

# THE PRINCIPLES OF LAW. PHILOSOPHICAL APPROACH

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## 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.*

**Key words:** Principles of the law/ / “given” and “constructed” in the law / Moral value / juridical value/ metaphysical principles/ constructed principles.

## I. Introduction

In philosophy and in general, in science, the principle has a theoretical value and an explanatory one as it is meant to synthesize and express the basis and unity of human existence, of existence in general and knowledge in its diversity of manifestation. The discovery and the assertion of the principles in any science concedes the certitude of knowledge, both by the expression of the *prime element*, that’s exist by itself, without having the need to be deducted or demonstrated, as throughout the achieving of cohesion within the system, without which the knowledge and scientific creation cannot exist.

The principle has multiple significances in philosophy and science, but for our scientific approach, one keeps in mind this one:” as element, idea, basic law on which a scientific theory is grounded, a norm of conduct or the totality of laws and basic concepts of a discipline”<sup>1</sup>. The common place of the meanings of the term of principle makes the essence, a common category important both for philosophy as for the law.

The principle represents the *given as such*, that may have a double significance: a) what existed before any knowledge as aprioric factor and ground for the science; b) theoretical and resulting element of the synthesis of the phenomenon diversity for the reality of any type. The distinction, but also the relationship between “given” and ‘constructed” are important in understanding the nature of the principles in science and mainly in law. In his work “*Science et technique en droit positif*” published at the beginning of XX century, François Geny<sup>2</sup> analyzes for the first time the relation between science and juridical technique starting from two concepts” the ‘given” and the ‘constructed”. In his opinion Geny one thing is “given” when it exists as an object outside the productive realities of human. On this meaning the author distinguishes four categories: the *real given*, the *historical given*; the *rational given*; the *ideal given*. From our researching theme’s

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<sup>1</sup> *Romanian explanatory dictionary*, Publishing House of the Socialist Republic of. Români, Bucharest, 1975, p.744.

<sup>2</sup> Author quoted by Ion Craiovan, in the Monography *Introduction into Law’s Philisophy*, Publishing House All Beck,Bucharest, 1998, p.63.

perspective two of these categories are of interest, namely:” the rational given” that consists of those principles that come out from the consideration that needs to be shown to the people and human relationships, and the “ideal given” throughout which is being established a dynamic element, respectively the moral and spiritual relationships of a particular civilization.

One thing is being “constructed” when being achieved by man, as reasoning, a juridical norm, etc. The “given” is relative in the meaning that is being influenced by a ‘constructed”, by human activity. Regarding the “given”, man’s attitude consists in knowing it by the help of science. Regarding the “constructed” the man is by hypothesis the “constructor”, he can make from this respect, art or technique. The sphere of the constructed stretches out onto the social and political order.

The question that arises is if the law is “given”, object of science, in other words for a finding, recording or it is “constructed, as technical work? From historical perspective, the law is obviously “given”, object of science, such as it appears in the old law, in the international or national contemporary law. The drafting of the positive law yet assumes a “construction” and the juridical rules are the work of technique on this respect.

In the juridical literature this distinction has been retained, in compliance with which the science explores the social climate that requires a certain juridical normality, and the technique is aiming towards the modalities through which the law maker transposes them into practice, “builds” the juridical rules. It was emphasized nevertheless upon the relativeness of this distinction, having into consideration that the juridical technique also assumes a creation, a scientific activity<sup>3</sup>.

Therefore the principles represent the “given” as ideal or background for the science and the ‘constructed” in situation they are developed or transposed into a human construction, included by juridical norms.

A good systematization of the meanings which the principle notion has is done in a monography<sup>4</sup>: “a) the founding principle of a field of existence; b) what would have been hidden to the direct knowledge, and requires logical-epistemological processing; c) logical concept that would allow the knowledge of the particular phenomenon.”

This systematization, applied to the law means: a) the discussion referring to the substance of law; b) if and how we may know the substance; c) the efficiency of placing into the phenomality of the law, related or not with the substance.”<sup>5</sup>

The need of the spirit to raise up to the principles is natural and mostly persistent. Any scientific construction or normative system must relate to the principles that will guarantee or substantiate them. This regressive motion towards unconditioned, towards what is prime in an absolute way is for example of the motion that Platon follows in the Book VII of the Republic<sup>6</sup>, when he puts the essence of the “Good” as a prime and non-hypothetical principle. In the same meaning another great thinker<sup>7</sup> speaks about the “first principles” or the eternal principles of the “Being”, non-demonstrable, a ground for any knowledge and of any existing one, beyond which is nothing else but ignorance.

