good systematization of the notion of principle's meanings is made by a monography[4]: "a) the founding principle of a realm of existence; b) which would be hidden from direct knowledge and requires logical-epistemological processing; c) logic concept which would allow the recognition of the particular phenomenon". This systematization, applied on the law means that "a) the debate regarding the essence of the law; b) if and how we would recognize the essence; c) the operativity of the settlement in the phenomenality of the law, corelated or not with the essence"[5].

The need of the spirit to climb up to the principles is natural and incredibly persistent. Any scientific construction or normative system must relate to principles that will guarantee or establish them. This regressive movement towards the unconditional, towards what it is absolutely prime is for example the movement followed by Plato in the 7th book of its *Republic*[6], when he puts the existence of "Good" as prime and non-hypothetical principle. In the same meaning, another great thinker[7] talks about "the first principles" or the eternal principles of the unprovable "Being", the basis of any knowledge and of any existing, beyond which lies only ignorance.

The question is to know if what seems necessary, in the logical virtue of knowledge is also necessary in the ontological order of existence. In the "Critique of Pure Reason"[8], Kant will show that such passing, from logic to existence (the ontological argument) is not legitimate. If the unconditional, as a principle, is necessarily put by our reason, this cannot and must not lead us to the conclusion that this unconditional exists outside it and independent of any reality. Therefore, the principles, since they aim at existence in all its domains, cannot and must not be immutable, but are the result of becoming. They are a "given", but only as a result of existential dialectics or as a reflection of becoming in the phenomenal and of essence world.

The principles and norms of law

The law, because it presupposes the particularly complex relationship between essence and phenomena, as well as a dialectic specific to each of the

4 G.C. Mihai, R.I. Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, All Beck, Bucharest 1997, p. 19.

5 *Ibidem*, p. 20.

6 Plato, *Opere*, vol. 5, Scientific and Encyclopedic, Bucharest 1982, p. 401–402.

7 Aristotle, *Metafizica*, Book 1, IRI, Bucharest 1996, nr. 9–69.

8 I. Kant, *Critica raţiunii pure*, IRI, Bucharest 1994, p. 270–273.

two categories in terms of theoretical, normative and social reality, cannot be outside the principles.

The issue of the statute of the legal principles and their explanation has always preoccupied the theoreticians. The school of the natural law has argued that the source, origin, thus the ground for all legal principles is the human nature. The historical school of law, under the influence of Kantianism, opens a new perspective in the research of the genesis of the legal principles, by presenting them as products of the popular spirit (Volkgeist) which shifts the legal ground from the universe of pure reason to the confluence of historical origins dissipated in a multitude of transient forms. The variants of the positivist school claim that the principles of law are generalizations induced by social experience. When generalization covers a sufficiently large number of social facts we are in the presence of principles. There are also authors such as Rudolf Stammler who deny the validity of any legal principle, considering the content of the law diversified in space and time, lacking universality. In the author's conception, law would be a cultural category[9].

By referring to the same issue, Mircea Djuvara stated that "All the science of law does not consist in reality, for a serious and methodical research, except in deriving from the multitude of the provisions of the law their essential, that is, precisely these ultimate principles of justice from which all other provisions derive. In this way the whole legislation becomes very clear and catches what is called the legal spirit. Only in this way is the scientific elaboration of a law done"[10]. In our opinion, this is the starting point for the understanding of the principles of law.

In the legal literature, there is no unanimous opinion regarding the definition and significations of the principles of law[11]. There can be identified a series of common elements that we underline up next:

- The legal principles are general ideas, guiding postulates, fundamental prescriptions or foundations of the legal system. They characterize the whole system of law, while constituting specific features of a type of law;

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[9] R. Stammler, *Theorie der Recktswissenschaft*, University of Chicago Press, Chicago 1989, p. 24–25.

[10] M. Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, All Beck, Bucharest 1999, p. 265.

