JUSTICE AND EQUITY

Elena ANGHEL*

Abstract

Juridical principles have a privileged place within the positive juridical order, representing foundation of the legal edifice: they prove the continuity of law during the centuries and that is why here we have to dig in order to find out the foundation of law, its permanent nature, its substance; they precede and give birth to positive law, which lies upstream of legal rules; principles build and direct the entire system of law, conferring to the legal order its necessary stability; being the underlayer of positive law, the principles of law represent a stability factor and, also, a source of unity, coherence, consistency and efficiency for that legal system[1].

The entire law science consists in reality of "generating from the multiplicity of law dispositions their essential, namely these exact last justice principles, from which all the other dispositions derive. Hereby, the entire legislation becomes of a great clarity and is caught in the so-called legal spirit"[2].

Keywords: *justice, equity, principle, value, judge*

Introduction

The scope of law, according to Alexandru Vălimărescu, consists in achieving a balance of interests which social harmony derives from, an harmony which is reached by means of two factors: the idea of justice and the idea of order[1].

The ultimate scope of the law, namely the idea of justice has received a multitude of meanings over the time. Regardless of the way it was founded (universal, divine, liberal, egalitarian, etatist justice, etc.), it was always considered that justice and society cannot be separated: *ubi societas, ibi jus*. It would be absurd to pretend that there is no justice if a positive law does not establish it, according to Montesquieu, thus claiming the transcendental nature of the principle of justice, which governs the society independently from its establishment in the regulations of the positive laws.

In the light of these historical considerations, we note that justice was assigned a multitude of meanings over the time: the meaning of justness, thus substantiating the positive law (principled justice); the individual's sense of justice (subjective justice); attainable ideal of any positive law (commutative justice); entitlement of judiciary institutions (distributive justice); prerogative of a state body to establish law (technical justice).

The following perspectives of approaching the concept of justice are noted in the current literature: ontological, as a principle of positive law; axiological, as a value of justness or of justice; moral, as a virtue of the human; sociological, as a social status, like equality or freedom; technical and legal, as a guiding principle of balanced organization of the society; political, as institutionalized power of the state[2].

Paper content

From the ontological point of view, justice is the basis of any law. According to Professor Gh. Mihai, there is a single multidimensional principle, the principle of Justice; it is a fundamental principle, which does not require acknowledgment, because it exists by itself; it is an innate principle, attached to human spirituality. The other fundamental principles – freedom, equality, responsibility – are only „dimensions" of the principle of Justice[3].

According to Djuvara, the idea of justice warms our souls and it is so rooted in our souls that we subordinate everything to it. It is „the guardian of our highest expectations"[4]. Therefore, the law as a science, discipline that dominates its every day application, „is based on an idea that owns it entirely, which infuses its whole life, the idea of justice. Without justness, namely without justice and equity, law cannot be understood, it is only a mean of torture of the people, and not a mean a peaceful coexistence between them"[5].

Sometimes, justice was mistaken for lawfulness. According to Gh. Mihai, we forget that justice is the knowledge of the ground the lawfulness is based on, as a tool which guarantees and ensures order. The father of the constitutions is the lawmaker and their mother is

* Lecturer, PhD Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: **elena_comsa@yahoo.com**).

[1] For a detailed analysis of the importance of the general principles of law, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition 2, C.H. Beck Publishing House, Bucharest, 2014.

[2] Mircea Djuvara, *General Theory of Law (Legal Encyclopedia),* All Publishing House, Bucharest, 1995, page 214.

[1] Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului*, Lumina Lex Publishing House, Bucharest, 1999, pag. 68 and the following.

[2] Gheorghe Mihai, *Fundamentele dreptului*, All Beck Publishing House, Bucharest, 2004, pag. 25.

[3] *Idem*, pag.184.

[4] Mircea Djuvara, *op. cit.*, pag. 11.

[5] Mircea Djuvara, *op. cit*, pag. 114.

justice. Therefore, the law has to be in accordance with justice. *Dura lex sed lex* (the law may be harsh, but it is still the law) outlines the vision according to which the strict application of the law, and not the dispensing of justice is important. Nowadays, it is widely acknowledged and confirmed in the constitutions of all countries of the world that nobody can be exempted from liability for the offenses committed in the exercise of public function[6]. The violation by the lawmaker of the justness standard often leads to the adoption of unfair laws. Although Romanian people stated that *lex injusta non est lex*, the reality contradicted them, so the question is to determine to what extent the law manages to express the standard of justness.