The question then is to know if what seems necessary, in the virtue of logics of knowledge is necessary also in the ontological order of the existence. In the “Critic of the Pure Reason”,<sup>8</sup> Kant will show that such a passing from the logic to the existing (the ontological argument) is not legitimate. If the unconditioned, as a principle, is put in a necessary way by our reasoning, this fact cannot and

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<sup>3</sup> Jean Dabin, *Théorie générale du Droit*, Bruxelles, 1953, p. 118-159.

<sup>4</sup> *Ibidem, op.cit.*, p.20.

<sup>5</sup> *Ibidem, op.cit.*, p.20.

<sup>6</sup> Platon, *Works* – volume V, Scientific and Encyclopedic Publishing House, Bucharest, 1982, p.401-402.

<sup>7</sup> Aristotel, *Metaphysics, Book I*, Ed. IRI, Bucharest, 1996, no.9-69.

<sup>8</sup> Immanuel Kant, *Critique of Pure Reason*, Publishing House IRI, Bucharest, 1994, p.270-273.

must not lead us to the conclusion that this unconditioned exists outside it and independently of any reality.

In consequence, as the principles aim the existence in all its fields, they cannot and must not be immutable, but are the outcome of the becoming. They are a “given”, but only as a result of the existential dialectics or as a reflection of becoming into the phenomenal world and of the essence.

## II. Paper content

Since the law is assuming a very complex relationship, between the essence and the phenomena, and also a dialectics specific to each of the two categories in the plane of theoretical, normative and also social reality, cannot be outside the principles.

The problem of the statute of the principles of law and their explaining was always a concern for the theoreticians. The natural law school argued that the source, origin, and therefore the grounds of the juridical principles are of human nature. The historical school of law, under Kantianism influence. The law historical school, under Kantianism’s influence, opens a new view in researching of juridical principles’ genesis, presenting them as products of the people’s spirit (Volkgeist) which shifts the grounds of law from the universe of pure reasoning, to the junction of some historical origins scattered in a multitude of transient forms. The versions of the positivist school claim that the principles of law are generalizations induced by the social experience. When the generalization covers a series of social facts, in a sufficient number, we are in the presence of principles. There are authors such as Rudolf Stammler that deny the lastingness of any juridical principle, considering the contents of law diversified in space and time, lacking universality. In the author’s concept the law could be a cultural category.<sup>9</sup>

Referring to the same problem, Mircea Djuvara asserted: “All law science does not consist in reality, for a very serious and methodical research, but merely in releasing out of a multitude of law dispositions, their essential, which are precisely these last principles of justice of which other dispositions derive from. In this way the entire legislation is of a large clarity and what it is called the juridical spirit comes into being. Only thus the scientific drafting of a law is being done.”<sup>10</sup>

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

In the specialized literature there is no unanimous opinion regarding the definition of the principles of law<sup>11</sup>. A series of common elements are identified, which we mention below:

- The principles of law are general ideas, guiding postulates, fundamental provisions or bases of the law system. They characterize the entire law system, constituting in the same time features specific to a certain type of law;
- The general principles of law configure the entire structure and the development of the law system, provide the unity, homogeneity, balance, coherence and its development capacity;
- The authors differentiate between fundamental principles of law, that characterize the entire law system and which reflect what is essential within the respective law type and the principles valid for certain law branches or juridical institutions.

Thus in the doctrine were identified and analyzed the following general principles of law: 1) providing the juridical bases for state’s functioning; 2) the principle of liberty and equality; 3)

<sup>9</sup> Rodolf Stammler, *Theorie der Rechtswissenschaft*, University of Chicago, Press, 1989, p.24-25.

<sup>10</sup> Mircea Djuvara, *Teoria generală a dreptului. Drept rațional, izvoare și drept pozitiv*, *General Theory of Law. Rational Law, Source and Positive Law*. Publishing House All Beck, Bucharest, 1999, p.265.

<sup>11</sup> On this meaning see also : Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului, Introduction in Law General Theory* Publishing House All, Bucharest, 1993, p.30; Gheorghe Boboș, *Teoria generală a statului și dreptului*, *General Theory of State and Law* Didactical and Pedagogical Publishing House, Bucharest, 1983, p.186; Nicolae Popa, *General Theory of Law*, Publishing House Actami, Bucharest, 1999, p.112-114; Ion Craiovan, *Tratat elementar de teorie generală a dreptului*, *Elementary Treaty of Law General Theory* Publishing House All Beck, Bucharest, 2001, p.209.; Radu Motica, Gheorghe Mihai, *Teoria generală a dreptului*, *General Theory of Law* Publishing House Alma Mater, Timișoara, 1999, p.75.

principle of responsibility; 4) principle of justice<sup>12</sup>. The same author considers that the general principles of law have a theoretical and practical importance that consists in: a) the principles of law are drawing the guiding line for the juridical system and orientates the activity of the law maker; b) these principles are important for the administering of the justice as “The man of law must ascertain not only the positiveness of the law, he has to explain the reason of its social existence, the social support of law, its connection with the social values”; c) the general principles of law take the place of the regulating norms when the judge, in the silence of the law, solutions the cause based on law general principles<sup>13</sup>.