[11] I. Ceterchi, I. Craiovan, *Introducere în teoria generală a dreptului*, All Beck, Bucharest 1993, p. 30; G. Boboş, *Teoria generală a statului şi dreptului*, Didactic and Pedagogical, Bucharest 1983, p. 186; N. Popa, *Teoria generală a dreptului*, Actami, Bucharest 1999, p. 112–114; I. Craiovan, *Tratat elementar de teorie generală a dreptului*, All Beck, Bucharest 2001, p. 209; R. Motica, G. Mihai, *Teoria generală a dreptului*, Alma Mater, Timişoara 1999, p.75.

- The general principles of law configure the structure and development of the system of law, insuring its unity, homogeneity, balance, coherence and the capacity of its development;
- The authors distinguish between the fundamental principles of law, which characterize the entire system of law and which reflect what it is essential for that particular type of law and principles valid for certain branches of law or legal institutions.

Thus, in the doctrine the following general principles of the law have been identified and analyzed: 1) insuring the legal basis for the functioning of the state; 2) the principle of freedom and equality; 3) the principle of responsibility; 4) the principle of equity and justice[12]. The same author considers that the general principles of the law have a theoretical and practical importance consisting in: a) the principles of law outline the guideline for the legal system and guide the activity of the legislator; b) these principles are important also for the administration of justice because "the man of law shall have to ascertain not only the positivity of the law, he must explain the reason of his social existence, the social support of the law, its connection with the social values"; c) the general principles of law may replace the norms of regulation when the judge, in the absence of the law, solves the case based on the general principles of law[13].

One of the main problems of the legal doctrine is represented by the relation between the principles of law, the norms of law and social values. The expressed opinions are not unitary, they differ depending on the legal conception. The school of the natural law, rationalists, the Kantian and Hegelian philosophies of the law admit the existence of certain principles outside the positive norms and superior to them. The principles of law are based on human reason and value the entire legal order. In contrast, the positivist school of law, the Kelsian normativism considers that principles are expressed by the rules of law and consequently there are no principles of law outside the system of legal norms.

Eugeniu Speranţia established a correspondence between the law and its principles: "If the law appears as a total of mandatory social norms, the unity of this totality is due to the consistency of all norms towards a minimum number of fundamental principles, themselves presenting a maximum of logical affinity between them"[14].

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12 N. Popa, *op. cit.*, p. 120–130.

13 *Ibidem*, p. 119.

14 *Ibidem*, p. 114.

About this issue, the Romanian specialized literature has expressed the idea that the principles of law are fundamental prescriptions of all legal norms[15]. In another opinion, it is considered that the principles of law guide the elaboration and application of legal norms, they have the force of superior norms, found in the texts of normative acts, but can also be deduced from the "permanent social values" when not expressly formulated by the rules of positive law[16].

We consider that the general principles of law are separated by the positive norms of law, but indisputably there is a relation between the two values. For instance, equality and freedom or equity and justice are fundamental values of social life. They must find their social expression. In this way the legal concepts that express these values appear, concepts that become foundations (principles) of law. Legal norms then derive from these principles. Unlike norms, the general principles of law have explanatory value because they contain the grounds for the existence and evolution of law. Legal norms then derive from these principles. Unlike norms, the general principles of law have explanatory value because they contain the grounds for the existence and evolution of law[17].

Together with other authors[18] we consider that the legal norms relate to the principles of law in two ways: the norms contain and describe most of their principles; the functioning of the principles is then achieved by the practical application of the conduct prescribed by the norms. In relation to the principles, the legal norms have an explanatory, a teleological value more restricted, the purpose of the norms being that of preserving the social values, not explaining the causal reason of their existence. The principles of law are the expression of the values promoted and protected by the law. One could even say that the most general principles of the law coincide with the social values promoted by the law.

For a correct understanding of the issue of the values of law and their expression through the principles of the law brief clarifications are necessary in the context of our scientific research. Different currents and legal schools, from antiquity to present days, have tried to explain and to fundament the regulations and legal institutions through certain general concepts appreciated as special values for society. Indeed, by its nature, law implies an

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15 E. Speranția, *Principii fundamentale de filozofie juridică*, Cluj, Ardealul 1936, p. 8; N. Popa, *op. cit.*, p. 114.

