THE PRINCIPLES OF LAW AS SEEN THROUGH THE LENS OF THE GENERAL THEORY OF LAW

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ABSTRACT: *All the remarks regarding the ambiguities existing in the field of the General Theory of Law lead us inevitably to the principles of law, others than the principles intended by one lawmaker or another, a generator of substantive law. Or, the approach of the principles of law overcomes the powers of the General Theory of Law, as they have to be rationally grounded, not postulated or announced as being this or that way.*
From the beginning of the paper, we wonder and we want to clarify if there are more types of principles – mandatory, rules or creations – because, this is what the doctrinarians claim. Also, we want to clarify if there are more types of principles like, fundamental principles, general principles, secondary or particular principles. Because, this is what some doctrinarians claim also. We think that it is strange to call them principles because this is what a lawmaker, a judge or a doctrinarian considered.
Another issue that is subject of the analysis is that on the quality of the source of law attributed to the principles of law.
In this paper we will try to distinguish between the principle and the law, and between a principle in law, a principle of law, a principle of positive law and what is a material or formal legal principle.
We consider that these are questions to which we should give an answer with epistemological and pragmatic value.

KEYWORDS: *principles of law; theory of law; positive right; rules, lawmaker.*
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1. CONCEPTUAL ASPECTS. ANALYSIS.

In the legal language of law books, the principles of law are defined in different ways and meanings, using various expressions that are often contradictory. Although certain differences are found in the field of the theory of law regarding the definition or classification of the principles of law, their existence and role are recognized and consecrated as such. Beyond all the generalities, it is controversial what the Principles of Law imply. General theory of law, as a subject-matter that performs a technical analysis of positive law and Philosophy of law that reflects upon the concept of „law" are legal

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disciplines concerned with the research of the legal principles that are methodologically guiding the process of elaborating, organizing and implementing positive law. (Mihai, 2004)

There are some doctrinal controversies related to issues such as, for example, those indicating that the principles of law are the basic guiding ideas of legal norms, or those concerning the authenticity that they possess in their quality of formal source of law. (Narits, 2007) Regarding the first aspect, if we consider them as being ideas that enjoy a leadership role in developing and guiding the application of law, those principles of law that do not impose a certain behavioral pattern could easily be confused with the normative rules that possess a typical-prescriptive character for those that they address. Regarding the disputes concerning their direct or subordinate authenticity, we would like to invoke the provisions of the Treaty of Rome, that indicate that the principles of law are part of the written law, elements of a positive legal order that are established and recognized both in the legislative field and the field of legal enforcement. We can also invoke the jurisprudence of the European Court of Justice that constantly refers to the authenticity of the principles of law.

Another dichotomy, the one concerning the separation and boundaries between rules and principles is significant in the present paper. Even more if the take into consideration the fact that, sometimes, legal principles are defined as rules of maximum generality or superior norms (Craiovan, 2015). Whereas the standards of behavior implied in these legal rules are written more or less precisely and are applicable in an all–or–nothing fashion, legal principles and fundamental rights, by contrast, are abstract, expressing general standards of behavior. (Erik Claes, 2009) In analyzing this dichotomy, it is necessary at first to acknowledge the idea that, in the present society, so dynamic and in constant and quick change, strict rules solving each individual case may not always function. There has been and is a societal need for more elastic legal norms. Principles are one type of those norms. (Aarnio, 2011)

The doctrinarians have stated opinion, on this subject, that can *grosso modo* be divided into two theories: the strong and the weak demarcation. According to the *strong* demarcation thesis, the difference between rules and principles is a qualitative one. The binding nature of principles is qualitatively different than the one of rules. Francisco Laporta has described the principles as follows: first, principles only provide *prima facie* reasons for a solution; second, principles but not the rules have a dimension of *weight* of importance. (Aarnio, 2011). In other words, principles cannot be separated from values, moral grounds and political goals.

In a practical and applied analysis, this means that principles only point towards the direction in which the decision should be made, and not towards a decision itself. Therefore, when applying law to a particular dispute, if uncertainty exists and if the applicable legal provisions do not offer the solution, legal principles form a guideline. It may even be the decisive argument for the solution. (Aarnio, 2011)

The second theory, as we have mentioned previously, is the weak demarcation theory, according to which there is only a difference of degree, not of quality between rules and principles. Rules and principles have a similar role in legal reasoning, although the principles have greater generality than rules. (Aarnio, 2011) In other words, there are no specific traits which separate the legal principles from the legal rules.