One of the main problems of the juridical doctrine is represented by the relation between the law principles, law norms and social values. The opinions expressed are not unitary they differ depending on the juridical conception. The natural law school, the rationalists, the Kantian and Hegelian philosophy of law admit the existence of some principles outside their norms, positive and superior to them. The principles of law are grounded on the human reason and configure valorically the entire juridical order. Unlike this, the positivist law school, the Kelsian normativism considers that the principles are expressed by the norms of law and in consequence there are no law principles outside the juridical norms system.

Eugeniu Speranția established a correspondence between the law and law principles: “If the law appears as a total of social norms, mandatory, the unity of this totality is due to the consequence of all norms related to a minimum number of fundamental principles, themselves presenting a maximum of logical affinity between them.”<sup>14</sup>

In connection to this problem, in Romanian specialized literature was emphasized the idea that the law principles are fundamental provisions of all juridical norms<sup>15</sup>. In another opinion, it was considered that the law principles orientate the drafting and enacting of the juridical norms, they have the force of some superior norms, that are found in the text of normative acts, but they can be deduced from the “permanent social values” when they are not expressly formulated by the positive law norms<sup>16</sup>.

We consider that the general law principles are delimited by the positive norms of law, but undoubtedly there is a relationship between these two values. For instance, the equality and liberty or equity and justice are valoric foundations of social life. They need to find their juridical expression. In this way appear the juridical concepts that express these values, concepts that become foundations (principles) of law. From these principles derive the juridical norms. Unlike the norms, the general principles of law have an explanatory value because they contain the grounds for law’s existence and development.<sup>17</sup>

Besides other authors<sup>18</sup> we consider that the juridical norms relate to the law principle in two meanings: the norms contain and describe most of their principles; the functioning of the principles is achieved by putting into practice of the conduct provided by the norms. In relation to the principles the juridical norms have an explanatory, teleological narrower value, the purpose of the norms being to preserve the social values, not to explain the causal reason of their existence. The principles of law are the expression of the values promoted and defended by the law. One can say that the most general principles of law coincide with the social values promoted by the law.

<sup>12</sup> Nicolae Popa, *quoted works.*, p.120-130.

<sup>13</sup> Ibidem, *quoted works*, p.119.

<sup>14</sup> Eugeniu Speranția, *Principii fundamentale de filozofie juridică, Fundamental Principles of Juridical Philosophy* Cluj, 1936, pg.8. On this meaning see also Nicolae Popa, *op.cit.*, p.114.

<sup>15</sup> Nicolae Popa, *quoted works*, p.114.

<sup>16</sup> Ioan Ceterchi, Ion Craiovan, *quoted works* p.30.

<sup>17</sup> Nicolae Popa, *quoted works*, p.116-117.

<sup>18</sup> Nicolae Popa, *quoted works*, pg.116-117, Radu I. Motica, Gheorghe C. Mihai, *Teoria generală a dreptului. Curs universitar, General Theory of Law. Academic Course* Ed. Alma Mater, Timișoara, 1999, p.78.

For a correct understanding of the problematic of the values in law and their expressing by the principles of law some brief comments are needed in the context of our researching theme. The different currents and juridical schools, from antiquity up to the present, have tried to explain and substantiate the regulations and juridical institutions by some general concepts appreciated as being special values for the society. The law is grounded on judgments of value. Indeed by its nature the law implies an appreciation, a value rendering of human conduct in relation to certain values, representing the finality of juridical order such as: justice, common good, liberty etc.<sup>19</sup>

The values are neither of a strict nature nor of an exclusively juridical nature. On the contrary, they have a larger dimension, moral, political, social, philosophical, in general. These values must be understood in their historical-social dynamics. Though some of them are to be found in all law systems, for instance the justice, nevertheless the specific and historical particularities of the society leave their print on them. The values of a society must be primordially deduced from philosophy (social, moral, political, juridical) which leads and guides the social forces in the respective society.

The law maker, in the enactment process, oriented by such values, expressed mainly in the general principles of law, transposes them into juridical norms, and on the other side, once these values "enacted" they are defended and promoted in the form specific to the juridical regulation. The juridical norm becomes both a standard for the appreciation of the conduct pending on respective social value, or a means to ensure the achieving of the exigencies of such a value and the prediction of the future development of society. Needs to be added that the juridical norms substantiate the juridical values in a relative way because, either as a whole or individually, they don't show totally a juridical value, they do not exhaust its richness in contents.