The possibility that the laws are unjust was noted by Toma d'Aquino, which wrote that it is always required to avoid unjust judgment, but it is not required to comply unconditionally with the laws, these being often unjust, „being by themselves contrary to natural law, either always, or most often; the same, well drawn up laws are in some cases faulty; in these cases, the judgment shall not be performed by the law, but by resorting to labels, according to the lawmaker's intention"[7].

Paul Roubier considers that unjust laws hurt the feeling of justice[8]. Despite this, they exist. The author gives several examples of serious damage caused to the achievement of modern justice, either by the imperfections of legal techniques (for reasons of practical utility, which concerns the effective implementation of justice, the legal technique sometimes proceeds with the suppression of justice contained in certain rules of law, in order to turn them into simple and easily applicable rules), or by the adoption of a certain legal and content policy of the institutions; in this respect, the author believes that the law moves away from the requirements of justice when it establishes the opportunity to acquire ownership by adverse possession by a bad faith person. We note that sometimes justice is sacrificed in favor of social order, an aspect justified by M. Hauriou by the fact that „the established social order is the one which separates us from catastrophe; most people in civilized countries prefer to bear a certain dose of injustice than to risk a catastrophe". Notwithstanding, Roubier claims that the supreme goal of law is to achieve justice as the feeling of justice animates social order[9]. In this respect, the author suggests two potential remedies against unjust laws: by way of interpretation, the harmful effects can be reduced, by resorting to actual sources, instead of formal sources and by applying a „free law", and not a „pure law"; furthermore, injustice can also be removed by controlling the constitutionality of the law, which is one of the highest expressions of a law substantiated on justice[10].

Gh. Mihai points out that not the actual facts can be qualified as just or unjust, but the legal regulation which connects legal consequences with such facts. Therefore, thus relating it to the principles of law, the regulation can be legal, but this does not mean that it possesses the justness: justice does not always establish lawfulness from the moral and legal point of view.

Mircea Djuvara noted that unjust laws have to be removed, because the lawmaker „can often be wrong, but the idea of justice necessarily dominates any conception of the law". The law „takes its authority from the principle of justice, which, at least formally, represents"[11]. The ideal of justice is covered by the legislation as it could be roughly formulated, so that the application of this legislation can lead to actual cases of injustice. Notwithstanding, the principle of justice remains the sole criterion for the assessment of justness. The fact that this principle was subject to different interpretations or applications over time, leading sometimes to the regulation of slaves sale, or war or euthanasia, is not likely to affect the uniqueness of the concept of justice.

For Mircea Djuvara, justice is a scope in itself: positive law has a sole justification, namely justice. The rule of law is observed because it is established by itself, it contains its value in itself, rationally, because „for our reason, nothing is superior to the idea of justice that such a rules entails; we necessarily understand that we cannot scarify justice in favor of another interest; the ideal of justice is superior to any other interest, in this respect being the ultimate ideal"[12].

However, the author does not embrace the idea of eternal justice, by postulating that justice remains an ideal, which is never achieved completely, a directive of thinking that subordinates the entire law: „just like geometric shapes, it is an ideal form, empty of contents"[13]. Djuvara defines the ideal as being an absolute rational concept, but points out that its achievement is always relative, since it depends on the facts and conscience that we have on it at some point in time. Therefore, this ideal is not fixed, but it varies from people to people and from a stage to another, it is „a reflex which changes according to places and times, thus representing the ideal of justice of every people, in every moment of its evolution"[14]. Therefore, we can

[6] Elena Emilia Ștefan, *Examen asupra jurisprudenței Curții Constituționale privind noțiunea de „fapte grave" de încălcare a Constituției*, Revista de Drept Public no. 2/2013, p.86.
[7] *Apud* Philippe Malaurie, Antologia gândirii, pag. 56-57.
[8] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2 edition, Éditions Dalloz 2005, pag. 221.
[9] *Idem*, pag. 199 and the following.
[10] *Idem*, pag. 225.
[11] Mircea Djuvara, *op. cit.*, pag. 270.
[12] *Idem*, pag. 214.
[13] *Idem*, pag. 243-244.
[14] *Idem*, pag. 299.

conclude that legal system is characterized by diversity, legal regulations being variable in time and space: „every state has its enacted law, which it deserves in accordance with its traditions and values, with its own social and political development"[15].