Ronald Dworkin argues that principles not only have a different linguistic status compared to rules but they are also valid due to a moral deliberation. That is why he uses the word "principle" to refer to *value* or *goal* principles. (Dworkin, 1986) From the deontological point of view, the rules and principles have a different role in legal reasoning. Legal rules are a matter of interpretation, legal principles that of weighing. This means that only the rules belong to the field of deontic logic, whereas the principles follow the logic of preference. (Aarnio, 2011)

Concerning the consecration and the recognition of the principles of law, we point out that there are principles of law that are established and recognized through written law, and there are still other principles that are consecrated and recognized by customary law or by the case-law of the judicial courts.

In the majority of the scholarly works, the general or fundamental principles of positive law are considered to be characterized by stability over time and generality, these being distributed on several levels, as follows: fundamental principles of law; fundamental principles of positive law, fundamental principles of each law branch and principles of juridical institutions. In their formal source of law capacity, the principles of law can only be the fundamental ones (Gheorghe Mihai, 2007) and yet they do not function in the same, identical way in every positive legal system.

Legal scholars distinguish between formal principles and procedural principles of law. The formal principles of law concern the generality, publicity, stability of the social and legal order while the procedural principles concern the processes of applying the legal provision into reality, as well as the public institutions that are involved in any way in the process of applying law. (Waldron, 2016)

2. PRINCIPLES OF LAW – SOURCE OF LAW.

The principles of law are considered (Lucretia Dogaru, 2015) to be formal sources of positive law, in those situations that are not covered by law or customs, where there are no similar legal provisions. Also, the principles of law are frequently invoked in the complex activity of legal interpretation. (Sofia Popescu, 2016) In this context, we mention that in cases where the law lacks and does not regulate a particular issue that needs resolving, the judge is directed towards taking into consideration the principles of law.Referring to this aspect, we have to underline, however, some blurry things such as, for instance: no principle that lacks legislative consecration and is merely considered as such by the judge cannot constitute the basis for a judgment, since the considerations upon that principle are variable and are, therefore, interpretable. Invoking a principle of law that is in conflict with the applicable law can give rise to discussions about the validity of the law itself, which may be prejudicial to the act of accomplishing the law. For such reasons, we appreciate that whenever the principles of law are used, it must be certain that they exist, in the sense that they are consecrated through a written text (Dan Claudiu Dănişor, 2008) and that their meaning is clear and their utterances are accepted, even if the number and their utterances are not set. A body that interprets and enforces the law cannot create law principles, as it cannot create any general and impersonal legal norms, its role in the judicial mechanism being that of identifying and interpreting the legal principles and legal rules created by the legislative body. (Ioan Vida, 2006)

Beyond these considerations, we have to remember that the concept of principle exists in all social sciences, bearing specific connotations. Under an epistemological aspect, we can state that a principle represents a true sentence that is not proven directly but through its consequences. In physics, for example, the general principles represent truths that become necessary on the consideration that they are not ruled out by experiments.(Huțanu, 1988) According to a more profound approach, the principle would be the function of a being in things, with the way of being in themselves. (Noica, 1981)Thus, we can outline two meanings of the concept of principle: the ontological meaning and the methodological meaning. If we are to consider that a principle is a fundamental idea, it therefore means that the enounced principle refers to something outside its own self.

Under an ontological perspective, any principle precedes and grounds, because it always has logical anteriority compared to what it grounds, so then the principle is the one that grounds the law. Taking into consideration the methodological aspect, we say that the principle orients, that it points or guides any construction of the subject without being constructive, merely guiding. It stands therefore that the principle guides and points the process of creating and accomplishing law. The scholarly doctrine unanimously recognizes the long existence of the general principles compared with the rules of behavior that legal provisions basically are.

The use of the notion of principle in more than one meaning has made possible its multiplication so that now we find ourselves in the presence of a great and variable number of principles that govern different domains such as, for example, are those concerning the regulation of the fundamental human rights, freedoms and duties, fundamental principles of civil and criminal liability, children's' rights principles, nationality law principles, principles of Romanian financial law, principles or European law or environmental law principles and so on and so forth.