In regard to the identification the values promoted by the law, the opinions of the authors do not coincide, yet they stay in closed related spheres. Thus, Paul Roubier named few such values *the justice, juridical security and social progress*<sup>20</sup>. Michel Villey named four large finalities of the law: *justice, good conduct, serving people and serving society*.<sup>21</sup> François Rigaux speaks about two categories, namely: the primordial ones called by him formal, *order, peace and juridical security* and the material ones *equality and justice*.<sup>22</sup>

The undeniable value that defines the finality of the law, in the concept of the most distinguished thinkers, yet from the ancient times, is the *justice*. The most complex concept *justice* was approached, explained and defined by numerous thinkers – moralist, philosophers, counselors, sociologists, theologians – that start in defining it from the ideas of *just, equitable*, in the meaning to give everyone what deserves. The general principle of law, equity and justice is the expression of justice as a social value. Many concepts about the law would be suitable, be it on a rationalist line or in a realistic one. The rationalists argue that the principle of justice is innate to men, it holds onto our reasoning in its eternity. The realists argue that the justice is an elaborate of history and human general experience.

Regardless of theoretical orientation, the justice undoubtedly constitutes a complex ground of the juridical universe. Giorgio del Vecchio asserts that the justice is a conformation to the juridical law, the juridical law being the one that contains the justice. According to Lalande the justice is the owner of what is just; Faberquetes considers the law as a unique expression of the principle of justice, and the justice, as, naturally, the unique content of the expression of law. It has been said that the justice is the will to give everyone what it is his; is the balance or proportion of the relationships between people, is the social love or the harmonious fulfilling of the human being essence.<sup>23</sup>

<sup>19</sup> Paul Roubier, *Théorie générale du Droit*, L.G.D.J., Paris, 1986, p.267.

<sup>20</sup> Paul Roubier, *quoted works*, p.268.

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

<sup>22</sup> Quoted by Ioan Ceterchi and Ion Craiovan in *Introducere în teoria generală a dreptului, Introduction into General Theory of Law* Publishing House All, Bucharest, 1993, p.27.

<sup>23</sup> For enlarging the topic see Gheorghe C. Mihai, Radu I. Motica *Fundamentele dreptului. Teoria și filozofia dreptului, Law Fundamentals. Theory and Philosophy of Law* Publishing House All, Bucharest, 1997, p.128.

The justice as a value and principle of the law exists throughout the juridical norms contained in constitutions, laws etc. This does not mean that the objective law, with expressings, carries on entirely and unavoidably “justice”: not all that is lawfully in force is just. On the other side there are juridical norms, such for instance, the technical ones that are indifferent to the idea of justice. There are circumstances when the positive law is inspiring more utility considerations than the justice ones, in order to maintain the order and stability in society.

In our opinion, the justice, as social value and also as a general principle of law, dimensions itself in the ideas of just measure, equity, lawfulness and good faith. Mainly the concepts of just measure and equitably express the proportionality.

The principle of justice has a guidance contents on the cognitive-acting line: to give each one what deserves. A law system is unitary, homogenous, balanced and coherent if all its components “provide, protect, establish” in such a way that every physical and juridical person be what it is, to have what he deserves without injuring one another or the social system.

The equity is a dimension of the principle of justice in its consensuality with the moral good. This concept moulds the formal juridical equality, makes it human, introducing into the law systems in force the categories of the moral from the perspective of those for which the justification is a making for good and for liberty.” Thus considered, the equity disseminates till the farthest spheres of the juridical norms system, fructifying even the strictly technical or formal fields, apparently indifferent towards the axiological concerns”<sup>24</sup>. Understood by the idea of proportionality, the equity regards the diminishing of the inequality there where the establishing of a perfect equality (also named formal justice) is impossible due to the particularity of the situation in fact. In other words, in relation to the generality of the juridical norm, the equity suggests to take into consideration the situations in fact, personal circumstances, unicity of the cause, without falling into extreme.

The idea of justice develops under the influence of the social-political transformations. Thus, in the contemporary democratic states, in order to underline the economic, social, cultural rights, one speaks about the *social justice*. The achieving of the social justice is mentioned as a requirement of the lawful state in the document adopted at the Conference for European Security and Cooperation, Copenhagen 1990.

Another problem of the juridical doctrine is to establish the relationship between the principles of law and those of the moral. Christian Thomasius in his work *Fundamenta juris naturae et gentium ex sensu comuni deducta* (1705)<sup>25</sup>, distinguished between the mission of the right to protect the external relationships of human individuals through provisions that form perfect and sanctionable obligations and the mission of the moral to protect the inner live of individuals, only throughout provisions that form imperfect and unsanctionable obligations. This difference between morals and law has become classic.