Even with this variable content, justice lasted from early evolution of human society, as the ancients defined it: *Fiat justitia, pereat mundus*. The source of the law is the idea of justice, rational idea which is established by means of its own authority; laws are formulated at least under the plea of being just, because law „is not at all Law when it can no longer be considered an effort to achieve Justice"[16]. Under these terms, according to Djuvara, it can be said that „law itself is justice in its essence and the scope of any social organization can only be the achievement of law and therefore of the justice, in the broader and deeper meaning of this expression"[17].

Giorgio del Vecchio conceives justice *a priori*, considering that nothing can be claimed in the name of justice without obedience to its rules. Absolute justice, which „transcends all positive legal findings", remains a high ideal criterion, as it is reflected in all laws, but it is not perfected in any of them. The author analyzes the relation between absolute justice and lawfulness: lawfulness is just an empirical and positive justice, therefore absolute justice represents an inexhaustible source meant to fill the gaps of the lawfulness. However, „those who easily violate laws undermine the very basis of civil life and damage the conditions the respect shown to own person depends on". This does not mean, according to the author, that justice is perfected by the mere cult of lawfulness: „we cannot answer to the vocation of our legal consciousness by standing impassively in the middle of the established order or by waiting passively for justice to fall from the sky. It requires an active and determined participation in that eternal drama, the scene of which is the history and the subject of which is the contrast between good and wrong and just and unjust. We need not only to obey the laws, but to vivify them and to cooperate to their renewal"[18].

According to Paul Roubier, the basis of the law is the ideal of justice; justice is the value which the author lays at the foundation of law and which dominates its entire general theory. First of all, it deals with the external appearance of the rule of law, then, following a rigorous and critical examination of the theories of the great school of laws, it investigates the basis of the legal regulation. Given that justness, the supreme moral value of the society, exists in the civilized human consciousness, beyond strictly legal terms relating to the formal framework of the rule of law, we cannot define law in its external appearance, without analyzing the contents of the rule of law[19].

According to Paul Roubier, the knowledge of the content of the law entails the understanding of the legal rules formation. The establishment of a rule of law must always start from the knowledge of social life needs, depending on which the rule is enacted, and then, according to them, the organization of legal relations is proceeded with. If the first approach is scientific, the second concerns the art of the law. The society is continuously evolving and the law is permanently renewed. The individual is not satisfied with knowing how the things are, but he will always seek to discover how the things should be. He relates to an ideal all the time, and this ideal cannot be found by scientific means, but only by valuable judgments. This is why law is an art, directed towards an ideal.

Therefore, the legal creation work covers two stages: the acknowledgment of those givens of social life and the construction of the rule of law and based on them[20]. By assessing the foundation of the rule of law, the author shows that, if the lawmaker creates the rule of law without taking into account all the givens of the social order, the lawmaker performs an useless work. The author lays at the basis of the law structure two givens: the experience and the ideal of justice, which turn the social order into a superior moral order.

Therefore, the superior principles of law are placed above positive laws[21]. The ideal of justice is the supreme moral value that governs the relations between people, is the „idea of a superior order which must reign in society and which will ensure the triumph of most respectable interests". Roubier pleads for the existence of a substantial criterion of the legal system; justness is contained in the rule of law. Justice is the product of a continuous progress, of law refining work, performed by lawyers in order to ensure a social balance. Therefore, all things which comply with „the superior order of human interests" are just.

According to Nicolae Popa, justice, the Roman sister of Dike, represents „the ideal general state of the society, achievable by ensuring for each and every individual and for all individuals together the fulfillment of their legitimate rights and interests"; if we say justice, we mean subordination to a hierarchy of values[22].

Justice is the reference point which guides the law towards the harmonization of individual interests with the interests of the society, a condition of the wished-

---

[15] Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică,* Hamangiu Publishing House, Bucharest, 2016, pag. 44. For further details on unity and diversity in the typology of law, see Laura-Cristiana Spătaru-Negură, *op. cit.*, pag. 42-44.

[16] Mircea Djuvara, *op. cit.*, pag. 501.

[17] Mircea Djuvara, *op. cit.,* pag. 504.

[18] Giorgio del Vecchio, *Justiţia*, Cartea Românească Publishing House, Bucharest, 1936, pag. 33-117, *Apud* Ion Craiovan, *Tratat de teoria generală a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, pag. 130.