16 I. Ceterchi, I. Craiovan, *op. cit.*, p. 30.

17 N. Popa, *op. cit.*, p. 116–117.

18 *Ibidem*; R.I. Motica, G.C. Mihai, *Teoria generală a dreptului. Curs universitar*, Alma Mater, Timişoara 1999, p. 78.

appreciation, a valorization of human conduct according to certain values, representing the finality of the legal order such as: justice, common good, freedom etc.[19] On the contrary, they have a broader moral, political, social, philosophical dimension in general. These values shall be understood in their socio-historical dynamic. Although some of them can be found in all legal systems, such as justice, the specifics and historical features of society make their mark on them. The values of a society can be primarily deduced from the philosophy (social, moral, political, legal) presiding and orienting the social forces from that particular society.

The legislator, in the process of legislating, following these values, expressed especially by the general principles of law, transposes them into legal norms, and on the other hand, once "legislated" these values are defended and promoted in the specific form of legal regulations. Thus, the legal norm becomes both a standard of appreciation of conduct according to the respective social value, and a means of ensuring the fulfillment of the exigencies of this value and of predicting the future evolution of the society. We need to add that the legal norms substantialize the legal values in a relative manner, because neither as a whole nor individually it indicates a total legal value, it does not exhaust its richness of content.

Regarding the identification of the legal values promoted, the authors' opinions do not coincide, although they are confined to close spheres. Thus, Paul Roubier lists as values: *justice*, *legal security* and *social progress*[20]. Michael Villey counts four finalities of the law: *justice, good behavior, serving individuals* and *serving society*[21]. François Rigaux talks about two categories, namely: the primordial ones, called by him formal, the *order*, *legal peace* and *security* and the material ones like *equality* and *justice*[22].

The indisputable value that defines the finality of law, in the conception of the most important thinkers, since antiquity is *justice*. The very complex concept of justice has been approached, explained and defined by numerous thinkers – moralists, philosophers, jurists, sociologists, theologists – who start in defining it from the ideas of *just*, *equitable*, in the meaning of giving to each other what he deserves. The general principle of the law, of equity and justice is the expression of justice as social value. Many conceptions about law would be suitable either in a rationalist line, or in a realistic one. Rationalists argue that the principle of justice is innate in man, it belongs to our reason

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19 P. Roubier, *Théorie générale du Droit*, L.G.D.J., Paris 1986, p. 267.

20 *Ibidem*, p. 268.

21 Quoted by Jean-Louis Bergel in *Théorie générale du Droit*, Dalloz, Paris 1989, p. 29.

22 I. Ceterchi, I. Craiovan, *op. cit.*, p. 27.

in its eternity. Realists argue that justice is an elaboration of general human history and experience.

Regardless of the theoretical orientation, justice is undoubtedly a complex theme of the legal universe. Giorgio del Vecchio claims that justice is a conformation with the juridical law, the juridical law comprising the justice. According to Lalande justice is the property of all that is fair; Faberquetes considers the law as the unique expression of the principle of justice, and justice as, naturally, the unique content of the expression of the law. It has also been said that justice is the will to give to each his own; is it balance or the *proportion* of relationships between people, is it social love or is it the harmonious realization of the essence of the human being[23].

Justice as value and principle of the law exists through judicial norms comprised in constitutions, laws etc. This does not mean that the objective law, with its expressions, carries entirely and inevitably "the justice": not everything that is right in force is fair. On the other hand, there are legal norms, as for instance the technical ones, which are indifferent to the idea of justice. As there are circumstances when the positive right is inspired more by considerations of utility than of justice in order to maintain order and stability in society. In our opinion, justice as social value and as general principle of the law is dimensioned in the ideas of true measure, equity, legality and good faith. In particular, the concepts of fairness and fairness express proportionality. The principle of justice has this guiding content in the cognitive-action line: to give everyone what they deserve. A system of law is unitary, homogenous, balanced and coherent if in all its components "ensures, protects and consecrates" so that every natural or legal person to be what it is, to have what he deserves without harming each other or the social system.