Undoubtedly, the law cannot be mistaken with the morals, for several reasons analyzed in specialized literature<sup>26</sup>. However, law and morals are from ancient times in a closed relationship that cannot be considered as accidental. The respective relationship is axiological. The juridical and ethical values have a common origin, respectively the conscience of the individuals living in the same community. The theory of justationalism – the modern form of justnaturalism – tried to argue that there is a background of universal and eternal justice, because they are written within

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<sup>24</sup> Ibidem, *quoted works*, p.133.

<sup>25</sup> Quoted by Ion Dobrinescu în *Dreptatea și valorile culturii, Justice and Values of Culture*, Romanian Academy Publishing House, Bucharest, 1992, p.95.

<sup>26</sup> See also Giorgio del Vecchio, *Lecții de filozofie juridică, Lessons of Judicial Philosophy* Publishing Europa Nova, Bucharest, 1995, p.192-202; Ion Dobrinescu, *quoted works*, p. 95-99; Gheorghe Mihai, Radu I. Motica, *quoted works*, pg.81-86; Ion Ceterchi, Ion Craiovan, *quoted works*, p. 39-42.

human reasoning where they connect with the principles of good and truth. Therefore, as law is rational, it is natural and because it is natural, it is also moral.

Of course, the law is eminently governing the outer conduct of human individual. Nevertheless the law is not disinterested by the morals, “by the fact that by means of equity it seeks the good acting to harmonize the exterior with the inside of the individual, throughout the same equity.”<sup>27</sup>

We consider that indeed the morals and law have a common valoric structure and it can be deducted only from the assertion pretty often met and according to which “the law is a morals minimum” but also from the observation that there isn’t a moral assertion to be denounced as unfair, yet sometimes are being discovered juridical assertions in disagreement with the moral principles. It is noticed the tendency of the law to make appeal to values with a moral character so that they can be introduced into juridical regulations. In this respect Ioan Muraru stated that: “the moral rules, though usually are closer to the natural rights and customary laws, they express ancient and permanent desires of mankind. The moral rules, though usually are not fulfilled, in case of need by using the coercive force of the state, they need to be juridically backed up in their fulfilling when they defend human life, freedom and happiness. Therefore, in Romania’s Constitution the referring to moral hypostasis is not missing. These constitutional referring provides efficiency and validity to the morals. Thus, for example, item 26, item 30 protect « good habits », item 35 mentions the « public morals » also the « good faith » which is obviously first a moral concept consecrated by item 11 and item 57<sup>28</sup>. Therefore the general principles of law and those of the morals have a common background of values. The norms of the law can express values that at their origin are moral and are to be found in the contents of the general principles of law, such as is for example the equity or its particular form, the proportionality.

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

- a) principles – categories – norms;
- b) principles – law, as social reality.

Few of the most important features of the principles of law can be identified, useful in order to establish if the proportionality can be considered a principle of law:

**A)** Any principle of law must be of the order of essence. It cannot be identified with an actual case or with an individual assessment of juridical relations. The principle must represent the stability and balance of the juridical relations, regardless the variety of normative regulations or particular aspects specific to juridical reality. In consequence, the principle of law must be opposed to the aleatory and should express the necessity as essence.

However, the principle cannot be a pure creation of the reasoning. It has a rational dimension, abstract of maximum generality, but is not a creation of metaphysics. Yet of substance order, the principles of law can neither be eternal nor absolute, but they do reflect the social transformations, they express the historical, economical, geographical, political particularities of the system which they contain and at their turn, which they substantiate.<sup>29</sup> The principles of law develop so that the realities they reflect and explain be subject to improving. The scientific improving of the juridical

<sup>27</sup> Gheorghe C. Mihai, Radu I. Motica, *quoted works*, p.84.

<sup>28</sup> Ioan Muraru, Elena Simina Tănăsescu, *Drept constituțional și instituții publice, Constitutional Law and Public Institutions* Publishing House All Beck, Bucharest, 2003, vol.I, p.8.

<sup>29</sup> On this meaning see Mircea Djuvara, *Drept și sociologie, Law and Sociology* I.S.D., Bucharest, 1936, pg.52-56 and Nicolae Popa, *op.cit.*, p.113-114.

analysis could never be ended. But in law, one needs to give immediate solutions so that the practical life does not wait<sup>30</sup>.

Being of the substance order the principles of law have a generalizing character, both for the variety of the juridical relationships as for the norms of law. At the same time expressing the essential and the general of the juridical reality, the principles of law are grounds for all other normative regulations.

There are great principles of law that do not depend on their consecration on the juridical norms as it is the juridical norm that determines their concrete contents in relation to the historical reference time.

**B)** The principles of law are consecrated and acknowledged by constitutions, laws, customary, jurisprudence, international documents or formulated by the juridical doctrine.