[19] Paul Roubier, *op. cit.*, pag. 120.

[20] *Idem*, pag. 193.

[21] *Idem*, pag. 58.

[22] Nicolae Popa, *Teoria generală a dreptului*, ediţia a 3-a, C. H. Beck Publishing House, Bucharest, 2008, pag. 100 and the following.

for social balance. Standing at the basis of law, justice acts as "glue of all other principles and at the same time, as a regulating principle, by limitation, of these principles"[23]. Due to the fact that social order is the ultimate purpose, justice occurs as a limitation of individual freedom: „human world would be more balanced if every entity of it accomplished its scope, by affirming its purpose in the scope of the world living in; only under such conditions, the respective entity would be and would have what it deserves"[24].

Therefore, the principles are levers the judge relies on in carrying out the work of justice, motivated by the fact that the principles: represent a quality guarantee for the system of justice, ensure the stability of justice, entail the required adjustment of law to social life conditions and enable the filling of the gaps of the law. And yet, ***„people move under the abstraction of the laws and sacrificing them to an excess of logic means to say that human is made for the law and not that the law is made for human, which is an absurdity"***[25]**.**

Permanently engaged in „what should be", justice can often seem cruel. In social reality, the ideal is never achieved, due to the fact „it is covered by the legislation of a moment as it could be roughly formulated. The application of this legislation can lead to actual cases of injustice"[26]. Therefore, too much social justice can mean injustice for actual individual. The high number of cases where the Romanian state was responsible for the activity of the powers of the state should be a warning for the Romanian lawmaker in order to improve legislation and to reconsider all the theory of legal liability in general[27].

If the severity of the principle of justice requires an overview of social relations, **equity** corrects this inconvenient: it is focused on actual cases, by taking into account personal circumstances of every situation and applies and becomes subject to the value of justness in social diversity in order to do JUSTICE, an actual justice. „Equity shows us the fair assessment, from the legal point of view, of every individual case. This assessment is therefore the individual legal relation, having a particular form in every case. It is at the beginning and at the end of law"[28].

The law establishes a formal legal equality, but there cannot be an absolute equality in the society because inherent natural and social differences exist between people[29]. The equity is the one establishing the balance required for the coexistence of individuals, by referring constantly to the idea of equivalence, proportionality. „Legal law, written or not, limited in space and time, lacks of the capacity to cover and establish equity in its universality, but cannot ignore it, by engaging it in the equality relation, which represents the translation of the equity in formal-legal terms"[30].

Equity humanizes positive law, by including the categories of moral in its content. As we have already stated, law does not exhaust the wealth of content of value horizon: besides self-standing legal values which establish the rules of law, other non-legal values, such as equity, are also required for human coexistence. Equity is the guarantor of „the unit of inner life of human individuality with the relative exteriority to the others and to the community", according to Gh. Mihai, adding that the principle of equity lies in the consensuality of Justice with Moral Goodness, with the same founding universality[31].

According to Dumitru Mazilu, equity is a general principle of law, concerning both the creation and the application of law; therefore, equity requires moderation in what concerns the prescription by the lawmaker of the rights and obligations, but also impartiality in the distribution of advantages and disadvantages in the activity of the bodies applying the law[32].

Equity serves as guidance in the filed of the legal liability. The statement engages again the idea of proportionality, this time between the seriousness of the offense and the sanction applied to the offender. But, as legal law is not the same with just law, the legal sanction is not necessarily just. This is why the legal sanction is required to stand between lawfulness and equity: sanction lawfulness would remain „a rigid and repressive form outside the connection with the equity, which ensures a minimum of morality to its content recorded in temporarity"[33].

Equity is an universal principle-idea. It is found as a reference point in the Roman law and in *Manu's Code*, but also in modern legislations. C. Perelman believed that equity represented the appeal of the judge against law. Therefore, equity represents a reference point for the case law, leading to the creation of legal constructions by Praetorian means, such as the theory of heir apparent. According to François Terré, the role

[23] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, Teoria generală a dreptului, C. H. Beck Publishing House, Bucharest, 2006, pag. 63.

[24] Gheorghe Mihai, *Fundamentele dreptului. Dreptul subiectiv. Izvoare ale drepturilor subiective*, vol. IV, All Beck Publishing House, Bucharest, 2005, pag. 29.

[25] Nicolae Titulescu, quote from Victor Duculescu, Georgeta Duculescu, *Justiția Europeană. Mecanisme, deziderate și perspective*, Lumina Lex Publishing House, Bucharest, 2002, pag. 269.