Equity is a dimension of the principle of justice in its consensuality with the good of morality. This concept softens the formal legal equality, humanizes it, introducing in the legal systems in force the categories of morality from the perspective of which the justification is both a doing for good and for freedom. "Considered in this way, equity spreads to the most distant spheres of the system of legal norms, fruiting even strictly technical or formal domains, apparently indifferent to the axiological concerns"[24]. Understood through the idea of proportionality, equity refers to the diminution of inequality, where the establishment of a perfect equality (also called formal justice) is impossible due to the particularities of the actual situation. In other

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[23] G.C. Mihai, R.I. Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, All Beck, Bucharest 1997, p. 128.

[24] *Ibidem*, p. 133.

words, in relation to the generality of the legal norm, equity suggests us to consider the actual situation, the personal circumstances, the unicity of the cause, without falling in extreme.

The idea of justice evolves under the influence of the socio-political transformations within the society. Thus, in the contemporary democratic states, in order to emphasize the achievements of social policy on living and working conditions, the economic, social or cultural rights, there are talks of *social justice*. The achievement of social justice is mentioned as a requirement of the state of law in the document adopted during the Conference for European Security and Cooperation, held in Copenhagen in 1990.

Another issue of the legal doctrine is that to establish the relation between the principles of law and those of morality. Christian Thomasius in his paper *Fundamenta juris naturae et gentium ex sensu comuni deducta* (1705)[25] distinguishes between the law's mission to protect the exterior relations of human individuals through prescriptions forming perfect and sanctionable obligations and the mission of morality to protect the inner life of individuals only through prescriptions forming imperfect and unsanctionable obligations. This differentiation between the morality and law has become classic.

Undoubtedly, law cannot be confused with morality, for several reasons analyzed in the literature[26]. However, law and morality are from ancient times in a close relationship which cannot be considered as accidental. That relationship is axiological in nature. Legal and ethical values have a common origin, namely the conscience of individuals living in the same community. The theory of jus-rationalism – the modern form of jus-naturalism – has tried to argue that there is a fund of principles of universal and eternal justice, because they are inscribed in human reason where they intertwine with the principles of good and truth. Therefore, law, because it is rational, is natural, and because it is natural, it is also moral.

Of course, the law eminently regulates the external conduct of the human individual. However, law is not disinterested in morality, "in that through equity it seeks the good by acting to reconcile the outside with the inside, while morality acts to reconcile the inside with the outside of the individual, for the same equity"[27].

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[25] Quoted by Ion Dobrinescu in *Dreptatea şi valorile culturii*, Romanian Academy Press, Bucharest 1992, p. 95.

[26] G. del Vecchio, *Lecţii de filozofie juridică*, Europa Nova, Bucharest 1995, p. 192–202; I. Dobrinescu, *op. cit.*, p. 95–99; G. Mihai, R.I. Motica, *op. cit.*, p. 81–86; I. Ceterchi, I. Craiovan, *op. cit.*, p. 39–42.

[27] G.C. Mihai, R.I. Motica, *op. cit.*, p. 84.

We consider that morality and law do have a common value structure and this can be deduced not only from the fairly common statement that "law is a minimum of morality", but also from the finding that there is no moral statement to be denounced as unjust, although legal statements are sometimes found that are inconsistent with moral principles. It is noted the tendency of the law to appeal to values with moral feature to have them inserted in legal regulations. In this meaning, Ioan Muraru stated that: "Moral rules, although usually much closer to natural law and custom, express ancestral and permanent desideratum of mankind. Moral rules, although usually not enforced, in case of need through the coercive force of the state must be legally supported in their realization when defending the life, freedom and happiness of the people. That is why in the Romanian Constitution the references to morality are not missing. These constitutional references insure efficiency and validity to morality. Thus, for instance, Art 26 and 30 protect "the good morals", while Art 53 states the "public morals". Also, the "good faith" which is first of all a moral concept is stated by Art 11 and Art 57"[28]. Therefore, the general principles of law and morality have a common value fund. The legal norms may express values which originally are moral and are also found in the content of the principles of law, as for instance equity or its particular form, the proportionality.

The principles of law have the same features and logical-philosophical meanings as the principles in general. Their particularities are determined by the existence of two systems of dialectic relations specific to the law:

A) Principles – categories – norms;

B) Principles – law, as social reality.

