THE PRINCIPLES OF LAW. METAPHYSICAL RATIONALITY AND LEGAL NORMATIVITY

Marius ANDREESCU[*]

Andra PURAN[**]

Abstract

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 the 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, are being materialized extensive references to the philosophical and juridical doctrine in the matter. This study is a pleading to refer to the principles, in the work for the law's creation and applying. 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.

Keywords: *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.*

1. Introduction

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 first element, which exists by itself, without needing to be deduced or demonstrated, and by achieving system cohesion, without which scientific knowledge and creation cannot exist.

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

The principle represents *the given as such*, which can have a double meaning: a) what exists before any knowledge as an a priori factor and basis for science; b) theoretical element and resulting synthesis of phenomenal diversity for reality of any kind. The distinction but also the reality between „given" and „constructed" are important to understand the nature of principles in science and especially in law. In his work „Séance et technique en droit positif", published at the beginning of the 20th century, François Geny[2] analyzes for the first time the relationship between science and legal technique starting from two concepts: the „given" and the „constructed". In Geny's opinion, a thing is „given" when it exists as an object outside the productive activity of man. In this sense, the author distinguishes four categories: real data; historical data; the rational data; the ideal data. From the perspective of our research topic, two of these categories are of interest, namely: the „rational data" which consists of those principles that arise from the consideration that must be shown to man and human relations, and the „ideal data" through which a dynamic element is established, namely moral aspirations and spiritual of a particular civilization.

[*] Lecturer PhD, Faculty of Economic Sciences and Law, University of Pitești (e-mail: andreescu_marius@yahoo.com).

[**] Lecturer PhD, Faculty of Economic Sciences and Law, University of Pitești (e-mail: andradascalu@yahoo.com).

[1] *Dicționar explicativ al limbii române*, Socialist Republic of Romania Press, Bucharest, 1975, p. 744.

[2] Quoted by I. Craiovan in the monograph *Introducere în filosofia dreptului*, All Beck Publishing House, Bucharest, 1998, p. 63.

A thing is „constructed" when it is made by man, for example a reasoning, a legal norm etc. The „given" is relative in the sense that it is influenced by the „constructed", by human activity. Regarding the „given", man's attitude consists in knowing it with the help of science. As far as the „built" is concerned, man is by hypothesis the builder, he can make art or technique in this sense. The sphere of the constructed also extends to the social and political order.

The question arises whether the right is „given", an object of science, in other words of ascertainment and registration, or is it „constructed", a technical work? From a historical perspective, law is obviously „given", an object of science, as old law, contemporary national or international law appears. However, the development of positive law requires „a construction" and in this sense the legal rules are the work of technique.

In the legal literature, this distinction has been retained, according to which science investigates the social climate that requires a certain legal normativity, and the technique aims at the ways in which the legislator transposes into practice, „builds" the legal rules. The relativity of this distinction was also emphasized, considering that the legal technique also implies a creation, a scientific activity[3].

Therefore, the principles represent the „given" as an ideal or basis for science and the „constructed" in the situation where they are elaborated or transposed into a human construction, including through legal norms.

A good systematization of the meanings of the notion of principle is made in a monograph[4]: „a) the founding principle of a field of existence; b) what would be hidden from direct knowledge and requires logical-epistemological processing; c) logical concept that would allow knowledge of the particular phenomenon".

This systematization, applied to law, means: „a) the discussion regarding the essence of law; b) if and how we would know the essence; c) the operativity of the placement in the phenomenality of the right, correlated or not with the essence"[5].

The spirit's need to ascend to principles is natural and particularly persistent. Any scientific construction or normative system must refer to principles that guarantee or establish them. This regressive movement towards the unconditional, towards what is absolutely first, is for example the movement that Plato follows in Book VII of the Republic[6], when he posits the existence of „Good" as a first and non-hypothetical principle.