An analysis of this category of principles, under an existential aspect, in terms of a logical-formal and normative undertaking, can be found at certain authors. (Lalande, 1991)(Noica, Cuvânt împreună despre rostirea românească, 1987) Frequently and argued, under an existential consideration, the principle is delineated as theme, as main cause. Under a logical aspect, any sentence that has the value of a starting point in front of a system and having a role in organizing and unifying its consequences, is considered principle.(Lalande, 1991) Due to many reasons, the principles, including the general principles of law and those specific to certain law branches, are not and cannot be considered as provisions under the form of rules, prescriptions or instructions. It is known that the legal rules are the exclusive product of the will of a determined normative authority and have a general-mandatory and impersonal character, being designed for generic subjects. However, any legal rule is a general rule, its generality being completely different from the generality of a principle of law.(Barac, 2015) And then, with the purpose of making its will effective, the normative authority attaches to the legal norm a sanction specific to its legal nature. Taking into consideration this aspect, the principles cannot have the quality of legal norms since they are not accompanied by any sanctions in case of their violation and do not impose an impersonal, generic model of behavior. Pursuing the same logic, the principles of law cannot be prescribed by the law and the law can merely recognize their existence, their alterations and even the end of their existence just as they cannot be abolished through a legal provision. Certainly, in the situation

where a principle would have a mandatory character it would lose its nature of being grounds for the legal rules. However, a mandatory rule, even if it is called a principle, has the sense of a procedural rule and it is fixed as such in procedural provisions (see contradictoriness, proportionality, publicity etc.).

It has been stated in the legal scholarly doctrine that legal principles have a difficult dual role, which easily makes the thought move in a circle. The principles partly point out the boundaries of the system, but a principle can only express the boundaries of law if we know that it actually is a legal principle. (Aarnio, 2011) For a principle to earn the status of legal source in reasoning, and a source of law, is must have institutional support in sources of law that are strongly or weakly binding (Hart, 1961) (Dworkin, 1986). This means either that the legal principle is expressly provided for in the legislation. This is for example the case, most often, of basic human rights protected by constitutional texts. If the legal principle is not manifest in the legislation, it may gain the status of a weakly binding legal source through acceptance. (Aarnio, 2011) In this particular case, legal principles can receive institutional support mainly by judicial precedents, in those legal systems that acknowledge precedents as source of law. In other legal systems, where judicial practice is not a source of law, as is the case of the Romanian legal system, still legal principles can receive weak institutional support when used by courts in giving a solution. Legal principles are often tacitly accepted in the precedent but are not publicly expressed among the reasons. It may even have a decisive impact but be "covered" with other arguments. (Aarnio, 2011) However, according to Dworkin, and receiving general acceptance, a legal problem must be solved primarily on the basis of what the law states on the matter. If the wording of the law is not clear, the decision is to be given in accordance with the principles of the law. The one that applies the law, in this hypothesis, must be careful though not to cross the line between law and non-law. A moral argument (as well as a moral principle) "becomes" a legal one, if, and only if, it is included in valid legal argumentation, otherwise, it remains a moral one. However, we agree with one point of view expressed in the scholarly doctrine, according to which in legal discourse we regularly appeal to moral principles and pragmatic arguments, besides traditional legal sources. In that sense, law is a meta– discourse, a discourse on other discourses. (Erik Claes, 2009)

3. SCHOLARLY APPROACHES TO THE PRINCIPLES OF LAW.

Some authors consider that the formation and development of the principles of law is owed in the same measure to jurisprudence, state politics and the will of the legislator. We believe such an approach as limitative for it eliminates the natural principles and maintains merely the products of the three creative forces. Or, it is well known that, in the Nürenberg trials for war crimes, the court have used the so-called "general principles, recognized by all civilized nations" of respecting human dignity, principle that did not exist in those times in any regulation and was thus a recognized principle and not a created one. It is of the utmost importance and relevance for states, whenever they apply treaties in the field of human rights to take into consideration the general principles of law which are embedded in the international human rights law and which, at the same time, guide the application of legal provisions in this field. Not forgetting the 1968 UN Resolution on Human Rights, even if the general principles of law are not directly

connected to human rights, some of them (such as, the principle of equality and the principle of non-discrimination), have gradually evolved towards substantive human rights. The important role of general principles is that of interpreting the human rights laws.

According to the Austrian theories, the principles of law are essential because the standard requirements that these express allow a constant adaptation of law to the new requirements of social life, adaptation that imposes in the field of law the creation of principles that later are used as adaptation instruments.(Tunc, 1986) We ask ourselves, in such a context, how is it that the standard requirements of principles allow the permanent adaptation of law and also creates them in a constant manner? We state that the standard requirements of principles either permit the constant adaptation of law and in such situations their creation is not necessary, or they are creations and then these do not have the quality of standard creations. The same author(Tunc, 1986) invokes the alteration and permanent renewal of the Austrian civil code, operations whose secret lies in the correct choice of the principles that it is founded upon. We remark that the reference is made to a correct choice and not a correct creation, the choice being made only upon what is already considered to exist.