Several more important features of the principles of law can be identified, useful in determining whether proportionality can be considered a principle of law:

A) Every principle of law must be of the order of essence. It cannot be identified with a specific case or an individual appreciation of the legal relationships. The principle shall represent order and balance of the legal relationships, regardless of the variety of normative regulations or of the particular aspects specific to legal reality. Consequently, the principle of law must be opposed to randomness and express necessity as its essence.

Nevertheless, the principle cannot be a simple creation of reason. It has a rational dimension, abstract of maximum generality, but it is not a meta-

[28] I. Muraru, E.S. Tănăsescu, *Drept constituţional şi instituţii publice*, vol. 1, All Beck, Bucharest 2003, p. 8.

physical creation. Regardless of the essence, the principles of law cannot be eternal and absolute, but they reflect the social transformations, they express the historical, economic, geographical, political particularities of the system that contains them and, in their turn, that it bases[29]. The principles of law evolve because the realities that it reflects and explain are subjected to perfecting. "In law, every legal relationship is susceptible – of perfecting. It will never be able to complete the scientific improvement of the legal analysis. But, in law, we must give solutions immediately, because practical life does not wait"[30].

Being of the order of essence, the principles of law have a generalizing character, both for the variety of legal relations and for the norms of law. In the same time, expressing the essential and general of the legal reality, the principles of law are grounds for all other normative regulations.

There are great principles of law which do not depend on their statement in legal norms, but the legal norm determines their specific content, in relation to the historical time of reference.

B) The principles of law are stated and recognized by constitutions, laws, customs, jurisprudence, international documents or documents drafted by the legal doctrine.

The principles must be accepted internally and be part of the national law of each state. The general principles of law are stated by constitutions. The features of the legal system of a state influence and even determine the statement and recognition of the principles of law.

The work of enshrining in the political and legal documents the principles of law is in full swing.

Thus, in international documents such as the UN Charter or the Declaration of the UN General Assembly of 1970[31] are stated principles[32] which characterize the international democratic legal order. The regional legal systems have known and recognized their own principles. For instance, the system of Community law enshrines the following more important principles: the principle of equality, the protection of the fundamental human rights,

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[29] M, Djuvara, *Drept şi sociologie*, I.S.D., Bucharest 1936, p. 52–56; N. Popa, *op. cit.*, p. 113–114.

[30] M. Djuvara, *Teoria generală a dreptului…*, *op. cit.*, p. 265.

[31] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, available at: https://treaties.un.org/doc/source/docs/A_RES_2625-Eng.pdf [access: 8.12.2020].

[32] A. Bolintineanu, A. Năstase, B. Aurescu, *Drept internațional contemporan*, All Beck, Bucharest 2000, p. 52–71; the UN Charter mentions as source of law "the general principles of the law recognized by all civilized nations".

the principle of legal certainty, the principle of subsidiarity, the principle of res judicata and the principle of proportionality[33]. Most of the democratic constitutions state principles such as: the principle of sovereignty, the principle of legality and supremacy of the constitution, the principle of democracy, the principle of pluralism, the principle of representation, the principle of equality etc.

Jurisprudence has a significant role in enshrining and applying the principles of law. There are situations in which the principles of law are recognized by jurisprudence, without being formulated in the text of normative acts. Thus, the Italian Civil Code recommends to judges to rule in the absence of certain texts, in the light of the general principles of law.

There are legal systems in which not all principles have a normative regulation. We especially refer to the great system known as *common law*, which consists in the existence of three normative, autonomous and parallel sub-systems: *common law* (in a narrow sense), *equity* and *statute law*. Equity represents an ensemble of principles resulted from the court's practice and which are a corrective brought to the rules of common law.

Despite the variety of ways of enshrining and recognizing the principles of law, there is a need for at least their recognition in order to be characterized and applied in the legal system. This consecration or recognition is not sufficient to be doctrinal but must be achieved through norms or jurisprudence. Still a definition between the consecration or recognition of the principles of law and on the other hand their application.