In the same sense, another great thinker[7] speaks of the „first principles" or the eternal principles of the unprovable „Being", the basis of all knowledge and of all existence, beyond which lies only ignorance.

The question then 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 a transition from logic to existence (the ontological argument) is not legitimate. If the unconditioned, as a principle, is necessarily posited by our reason, this cannot and must not lead us to the conclusion that this unconditioned exists outside of it and independently of any reality.

Consequently, 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 the existential dialectic or as a reflection of becoming in the phenomenal world and of essence.

2. Content

Law, because it presupposes the particularly complex relationship between essence and phenomena, as well as a dialectic specific to each of the two categories in terms of theoretical, normative and social reality, cannot be outside the principles.

The problem of the status of the principles of law and their explanation has always concerned theorists. The school of natural law argued that the source, the origin, therefore the basis of legal principles is human nature. The historical school of law, under the influence of Kantianism, opens a new perspective in researching the genesis of legal principles, presenting them as products of the popular spirit (Volkgeist) which moves the basis of law 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 from social experience. When the generalization covers a sufficiently large series of social facts we are in the

[3] J. Dabin, *Théorie générale du Droit*, Bruxelles, 1953, p. 118-159.
[4] Gh.C. Mihai, R.I. Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, All Beck Publishing House, Bucharest, 1997, p. 19.
[5] Gheorghe C. Mihai, Radu I. Motica, *op. cit.*, p. 20.
[6] Platon, *Opere*, 5th vol., Scientific and Enciclopedic Publishing House, Bucharest, 1982, p. 401-402.
[7] Aristotel, *Metafizica*, Book I, IRI Press, Bucharest, 1996, no. 9-69.
[8] I. Kant, *Critica raţiunii pure*, IRI Press, Bucharest, 1994, p. 270-273.

presence of some principles. There are also authors such as Rudolf Stammler who deny the validity of any legal principle, considering the content of law diversified in space and time, lacking in universality. In the author's view, law would be a cultural category[9].

Referring to the same problem, Mircea Djuvara affirmed: „The whole science of law does not consist in reality, for a serious and methodical research, except to release from the multitude of provisions of the law their essentials, *i.e.*, precisely these ultimate principles of justice from which all derive the other provisions. In this way, the entire legislation becomes very clear and what is called the legal spirit is captured. Only in this way the scientific elaboration of a law is done"[10].

In our opinion, this is the starting point for understanding the principles of law.

In specialized literature, there is no unanimous opinion regarding the definition and meanings of the principles of law[11]. Several common elements can be identified, which we highlight below:

- Legal principles are general ideas, guiding postulates, fundamental prescriptions or foundations of the legal system. They characterize the entire system of law, constituting at the same time specific features of a type of law.
- The general principles of law configure the structure and development of the legal system, ensure unity, homogeneity, balance, coherence and capacity for its development.
- The authors distinguish between fundamental principles of law, which characterize the entire legal system and which reflect what is essential within the respective type of law, and principles valid for certain branches of law or legal institutions.

Thus, in the doctrine, the following general principles of law were identified and analyzed: 1) ensuring 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 believes that the general principles of the law have a theoretical and practical importance which consists in: a) the principles of the law draw the guideline for the legal system and guide the legislator's activity; b) these principles are also important for the administration of justice because, „The legal person must ascertain not only the positivity of the law, he must also explain the reason for his social existence, the social support of the law, its connection with social values"; c) the general principles of law can take the place of regulatory norms when the judge, in silence of the law, resolves the case based on the general principles of law[13].

One of the great problems of legal doctrine is the relationship between the principles of law, legal norms and social values. The opinions expressed are not unified, they differ depending on the legal concept. The school of natural law, the rationalists, the Kantian and Hegelian philosophy of law admit the existence of some principles outside the positive norms and superior to them. The principles of law are based on human reason and configure the value of the entire legal order. Unlike the positivist school of law, 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 law and the principles of law: „If law appears as a total of social, mandatory norms, the unity of this totality is due to the consistency of all norms with a minimum number of fundamental principles, themselves presenting a maximum of logical affinity between they"[14].