The principles must be accepted internally and must be a part of the national law of each state. The general principles of law are consecrated in constitutions. The characters of the state's juridical system influence, and even determines, the consecration and acknowledging of the principles of law.

The work of consecration of the principles of law in the political and juridical documents is in full progress.

Thus, in the international documents such as U.N.O Charta or the Declaration of U.N.O. General Assembly in 1970, are consecrated principles<sup>31</sup> that characterize the democratic international law order. The regional law systems had known and acknowledged their own principles. For example, the community law consecrates the following most important principles : principle of equality, protection of the human fundamental rights, principle of juridical certitude, principle of subsidiarity, principle of authority of *res judicata* and principle of proportionality<sup>32</sup>. Most democratic constitutions consecrate principles such as: principle of sovereignty, principle of juridicality and supremacy, constitution, principle of democracy, principle of pluralism, principle of representation, principle of equality etc.

The jurisprudence has a significant role in the consecration and applying of the principles of law. There are situations when the principles of law are acknowledged by jurisprudential ways, without being formulated in the text of normative acts. Thus, the Italian Civil Code recommends to the judges to decide in the absence of some texts, in the light of the general principles of law.

There are systems of law in which not all principles have a normative consecration. We refer mainly to the great system known by the name of *common law*, consisting in essence of three normative, autonomous and parallel subsystems: common law (in a narrow meaning); equity; and statute-law. Equity represents a set of principles coming out from the practice of the instance and is a correction brought to the common-law rules.

With all variety of the consecration manner and the recognition of the principles of law, comes out the need at least for their recognition in order to be characterized and enacted in the system of law. This consecration or acknowledging is not enough to be doctrinary, nevertheless it must be realized throughout norms or jurisprudence. However, a distinction between the consecration and acknowledging of the principles of law must be made, and on the other side, in their enacting.

**C)** The principles of law represent values for the law system, because they express both the juridical ideal, as the objective requirements of society, have a regulating role for the social relations. In situation in which the norm is not clear or it does not exist, the solving of the litigations can be

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<sup>30</sup> Mircea Djuvara, *Teoria generală a dreptului. Drept rațional, izvoare și drept pozitiv, General Theory of Law. Rational Law, Source and Positive Law* Publishing House All Beck, Bucharest, 1999, p. 265.

<sup>31</sup> Alexandru Bolintineanu, Adrian Năstase, Bogdan Aurescu, *Drept internațional contemporan, Contemporary International Law* Publishing House All Beck, Bucharest, 2000, p.52-71. ONU Charta specifies the "General Principles of Law Acknowledged by Civilized Nations" as source of law.

<sup>32</sup> Ion Craiovan, *quoted works* p.211.



achieved directly based on the general or special principles of the law. As ideal, they represent a coordinating ground for the work of law making.

**D)** In classifying the principles of law it is started from the consideration that between them there is a hierarchy or relation from the general to particular<sup>33</sup>. Starting from this observation one can distinguish:

1. General principles of law which form the contents of some norms with universal application with a maximum level of generality. These are acknowledged by the doctrine and expressed by the normative acts in the internal law or internationally treaties as having a special importance. As a rule these principles are written in constitutions having thus a superior juridical force in relation to the other laws and all law branches. Referring to the theoretical and practical importance for studying the law branches, Nicolae Popa remarks: “the general principles of law are fundamental provisions that cumulate the creation of law and its enacting... In conclusion the action of the principles of law has as a result the conceding of *certitude of law* – the guarantee granted to individuals against the unpredictability of the coercive norms – and the congruence of the legislative system, namely the concordance of the laws, their social character, credibility, and opportunity.”<sup>34</sup>

The general principles have a role also in the administering of justice, because those in charge with the law enforcing must know not only the letter of the law, but also its spirit, and the general principles’ make up of this spirit. As part of them one can include: principle of lawfulness, principle of consecration, respecting and guaranteeing human rights, principle of equality, principle of justice and equity etc.

2. The specific principles that express particular values and as a rule have a limited action to one or several branches of law. They are mentioned in codes or other laws. In this category can be included the principle of lawfulness of penalties, binding of contracts, presumption of innocence, principle of compliance with international treaties etc. The special principles have their source of values in the law’s fundamental principles.

For instance the proportionality is one of the oldest and classic principles of law, rediscovered in the modern age. The significance of this principle, in a general meaning, is that of an equivalent relation, balance between phenomena, situations, persons etc., but also the idea of just measure.