C) The principles of law represent values for the legal system, because they express both the legal ideal, as well as the objective requirements of society, have a regulatory role for social relations. If the norm is unclear or does not exist, the settlement of disputes can be done directly based on the general or special principles of law. Ideally, they are a coordinating theme for the legislative work.

D) The classification of the principles of law starts from the consideration that there is a hierarchy or a relationship between the general and the individual[34]. Starting from this ascertainment we can distinguish:

1) The general principles of law forming the content of certain universal application norms with a maximum level of generality. These are recognized by the doctrine and expressed by normative acts in the domestic law or inter-

[33] I. Craiovan, *Tratat elementar…*, *op. cit.*, p. 211.

[34] I. Ceterchi, I. Craiovan, *op. cit.*, p. 31; R.I. Motica, G.C. Mihai, *op. cit.*, p. 77.

national treaties of special importance. Usually, these principles are enshrined in constitutions thus having a legal force superior to all the other laws and to all branches of the law. Referring to the theoretical and practical importance of studying the principles of law, Nicolae Popa remarked: "the general principles of law are the fundamental prescriptions that combine the creation of law and its application… In conclusion, the action of the principles of law results in conferring the *certainty of the law* – the guarantee granted to individuals against the unpredictability of coercive norms – and the congruence of the legislative system, i.e. the concordance of laws, their social feature, their probability, their opportunism"[35].

The general principles also have a role in the administration of justice, because the ones entrusted with the application of the law must know not only the law, but also its spirit, with the general principles representing this spirit. Among them we can include: the principle of legality, the principle of consecration, of compliance with and guarantee of human rights, the principle of equality, the principle of justice and equity etc.

2) Specific principles expressing particular values, and which normally have an action limited to one or multiple branches of law. They are mentioned by codes or other laws. In this category we may include the principle of legality of sanctions, of compulsoriness of contracts, the assumption of innocence, the principle of compliance with the international treaties etc. Special principles have their value source in the fundamental principles of law.

For instance, proportionality is one of the oldest and classical principles of the law, rediscovered in modern times. The signification of this principle, in general meaning, is that of equivalent relation, balance between phenomena, situations, persons etc., but also the idea of fair measure.

Ion Deleanu states that "Originally, the concept of proportionality is outside the law; it evokes the idea of correspondence and balance, even harmony. Emerged as mathematical principle, the principle of proportionality was developed as fundamental idea in philosophy and law by receiving different forms and acceptations: "reasonable", "rational", "balance", "admissible", "tolerable" etc.[36] Therefore, proportionality is part of the content of the principle of equity and justice, considered as being a general principle of law. At the same time, through its normative consecration, explicit or implicit, and through its jurisprudential application, proportionality has particular meanings in different branches of law: constitutional law, administrative law,

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[35] N. Popa, *op. cit.*, p. 117.

[36] I. Deleanu, *Drept constituțional și instituții politice*, vol. 1, Europa Nova, Bucharest 1996, p. 264.

community law, criminal law, etc. The definition, understanding and application of this principle, in the above-mentioned meanings result from the doctrinal analysis and jurisprudential interpretation[37].

Philosophical founding of the principles of law

An argument for which the philosophy of law must be a reality present not only in the theoretical sphere but also for the practical activity of elaborating normative acts or the administration of justice, is the existence of general and branching principles of law, some being enshrined in the Constitution.

The principles of law, by their nature, generality and depth, are topics of reflection primarily for the philosophy of law. Only after their construction in the sphere of law's metaphysics, these principles can be transposed into the general theory of law, and thus can be enshrined in law and applied in jurisprudence. Moreover, there is a dialectical circle because the "meanings" of the principles of law, after the normative consecration and the jurisprudential elaboration, are to be elucidated also in the sphere of the philosophy of law. Such ascertainment requires the distinction between what we could call: *built principles of law*, and on the other hand, *metaphysical principles of law*. The distinction we propose has as a philosophical basis, which is the difference shown above between "built" and "given" in law.