In relation to this problem, in the Romanian specialized literature the idea was expressed 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 development and application of legal norms, they have the force of higher norms, found in the texts of normative acts, but they can also be deduced from „permanent social values" when they are not expressly stated by the rules of positive law[16].

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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 pozitv*, All Beck Publishing House, Bucharest, 1999, p. 265.

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

[12] Nicolae Popa, *op. cit.*, p. 120-130.

[13] *Ibidem*.

[14] E. Speranţia, *Principii fundamentale de filozofie juridică*, Cluj, 1936, p. 8; N. Popa, *op. cit.*, p. 114.

[15] N. Popa, *op. cit.*, p. 114.

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

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

Together with other authors[18], we believe that the legal norms relate to the principles of law in two senses: the norms contain and describe most of their principles; the functioning of the principles is then achieved by applying in practice the conduct stated by the rules. In relation to principles, legal norms have a narrower teleological explanatory value, the purpose of norms being to preserve social values, not to explain the causal reason for their existence. The principles of law are the expression of the values promoted and defended by law. We could say that the most general principles of law coincide with the social values promoted by law.

For a correct understanding of the issue of values in law and their expression through the principles of law, some brief clarifications are required in the context of our research topic. The different currents and legal schools, from antiquity to the present, have sought to explain and substantiate legal regulations and institutions through some general concepts valued as special values for society. Law is based on value judgments. Indeed, by its nature, law implies an appreciation, a valorization of human conduct according to certain values, representing the finality of the legal order, such as: justice, the common good, freedom etc.[19].

The values are not strictly and exclusively legal in nature. On the contrary, they have a wider dimension of a moral, political, social, philosophical nature in general. These values must be understood in their historical-social dynamics. Although some of them can be found in all legal systems, such as justice, still the specificity and historical particularities of society leave their mark on them. The values of a society must be derived primarily from the philosophy (social, moral, political, legal) that presides and guides the social forces in that society.

The legislator, in the process of legislation, orienting himself according to 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 form specific to the regulation legal. The legal norm becomes both a benchmark for assessing behavior according to the respective social value, and a means of ensuring the realization of the demands of this value and of predicting the future evolution of society. It should also be added that legal norms materialize legal values relatively, because neither as a whole nor individually they fully indicate a legal value, they do not exhaust its wealth of content.

Regarding the identification of the values promoted by law, the opinions of the authors do not coincide, although they are in close spheres. Thus, Paul Roubier lists *justice*, *legal security* and *social progress* as values[20]. Michel Villey lists four great purposes of law: *justice*, *good conduct*, *serving people* and *serving society*[21]. François Rigaux speaks of two categories, namely: the primordial ones, which he calls formal, *order*, *peace* and *legal security*, and the material ones, *equality* and *justice*[22].

The indisputable value that defines the finality of law, in the view of the most prominent thinkers, since antiquity is justice. The particularly complex concept of *justice* has been approached, explained and defined by numerous thinkers – moralists, philosophers, jurists, sociologists, theologians – who start their definition from the ideas of just, fair, in the sense of giving everyone what is due. The general principle of law, equity and justice is the expression of justice as a social value. Many conceptions of law could be located either in a rationalist line or in a realistic one. Rationalists argue that the principle of justice is innate to man, it belongs to our reason in its eternity. Realists argue that justice is an elaboration of history and general human experience.

Regardless of the theoretical orientation, justice undoubtedly constitutes a complex basis of the legal universe. Giorgio del Vecchio states that justice is compliance with the legal law, the legal law being what includes justice. According to Lalande, justice is the property of everything that is just; Faberquetes considers the law as the unique expression of the principle of justice, and justice as, of course, the unique content of the expression

[17] N. Popa, *op. cit.*, p. 116-117.