Ion Deleanu specifies that: “At the origin, the concept of proportionality is outside the law; it calls up the idea of correspondence and balance, but also of harmony. Appeared as a mathematical principle, the principle of proportionality was developed also as a fundamental idea in philosophy and law receiving different forms and acceptions: “reasonable”, “balance”, “admissible”, “tolerable”, etc.<sup>35</sup>. Therefore, the proportionality is a part of the content of principle of equity and justice, considered as being a general principle of law. At the same time by its normative consecration, explicit or implicit, and by jurisprudential applying, the proportionality has particular significances in different branches of law: constitutional law, administrative law, community law, criminal law etc. This principle definition, understanding and applying, in the above shown significances result from the doctrinary analysis and the jurisprudential interpretation.<sup>36</sup>

### III Conclusions

An argument for which the philosophy of law needs to be a reality present not only in the theoretical sphere but also in the practical activity for normative acts drafting or justice

<sup>33</sup> Ioan Ceterchi, Ion Craiovan, *quoted works*, pg.31. Radu I. Motica, Gheorghe C. Mihai, *Teoria generală a dreptului, General Theory of Law, quoted works*, p.77.

<sup>34</sup> Nicolae Popa, *quoted works*, p.117.

<sup>35</sup> Ion Deleanu, *Drept constituțional și instituții politice, Constitutional Law and Political Institutions* Publishing House Europa Nova, Bucharest, 1996, volume.I, p.264.

<sup>36</sup> For details see, Marius Andreescu, *Principiul proporționalității în dreptul constituțional, Principle of Proportionality in Constitutional Law* Publishing House C.H. Beck, București, 2007.

accomplishing, is represented by the existence of the general principles and branches of law, some of them being consecrated also in the Constitution.

The principles of law, by their nature, generality and profoundness, are themes for reflection firstly for law's philosophy, only after their construction in the sphere of law metaphysics; these principles can be transposed to the general theory of law, can be consecrated normatively and applied to jurisprudence. In addition, there is a dialectical circle because the "understandings" of the principles of law, after the normative consecration and the jurisprudential drafting, are subject to be elucidated also in the sphere of the philosophy of law. Such a finding however imposes the distinction between what we may call: *constructed principles of law* and on the other side *the metaphysical principles of law*. The distinction which we propose has as philosophical grounds the above shown difference between 'constructed' and "given" in the law.

The constructed principles of law are, by their nature, juridical rules of maximum generality, elaborated by the juridical doctrine by the law maker, in all situations consecrated explicitly by the norms of law. These principles can establish the internal structure of a group of juridical relationships, of a branch or even of the unitary system of law. The following features can be identified: 1) are being elaborated inside law, being as a rule, the expression of the manifestation of will of the law maker, consecrated in the norms of law; 2) are always explicitly expressed by the juridical norms; 3) the work of interpretation and enacting of law is able to recognize the meanings and determinations of the law's constructed principles which, obviously, cannot exceed their conceptual limits established by the juridical norm. In this category we find principles such as: publicity of the court's hearing, the adversarial principle, law supremacy and Constitution, the principle of non-retroactivity of law, etc.

Consequently, the law's constructed principles have, by their nature, first a juridical connotation and only in subsidiary, a metaphysical one. Being the result of an elaboration inside the law, the eventual significances and metaphysical meanings are to be, after their later consecration, established by the metaphysic of law, at the same time, being norms of law, have a mandatory character and produce juridical effects like any other normative regulation. Is necessary to mention that the juridical norms which consecrate such principles are superior as a juridical force in relation to the usual regulations of law, because they aim, usually, the social relations considered to be essential first in the observance of the fundamental rights and of the legitimate interests recognized to the law subjects, but also for the stability and the equitable, predictable and transparent carry on of juridical procedures.

In case of a such category of principles, the above named dialectical circle has the following look: 1) the constructed principles are normatively drafted and consecrated by the law maker; 2) their interpretation is done in the work of law's enacting; 3) the significances of values of such principles are later being expressed in the sphere of metaphysics of law; 4) the metaphysical "meanings" can establish the theoretical base necessary to broaden the connotation and denotation of the principles or normative drafting of several such newer principles.

The number of the constructed principles of law can be determined to a certain moment of the juridical reality, but there is no pre-constituted limit for them. For instance, we mention the "principle of subsidiarity", a construction in the European Union law, assumed in the legislation of several European states, included in Romania.

The metaphysical principles of law can be considered as a 'given' in relation to the juridical reality and by their nature, they are outside law. At their origin they have no juridical, normative, respectively jurisprudential elaboration. They are a transcendental 'given' and not a transcendent of the law, consequently, are not "beyond" the sphere of law, but are something else in the juridical system. In other words, they represent the law's essence of values, without which this constructed reality cannot have an ontological dimension.