The built principles of law are, by their nature, legal rules of maximum generality, drafted by the legal doctrine or by the legislator, in all situations explicitly stated in the name of the law. These principles may represent the internal structure of a group of legal relations, of a branch or even of the entire system of law. One can identify the following features: 1) they are drafted within the law, usually expressing the manifestation of the legislator's will, stated by legal norms; 2) they are always expressed by legal norms; 3) the work of interpretation and application of law is able to discover the meanings and determinations of the constructed principles of law which, obviously, cannot exceed their conceptual limits established by the legal norm. In this category we can identify principles such as: publicity of the court hearing, the principle of adversariality, of the supremacy of the law and Constitution, the principle of non-retroactivity of the law etc.

Therefore, the built principles of law have, by their nature, first of all, a legal connotation and a metaphysical one, in subsidiary. Being the result of an elaboration within the law, the possible metaphysical meanings and meanings are to be subsequent to their consecration established by the meta-

[37] M. Andreescu, *Principiul proporționalității în dreptul constituțional*, C.H. Beck, Bucharest 2007.

physics of the law. Also, being legal norms, they have a compulsory feature and generate legal effects as any other normative regulation. It should be noted that the legal norms enshrining such principles are superior in legal force to the usual rules of law, as they usually concern social relations considered essential primarily for the observance of fundamental rights and legitimate interests recognized to the subjects, but also for the stability and fair, predictable, transparent conduct of judicial proceedings.

For the situation of this category of principles, the above-mentioned dialectical circle has the following look: 1) the built principles are elaborated and normatively enshrined by the legislator; 2) their interpretation is performed during the application of the law; 3) the valuable significations of these principles are subsequently expressed in the area of the metaphysics of the law; 4) "the metaphysical meanings" may represent the theoretical basis necessary for the enlargement of the connotation and denotation of the principles or of the normative elaboration of new such principles.

The number of constructed principles of law may be determined at a certain moment of the legal reality, but there is no pre-constituted limit to them. The evolution of the law is manifested through the normative elaboration of new such principles. As example, we mention "the principle of subsidiarity", a construction in the law of the European Union, taken by the legislation of many European states, including by Romania.

The metaphysical principles of law may be considered as a "given" towards the legal reality and by their nature being exterior to law. At their origin, they do not have a legal, normative or jurisprudential elaboration. They are a transcendental "given" and not transcendent of the law, therefore, are not "beyond" the sphere of the law but are "something else" in the legal system. In other words, they represent the value essence of the law, without which this constructed reality would not have an ontological dimension.

Without being constructed, but representing a transcendental, metaphysical "data" of law, it is not necessary to express them explicitly through legal norms. The metaphysical principles may also have an implicit existence, discovered or valorized in the interpretation of the law. As an implicit fact and at the same time as a transcendental essence of the law, these principles must be found, in the end, in the content of any legal norm and in any act or manifestation that represents, as the case may be, the interpretation or application of the legal norm. It must be underlined that the existence of the metaphysical principles' fundament the teleological nature of the law, because any manifestation in the area of judicial, in order to be legitimate, must be appropriated with such principles.

In the legal literature, such principles, without being called metaphysical, are identified by their generality and are therefore called "general principles of law". We prefer to underline the metaphysical dimension, value and transcendental, as a result of which we consider them metaphysical principles of legal reality. As transcendental and not built "given" of the law, the principles in case are permanent, limited, but with determinations and meanings which can be diversified in the dialectic circle comprising them.

According to our opinion, the metaphysical principles of the law are *the principle of justice, the principle of truth, the principle of equity and justice, the principle of proportionality, the principle of freedom*. In a future study, we will set out in detail the considerations that entitle us to identify the principles mentioned above as having a metaphysical and transcendental value in relation to legal realities.

The metaphysical dimension of these principles is uncontestable, but it remains in debate the normative dimension. A deeper analysis of this issue exceeds the object of this study, which aimed to be a wide trip over the philosophical dimension of the principles of law. Still, several considerations are necessary. The contemporary ontology no longer considers reality by reference to classical concepts, of substance or matter. In his paper "*Substamzbegriff und Funktionsbegriff*" (1910), Ernest Cassirer opposes the modern concept of functioning to the ancient one of substance. Not what is "work" or concrete reality, but their way of being, their inner fabric, the structure interests the modern. There are no more concrete objects in front of knowledge, but only "relationships" and "functions". In a way, for scientific knowledge, but not for ontology, things disappear making room for relations, functions. Such approach is cognitively operational for the material reality, but not for the ideal reality, that "world of ideas" which Plato talked about[38].