[18] N. Popa, *op. cit.*, p. 116-117; Gh.C. Mihai, R.I. Motica, *Teoria generală a dreptului. Curs universitar*, Alma Mater Publishing House, Timişoara, 1999, p. 78.

[19] P. Roubier, *Théorie générale du Droit*, LGDJ, Paris, 1986, p. 267.

[20] *Idem*, p. 268.

[21] Qouted by J.-L. Bergel in *Théorie générale du Droit*, Dalloz, Paris, 1989, p. 29.

[22] Quoted by I. Ceterchi, I. Craiovan in *Introducere în teoria generală a dreptului*, All Publishing House, Bucharest, 1993, p. 27.

of law. It has also been said that justice is the will to give everyone what is his; it is balance or the proportion of relationships between people, it is social love, or it is the harmonious realization of the essence of the human being[23].

Justice as a value and principle of law exists through the legal norms contained in constitutions, laws, etc. This does not mean that objective law, with its expressions, completely and inevitably carries „justice": not everything that is right in force is just. On the other hand, there are legal norms, such as technical ones, which are indifferent to the idea of justice. As there are circumstances when positive law is more inspired by considerations of utility than justice in order to maintain order and stability in society.

In our opinion, justice, as a social value and at the same time as a general principle of law, is dimensioned in the ideas of fair measure, equity, legality and good faith. In particular, the concepts of fair measure and equity express proportionality.

The principle of justice has this guiding content in a cognitive-actional line: to give everyone what is due to them. A legal system is unitary, homogeneous, balanced and coherent if in all its components it „ensures, protects, enshrines", so that each natural and legal person is what he is, has what is due to him without harm each other or the social system.

Equity is a dimension of the principle of justice in its consensus with the moral good. This concept rejuvenates formal legal equality, humanizes it, introducing into the legal systems in force the categories of morality from the perspective of which justification is also a doing for good and for freedom. „Considered in this way, equity spreads to the most distant spheres of the system of legal norms, bearing fruit even in strictly technical or formal domains, apparently indifferent to axiological concerns"[24]. Understood by the idea of proportionality, equity concerns the reduction of inequality, where the establishment of perfect equality (also called formal justice) is impossible due to the particularities of the factual situation. In other words, in relation to the generality of the legal rule, equity suggests that we take into account the factual situations, the personal circumstances, the uniqueness of the case, without going to extremes.

The idea of justice evolves under the influence of social-political transformations in society. Thus, in contemporary democratic states, in order to emphasize the achievements of social policy regarding living and working conditions, economic, social and cultural rights, we speak of *social justice*. The achievement of social justice is listed as a requirement of the rule of law in the document adopted at the Conference for European Security and Cooperation, Copenhagen, 1990.

Another problem of legal doctrine is to establish the relationship between the principles of law and those of morality. Christian Thomasius in his work *Fundamenta juris naturae et gentium ex sensu comuni deducta* (1705)[25], distinguished between the mission of law to protect the external relationships of human individuals through prescriptions that form perfect and punishable obligations and the mission of morality to protect the inner life of individuals only through prescriptions which form imperfect and unsanctionable obligations. This distinction between morality and law has become classic.

Undoubtedly, law cannot be confused with morality, for several reasons analyzed in the specialized literature[26]. However, since ancient times, law and morality have been in a close relationship that cannot be considered accidental. The respective relationship is of an axiological nature. Legal and ethical values have a common origin, namely the conscience of individuals living in the same community. The jusrationalism theory – a modern form of jusnaturalism – 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, since law is rational, it is natural, and since it is natural, it is also moral.

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

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

[24] *Ibidem*, p. 133.