Not being constructed, but representing a transcendental, metaphysical "given" of law, it is not necessary to be expressed explicitly by the juridical norms. The metaphysical principles may

have also an implicit existence, discovered or valued throughout the work for law's interpretation. As implicit "given" and at the same time as transcendental substance of law these principles must eventually meet in the end in the contents of any juridical norm and in every document or manifestation that represents, as case is, the interpretation or enacting of the juridical norm. It should be emphasized that the existence of metaphysical principles substantiates also the teleological nature of law, because every manifestation in the sphere of juridical, in order to be legitimate, must be suited to such principles.

In the juridical literature, such principles, without being called metaphysical, are identified by their generality and that's why they were called "general principles of law". We prefer to emphasize their metaphysical, value and transcendental dimension, which we consider metaphysical principles of juridical reality. As a transcendental "given" and not a constructed one of the law, the principles in question are permanent, limited, but with determinants and meanings that can be diversified within the dialectical circle that contains them.

In our view, the metaphysical principles of law are: *principle of fairness; principle of truth; principle of equity and justice; principle of proportionality; principle of liberty*. In a future study, we will explain extensively the considerations that entitle us to identify the above named principles for having a metaphysical and a transcendental value in respect to the juridical realities.

The metaphysical dimension of such principles is undeniable, yet still remains to argument the normative dimension. An elaborate analysis of this problem is outside the objective of this study, which is an extensive expose about the philosophical dimension of the principles of law. The contemporary ontology does not consider the reality by referral to classical concept, in substance or matter. In his work „*Substanzbegriff und Funktionsbegriff*” (1910) Ernest Cassirer opposes the modern concept of function to the ancient one of substance. Not what is the "thing" or actual reality, but their way of being, their inmost make, the structure concern the modern ones. Ahead of knowledge there are no real objects, but only "relations" and "functions". Somehow, for the scientific knowledge, but not for the ontology, the things disappear and make space for the relations and functions. Such an approach is operational cognitive for the material reality, not for the ideal reality, that "world of ideas" which Platon was talking about.<sup>37</sup>

The normative dimension of juridical reality seems to correspond very well to the observation made by Ernest Cassirer. What else is the juridical reality if not a set of social relations and functions that are transposed in the new ontological dimension of "juridical relations" by applying the law norms. The principles constructed applied to a sphere of social relations by means of juridical norms transforms them into juridical relations, so these principles correspond to a reality of judicial, understood as the relational and functional structure.

There is an order of reality more profound than the relations and functions. Constantin Noica said that we have to name an "element" in this order of reality, in which the things are accomplished, which make them *be*. Between the concept of substance and the one of function or relation a new concept is being imposed, that will maintain the substantiality without being dissolved in functioning, to manifest the functionality<sup>38</sup>.

Assuming the great Romanian philosopher idea, one can assert that the metaphysical principles of law evoke not only the juridical relationships or functions, but the "valoric elements" of juridical reality, without which it would not exist.

The metaphysical principles of law have a normative value, even if not explicitly expressed by law norms. Furthermore, such as results from jurisprudence interpretations, they can even have a supernormative significance and thus, can legitimate the justnaturalist conceptions in law. These conceptions and the superjuridicality doctrine asserted by Francaise Geny, Leon Duguit and Maurice

<sup>37</sup> For more details see also, Constantin Noica, *Devenirea întru ființă, Becoming into Being* Publishing House Humanitas, București, 1998, p. 332-334.

<sup>38</sup> Constantin Noica, *quoted works*. p. 327-367.

Duverger, consider that justice, the constitutional justice, in particular, must relate to rules and superconstitutional principles. In our view, such standards are expressed precisely by the metaphysical principles which we referred to. The jurisprudential conceptions were applied by some constitutional courts. It is famous on this meaning, the decision on January 16<sup>th</sup> 1957 of the Federal Constitutional Court of Germany with regard to the liberty to leave the federal territory. The Court declares: “The laws are not constitutional unless they were not enacted with the observance of the norms foreseen Their substance must be in agreement with the supreme values established by the constitution, but they need to be in conformity with the *unwritten elementary principles* (s.n.) and with the fundamental principles of the fundamental Law, mainly with the principles of lawful state and the social state”<sup>39</sup>.

One last thing we wish to emphasize refers to the role of the judge in applying the principles constructed especially the metaphysical principles of law. We consider that the fundamental rule is that of interpretation and implicitly of enacting any juridical regulation within the spirit and with the observance of the valoric contents of the constructed and metaphysical principles of law. Another rule refers to the situation in which there is an inconsistency between the common juridical regulations and on the other side the constructed principles and the metaphysical ones of the law. In such a situation we consider, in the light of the jurisprudence of the German constitutional court, that the metaphysical principles need to be applied with priority, even at the expense of a concrete norm. In this manner, the judge respects the character of being of the juridical system, not only the functions or juridical relations.

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<sup>39</sup> For details see ,Andreescu Marius , *quoted works*, p. 34-38.