The normative dimension of the legal reality seems to correspond very well with Ernest Cassirer's statements. What else is the legal reality than an ensemble of social relations and functions which are transposed in the new ontological dimension of "legal relations" by the application of legal norms. The built principles by being applicable to a sphere of social relations through the legal norm it transforms them in legal relations, so these principles do correspond to a reality of the judicial, understood as relational and functional structure.

But there is a deeper order of reality than relationships and functions. Constantin Noica said that we must call "element" this order of reality, in which things are fulfilled and which makes them be. Between the concept of

[38] C. Noica, *Devenirea întru ființă*, Humanitas, Bucharest 1998, p. 332–334.

substance and the one of function or relation it is necessary a new concept, which will maintain a substantiality and without dissolving in function, to manifest functionality[39].

Taking this idea of the great Romanian philosopher, we can say that the metaphysical principles of law evoke not only legal relations or functions, but "value elements" of legal reality, without which it would not exist.

The metaphysical principles of law have normative value, even if they are not explicitly expressed by norms of law. Moreover, as it results from the jurisprudential interpretations, they may even have a supra-normative signification, and, in this manner, may legitimate the jus-naturalist conceptions in the law. These conceptions and the doctrine of super-legality supported by Francois Geny, Leon Duguit and Maurice Duverger, consider that justice and especially constitutional justice must relate to super-constitutional rules and principles. In our opinion, such standards are expressed by the metaphysical principles which we have mentioned. The jus-naturalist conceptions have been applied by certain constitutional courts. It is famous in this meaning the decision of 16 January 1957 of the Federal Constitutional Court of the Federal Republic of Germany regarding the freedom to exit from the federal territory. The court states that "The laws are not constitutional unless they have been drafted in compliance with the mentioned forms. Their substance must be in accordance with the supreme values of the democratic and liberal order as a system of values established by the Constitution, but they must also be in accordance with the *basic unwritten principles* (s.n.) and with the fundamental principles of the Fundamental Law, especially with the principles of the rule of law and the welfare state"[40].

A last aspect that we want to emphasize refers to the role of the judge in the application of the constructed principles but especially of the metaphysical principles of law. We consider that the fundamental rule is that of interpretation and implicitly, of the application of any legal regulation in the spirit and with the compliance of the valuable content of the metaphysical principles built by the law. Another rule refers to the situation in which there is an inconsistency between the normal legal regulations and on the other hand the principles built and the metaphysical ones. In such situation, we consider, in the light of the jurisprudence of the German constitutional court, that the metaphysical principles shall be applied with priority, even to the detriment of a concrete rule. In this way, the judge respects the essential feature of the legal system and not only the legal functions or relations.

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[39] *Ibidem*, p. 327–367.

[40] M. Andreescu, *op. cit.*, p. 34–38.

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Abstract

Some considerations on the principles of law

Any scientific intercession that has as objective the understanding of the significances of the "principle of law" needs to have an interdisciplinary character, the basis for the approach being the philosophy of law. In this study we fulfill such an analysis with the purpose to underline the multiple theoretical significances due to this concept, but also the relationship between the juridical principles and norms, respectively the normative value of the principle of the law. Thus, extensive references to the philosophical and juridical doctrine in the matter are being materialized. This study is a pleading to refer to the principles in the work for the law's creation and application. Starting with the difference between "given" and "constructed", we propose the distinction between the

"metaphysical principles" outside the law, which by their contents have philosophical significances, and the "constructed principles" elaborated inside the law. We emphasize the obligation of the law maker, but also of the expert to refer to the principles in the work of legislation, interpretation and applying of the law. Arguments are brought for the updating, in certain limits, the justice – naturalistic concepts in the law.
Key words: principles of the law, essence and phenomenon like aspect of the law, "given" and "constructed" in the law, significances of the principles of law, moral value, juridical value, metaphysical principles, constructed principles