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

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

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

We consider that indeed morality and law have a common value structure and this can be deduced not only from the fairly frequently encountered 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 sometimes legal statements are discovered in disagreement with moral principles. The tendency of the law to appeal to values of a moral character is observed in order for them to be introduced in legal regulations. In this sense, Ioan Muraru states that: „Moral rules, although they are usually much more appropriated by natural law and custom, they express the ancestral and permanent desires of mankind. Moral rules, although they are usually not fulfilled, in case of necessary through the coercive force of the state must be legally supported in their realization when they defend the life, freedom and happiness of people. That's why the Romanian Constitution does not lack references to the hypostases of morality. These constitutional references ensure efficiency and validity to morality. Thus, for example, art. 26 and art. 30 protect the 'good morals', art. 53 mentions the 'public moralsd'. Likewise, 'good faith', which is obviously first a moral concept, is enshrined in art. 11 and art. 57"[28]. Therefore, the general principles of law and those of morality have a common value base. Law norms can express values that are originally moral and that are also found in the content of the general principles of law, such as equity or its particular form, proportionality.

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

- Principles – categories – norms;
- Principles – the law, as social reality;

Some more important features of the principles of law can be identified, useful to establish whether proportionality can be considered a principle of law:

- Any principle of law must be of the essence. It cannot identify with a concrete case or with an individual assessment of legal relations. The principle must represent the stability and balance of legal relations, regardless of the variety of normative regulations or particular aspects specific to legal reality. Consequently, the principle of law must be opposed to randomness and express necessity as its essence.

However, the principle cannot be a pure creation of reason. It has a rational, abstract dimension of maximum generality, but it is not a metaphysical creation. Although of the order of essence, the principles of law cannot be eternal and absolute, but reflect social transformations, express the historical, economic, geographical, political particularities of the system that contains them and, in turn, that underpins them[29]. The principles of law evolve because the realities they reflect and explain are subject to improvement. "In law, every legal relationship is susceptible – equally to improvement. The scientific improvement of legal analysis will never be finished. But, in law, we must immediately give solutions, 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 relationships and for the rules of law. At the same time expressing the essential and general of legal reality, the principles of law are the basis for all other normative regulations.

There are great principles of law that do not depend on their consecration by legal norms, but the legal norm determines their concrete content, in relation to the historical reference time.

- The principles of law are enshrined and recognized by constitutions, laws, custom, jurisprudence, international documents or formulated in legal doctrine.

The principles must be accepted internally and be part of the national law of each state. The general principles of law are enshrined in the constitutions. The characteristics of the legal system of a state influence and even determine the consecration and recognition of the principles of law.

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

Thus, in international documents such as the UN Charter or the Declaration of the UN General Assembly from 1970, principles that characterize the democratic international legal order are enshrined[31]. The regional legal systems knew and recognized their own principles. The regional legal systems knew and recognized their own principles. For example, the community law system enshrines the following more important principles: the principle of equality, the protection of fundamental human rights, the principle of legal certainty, the principle

[28] I. Muraru, E.S. Tănăsescu, *Drept constituţional şi instituţii publice*, 1st vol., All Beck Publishing House, Bucharest, 2003, p. 8.
[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. Drept raţional, izvoare şi drept pozitiv*, All Beck Publishing House, Bucharest, 1999, p. 265.
[31] Al. Bolintineanu, A. Năstase, B. Aurescu, *Drept internaţional contemporan*, All Beck Publishing House, Bucharest, 2000, p. 52-71.

of subsidiarity, the principle of res judicata and the principle of proportionality[32]. Most democratic constitutions enshrine principles such as: the principle of sovereignty, the principle of legality and supremacy, 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 consecrating and applying the principles of law. There are situations in which the principles of law are recognized through jurisprudence, without being formulated in the text of normative acts. Thus, the Italian Civil Code recommends judges to rule in the absence of texts, in light of the general principles of law.

There are legal systems in which not all principles have a normative consecration. We are specifically referring to the great system known as common law, which consists of the existence of three autonomous and parallel normative subsystems: common law (in the narrow sense); equity; and statute-law. Equity represents a set of principles derived from court practice and which are a corrective to common-law rules.