Both the Austrian and the German theories argue that the enunciation of the principles are the product of discovery and choice of principles, the resulting principles of the conjugated creation of three authors: jurisprudence, state politics and the will of the legislative body. It would therefore result that the existence of the principles of law coincides with the existence of these three authors, authors that create the principles that are later perfected by the legal theoreticians. Certainly, a principle that has been discovered is fixed in a written formulation that is susceptible to later perfecting, but the perfecting of the initial text of the principle does not necessarily imply its improvement. For example, the improvement of the formulation of a criminal provision does not equal to the improvement of that particular criminal law but rather of its formulation.

The known and enunciated principles, although historically not preceding the norms, are logically anterior to these. In the field of public international law exists the premises that the principle is a rule of law having mandatory force. (Vaughan, 2007) However, in modern law, only the legal provision can have the value of rule of law, for only that rule of behavior can become a legal provision that is prescribed by a legislative body. At the same time, the function of a legal norm is that of imposing for its recipients a generic behavioral pattern and not that of guiding them, while a principle guides the legal construction of legislating and accomplishing the law. Hence, the legal interpretation through the use of the principles of law, regards only what is consecrated by the normative text and is valid only by the argumentation that it exists this way or that it can be revealed within the normative acts. It is however also true that certain basic principles like *audiatur et altera pars, reformatio in pejus* and *nulla poena sine lege* protect the position of an individual in cases where no exact statues are available.

We dare to outline a distinction between the principles of law and the legal principles that are methodological rules provided in different normative acts, at the level of branches of law, for the realization of a legal system. In the same time, we state that the principles of law exist, but we find a difficulty any time we have to enumerate these principles and give them a definition. We include in such an enumeration: the principle of freedom, principle of equality, principle of justice and equity, the principle of legality, the principle

of responsibility etc. Certainly, when we proceed to such an enumeration we ask ourselves whether these are principles of law and if others also exist or merely those included in our enumeration. We ask ourselves: how can a principle be formulated in a sentence that has the value of truth and that indicates its necessity? Words like freedom, equality, equity, responsibility, personality, are words with a meta-legal meaning, being conceived with a content that is not definable merely legally.

The interpretation of law with the help of the principles of law can be used through mediation in the sense that the principles of internal law can either be consecrated in normative acts (for example, the principle according to which "Nobody is above the law"), or can the deduced from the normative acts (for example, the principle of subsidiarity), or are engaged in interpretative procedures. Using directly the principles of law in the interpretation process means that these are invoked in the form of customs, internal or international, that are accepted, or in the form of natural principles that are declared as such (for example, freedom).

4. CONCLUSIONS

The value of the fundamental principles of law is recognized in society and is strongly expressed in the activities of drafting, applying and interpreting the legal norms in force. The essential role of these mainly intervenes in the process of legislative creation, of constructing and shaping the law, of building certain legal solutions that are capable of satisfying the needs a society has at one particular moment in time. (Craiovan, 2015)

In their capacity of universal substratum of judicial, the principles of law hold a privileged position in the legal order of a society, bringing an essential contribution to the knowledge of the legal system, to whose balance, unity, cohesion and development contribute in a decisive manner. The general principles of law are indissolubly correlated to social values, being guiding rules that underpin all legal systems, with an important role in orienting the law-maker and law-enforcer. Legal concepts, rules and principles, but also legal arguments and decisions carry and express broader cultural meanings. (Erik Claes, 2009) The practical importance of the general principles of law consists in the fact that they provide guidelines for judges in deciding individual cases or litigations and, at the same time, they have the ability to limit the discretionary power of judges and of the executive power when making decisions in individual cases. (Dogaru, 2018)

Certainly, the source of the principles of law is not the legislative body but a process of crystallization of certain general ideas that become important within a judicial system. Without an institutional support, these ideas of great essence and value that belong to the legal system of a country, establish the positive law and are landmarks that orient its elaboration, accomplishment, and enforcement. It is certainly undeniable that contemporary legal doctrine recognizes the privileged place general principles of law hold in the positive legal order and the special role they play in the legal structure, that of foundation for any legal construction. Any legal order is nothing more than normative whole made up of rules and principles. The general principles of law are one component, fundamental, of each legal order and their meaning is not exhausted by a specific use at a given moment and in a given context. They have a relative meaning and applicability according to the circumstances in which they intervene. On each occasion they demand

careful deliberation in order to reinvent and delimit, as it were, their content in a particular case. (Erik Claes, 2009)

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