With all the variety of ways of enshrining and recognizing the principles of law, the necessity of at least their recognition is evident in order to be characterized and applied in the legal system. This consecration or recognition is not enough to be doctrinal but must be achieved through norms or jurisprudence. However, a distinction must be made between the consecration or recognition of the principles of law, and on the other hand, their application.

- The principles of law represent values for the legal system, because they express both the legal ideal and the objective requirements of society, they have a regulatory role for social relations. In the situation where the rule is unclear or does not exist, the settlement of disputes can be done directly based on general or special principles of law. Ideally, they represent a coordinating theme for the work of legislation.
- In the classification of the principles of law, one starts from the consideration that between them there is a hierarchy or a relationship from general to particular[33]. Starting from this finding we can distinguish:

General principles of law that form the content of norms of universal application with a maximum level of generality. These are recognized by the doctrine and expressed by normative acts in domestic law or international treaties of particular importance. As a rule, these principles are written in constitutions, thus having a superior legal force over all other laws and over all branches of 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 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 plausibility, their opportunity[34].

General principles also play a role in the administration of justice, because those charged with applying the law must know not only the letter of the law, but also its spirit, and the general principles constitute this spirit. Among them we can include: the principle of legality, the principle of enshrining, respecting and guaranteeing human rights, the principle of equality, the principle of justice and equity, etc.

Specific principles that express values and that usually have limited action to one or more branches of law. They are written in codes or other laws. The principle of the legality of punishments, the obligation of contracts, the presumption of innocence, the principle of respecting international treaties, etc. can be included in this category. The special principles have their value source in the fundamental principles of law.

For example, proportionality is one of the old and classical principles of law, rediscovered in the modern era. The meaning of this principle, in a general sense, is that of equivalent relationship, balance between phenomena, situations, persons, etc., but also the idea of fair measure.

Ion Deleanu specifies that: „Originally, the concept of proportionality is outside the law; he evokes the idea of correspondence and balance, even harmony. Appeared as a mathematical principle, the principle of proportionality also developed as a fundamental idea in philosophy and law, receiving different forms and meanings: „reasonable", „rational", „equilibrium", „admissible", „tolerable", etc.[35]. Therefore, proportionality is part of the content of the principle of equity and justice, considered to be a general principle of law. At the same time, through its normative consecration, explicit or implicit, and through jurisprudential application,

[32] I. Craiovan, *op. cit.*, p. 211.
[33] I. Ceterchi, I. Craiovan, *op. cit.*, p.31; Gh.C. Mihai, R.I. Motica, *Teoria generală a dreptului*, p. 77.
[34] N. Popa, *op. cit.*, p. 117.
[35] I. Deleanu, *Drept constituţional şi instituţii politice*, Europa Nova Publishing House, Bucharest, 1996, p. 264.

proportionality has particular meanings in different branches of law: constitutional law, administrative law, community law, criminal law, etc. The definition, understanding and application of this principle, in the meanings shown above, result from the doctrinal analysis and jurisprudential interpretation[36].

3. Conclusions

An argument for which the philosophy of law must be a present reality not only in the theoretical sphere but also for the practical activity of drafting normative acts or the administration of justice, is represented by the existence of general and branch principles of law, some of which are 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 the metaphysics of law, these principles can be transposed into the general theory of law, can be normatively enshrined and applied in jurisprudence. Moreover, there is a dialectical circle because the „meanings" of the principles of law, after the normative consecration and jurisprudential elaboration, are to be elucidated also in the sphere of the philosophy of law. Such a finding nevertheless imposes the distinction between what we could call: constructed principles of law, and on the other hand metaphysical principles of law. The distinction we propose has as its philosophical basis the distinction shown above between „constructed" and „given" in law.

The constructed principles of law are, by their very nature, legal rules of maximum generality, elaborated by legal doctrine or by the legislator, in all situations explicitly established by the rules of law. These principles can constitute the internal structure of a group of legal relations, of a branch or even of the unitary system of law. The following features can be identified: 1) they are elaborated within the law, being, as a rule, the expression of the will of the legislator, enshrined in legal norms; 2) are always expressed explicitly by legal norms; 3) the work of interpretation and application of the law is able to discover the meanings and determinations of the constructed principles of the law which, obviously, cannot exceed their conceptual limits established by the legal norm. In this category we find principles such as: the publicity of the court session, the principle of contradiction, of the supremacy of the law and the Constitution, the principle of non-retroactivity of the law, etc.

Therefore, the constructed principles of law have, by their nature, first of all a legal connotation and only in the subsidiary a metaphysical one. Being the result of an elaboration within the law, the possible metaphysical meanings are to be after their consecration established by the metaphysics of law. At the same time, being rules of law, they are binding and produce legal effects just like any other normative regulation. It is necessary to mention that the legal norms that enshrine such principles are superior in legal force to the usual regulations of the law, because they usually target social relations considered to be essential in the first place for the respect of the fundamental rights and legitimate interests recognized by the subjects by law, but also for the stability and fair, predictable, transparent conduct of judicial procedures.

In the situation of this category of principles, the dialectical circle mentioned above has the following appearance: 1) the constructed principles are elaborated and normatively consecrated by the legislator; 2) their interpretation is carried out in the law enforcement work; 3) the value meanings of these principles are later expressed in the sphere of metaphysics of law; 4) metaphysical „meanings" can constitute the theoretical basis necessary for broadening the connotation and denotation of principles or for the normative elaboration of such new principles.

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

The metaphysical principles of law can be considered as a „given" to legal reality and by their nature are external to law. At their origin, they do not have a legal, normative or jurisprudential elaboration. They are a transcendental and non-transcendent „given" of law, therefore, they are not „beyond" the sphere of law, but they are „something else" in the legal system. In other words, it represents the value essence of law, without which this constructed reality could not have an ontological dimension.

Since they are not constructed, but represent a transcendental, metaphysical „given" of law, it is not necessary to express them explicitly through legal norms. Metaphysical principles can also have an implicit existence, discovered or exploited in the work of interpreting the law. As an implicit given and at the same time

[36] M. Andreescu, *Principiul proporţionalităţii în dreptul constituţional*, C.H. Beck Publishing House, Bucharest, 2007.

as the transcendental essence of the law, these principles must be found, after all, 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 emphasized that the existence of metaphysical principles also underpins the teleological nature of law, because any manifestation in the legal sphere, in order to be legitimate, must be appropriate to such principles.

In the specialized legal literature, such principles, without being called metaphysical, are identified by their generality and that is why they were called „general principles of law". We prefer to emphasize their metaphysical, valuable and transcendental dimension, which is why we consider them metaphysical principles of legal reality. As a transcendental „given" and not constructed by law, the principles in question are permanent, limited, but with determinations and meanings that can be diversified in the dialectical circle that encompasses them.

In our opinion, the metaphysical principles of 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 elaborate on 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 indisputable, but the normative dimension remains under discussion. A broader analysis of this problem exceeds the object of this study, which was intended to be a broad excursion on the philosophical dimension of the principles of law. However, some considerations are necessary. Contemporary ontology no longer considers reality by referring to the classical concepts of substance or matter. In his work, „Substamzbegriff und Funktionsbegriff" (1910), Ernest Cassirer opposes the modern concept of function to the ancient concept of substance. Not what the „thing" is or the concrete reality, but their way of being, their inner fabric, their structure interests the moderns. Concrete objects no longer exist in front of knowledge, but only „relations" and „functions". In a way, for scientific knowledge, but not for ontology, things disappear and give way to relationships and functions. Such an approach is cognitively operational for material reality, not for ideal reality, that „world of Ideas" of which Plato spoke of[37].

The normative dimension of legal reality seems to correspond very well to the findings formulated by Ernest Cassirer. What else is the legal reality than an ensemble of social relations and functions that are transposed into the new ontological dimension of „legal relations" through the application of the rules of law. The principles built by applying to a sphere of social relations through the legal norm transform them into legal relations, so these principles correspond to a legal reality, understood as a 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 substance and that of function or relationship, a new concept is imposed, which preserves a substantiality and, without dissolving in function, manifests functionality[38].

Taking this idea of the great Romanian philosopher, we can affirm that the metaphysical principles of law evoke not only legal relationships 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 legal norms. Moreover, as it follows from the jurisprudential interpretations, they can even have a super-normative meaning and, in this way, can legitimize jusnaturalist conceptions in law. These concepts and the doctrine of supra-legality supported by François Geny, Leon Duguit and Maurice Duverger, consider that justice and, in particular, constitutional justice must relate to supra-constitutional rules and principles. In our opinion, such standards are expressed precisely by the metaphysical principles to which I referred. Natural law concepts were also applied by some constitutional courts. The decision of January 16, 1957, of the Federal Constitutional Court of the Federal Republic of Germany regarding the freedom to leave the federal territory is famous in this regard. The Court declares: „Laws are not constitutional unless they were enacted in compliance with the prescribed 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 *unwritten*

[37] C. Noica, *Devenirea întru ființă*, Humanitas Publishing House, Bucharest, 1998, p. 332-334.
[38] C. Noica, *op. cit.*, p. 327-367.

elementary principles (s.n.) and the fundamental principles of the Basic Law, especially with the principles of the rule of law and the social state"[39].

A final aspect that we want to emphasize refers to the role of the judge in the application of constructed principles, but especially of the metaphysical principles of law. We believe that the fundamental rule is that of the interpretation and, implicitly, of the application of any legal regulation in the spirit and respecting the value content of the metaphysical and constructed principles of law. Another rule refers to the situation where there is inconsistency between the usual legal regulations and, on the other hand, the constructed and metaphysical principles of law. In such a situation, we appreciate, in the light of the jurisprudence of the German constitutional courts, that the metaphysical principles will have to be applied with priority, even at the expense of a concrete norm. In this way, the judge respects the essential feature of the legal system and not only the legal functions or relations.

References

- M. Andreescu, *Principiul proporţionalităţii în dreptul constituţional*, C.H. Beck Publishing House, Bucharest, 2007;
- Aristotel, *Metafizica*, Book I, Bucharest: IRI Press, 1996;
- Al. Bolintineanu, A. Năstase, B. Aurescu, *Drept internaţional contemporan*, All Beck Publishing House, Bucharest, 2000;
- I. Ceterchi, I. Craiovan, *Introducere în teoria generală a dreptului*, All Publishing House, Bucharest, 1993;
- I. Craiovan, *Introducere în filosofia dreptului*, All Beck Publishing House, Bucharest, 1998;
- I. Deleanu, *Drept constituțional și instituții politice*, Europa Nova Publishing House, Bucharest, 1996;
- G. del Vecchio, *Lecţii de filozofie juridică*, Europa Nova Publishing House, Bucharest, 1995;
- M. Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv*, All Beck Publishing House, Bucharest, 1999;
- I. Kant, *Critica raţiunii pure*, Bucharest: IRI Press, 1994;
- Gh. C. Mihai, R.I. Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului*, All Publishing House, Bucharest, 1997;
- I. Muraru, E.-S. Tănăsescu, *Drept constituțional și instituții politice.* 1st vol., All Beck Publishing House, Bucharest, 2003;
- C. Noica, *Devenirea întru fiinţă*, Humanitas Publishing House, Bucharest, 1998;
- Platon, *Opere*, 5th vol., Scientific and Enciclopedic Publishing House, Bucharest, 1982;
- E. Speranţia, *Principii fundamentale de filozofie juridică*, Institutul de arte grafice Ardealul, Cluj. 1936.

[39] M. Andreescu, *op. cit.*, p. 34-38.