[26] Mircea Djuvara, *op. cit*., pag. 228.

[27] Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, ProUniversitaria Publishing House, Bucharest, 2013, p.317.

[28] Mircea Djuvara, *op. cit*., pag. 227.

[29] In what concerns the right to nondiscrimination, see Elena Emilia Ștefan, *Opinions on the right to nondiscrimination*, published in CKS e-Book 2015, pp.540-544.

[30] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 183.

[31] *Ibidem.*

[32] Dumitru Mazilu, *General Theory of Law*, All Beck Publishing House, Bucharest, 1999, pag. 178.

[33] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, pag. 384.

of the equity is different if we refer to a legal system where law is dominant, case in which it occurs as a remedy thereof, or if case law or common law ranks first in the category of the sources of law[34]. In what concerns the power of the judge to decide on equity, Paul Roubier believes that, if it appeared as established in the old French monarchy, where it was considered that individuals could not be equal before the law, it is no longer justified today, when modern democratic societies vigorously promote the principle of civil freedom and equality. Furthermore, the author notes that, the appeal to equity can be dangerous if it contradicts legal security and social order, social values considered superior[35].

Conclusions

Being a moral-legal constant of humanity, the idea of justice is closely connected with the principle of justice. Mircea Djuvara believed that justice and equity are mistaken as ideals: „if they reach differentiation, this is a mistake that has to be remedied"[36]. We believe that they complement each other. Due to its requirements, the ideal of justice never leans on actual cases, this is why law has to include the ideal of equity in its content, and the two concepts should balance each other.

References:

- Alexandru Vălimărescu, *Tratat de Enciclopedia dreptului* (Lumina Lex Publishing House, Bucharest, 1999);
- Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului* C. H. Beck Publishing House, Bucharest, 2006);
- Dumitru Mazilu, *General Theory of Law*, All Beck Publishing House, Bucharest, 1999;
- Elena Emilia Ștefan, Examen asupra jurisprudenţei Curţii Constituţionale privind noţiunea de „fapte grave" de încălcare a Constituţiei, Revista de Drept Public no. 2/2013;
- Elena Emilia Ștefan, The role of the Ombudsman in improving the activity of the public administration (Public Law Review no.3/2014, pag.127-135);
- Elena Emilia Ștefan, Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ, ProUniversitaria Publishing House, Bucharest, 2013;
- Elena Emilia Ștefan, *Opinions on the right to nondiscrimination*, published in CKS e-Book 2015, pp.540-544;
- François Terré, *Introduction générale au droit*, 7th edition (Dalloz Publishing House, 2006);
- Gheorghe Mihai, *Fundamentele dreptului*, vol. I – II (All Beck Publishing House, Bucharest, 2003);
- Gheorghe Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III (All Beck Publishing House, Bucharest, 2004);
- Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* vol. V (C. H. Beck Publishing House, Bucharest, 2006);
- Gheorghe Mihai, *Natura dreptului: ştiinţă sau artă?* (Studii de Drept Românesc, year 12 (45), no. 1-2/2000);
- Gheorghe Mihai, *Despre principii în drept* (Studii de Drept Românesc, year 19 (43), no. 3-4/1998, pag. 273-285);
- Ioan Ceterchi, Ion Craiovan, *Introducere în teoria generală a dreptului* (All Publishing House, Bucharest);
- Ion Craiovan, *Tratat de teoria generală a dreptului* (Universul Juridic Publishing House, Bucharest, 2007);
- Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016;
- Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)* (All Publishing House, Bucharest, 1995);
- Nicolae Popa, *Teoria generală a dreptului*, ediţia a 3-a, C. H. Beck Publishing House, Bucharest, 2008;
- Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition no. 2, C.H. Beck Publishing House, Bucharest, 2014;
- Paul Roubier, Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales, 2 edition, Éditions Dalloz 2005;
- Roxana-Mariana Popescu, *Features of the unwritten sources of European Union law*, Lex et Scientia, International Journal, no.2/2013, pag. 100-108;
- Roxana-Mariana Popescu, Influenţa jurisprudenţei Curţii de Justiţie de la Luxemburg asupra dreptului Uniunii Europene – case study: the concept of „charge having equivalent effect to customs duties, Revista de Drept Public, no.4/2013, Universul Juridic Publishing House, Bucharest, pag. 73-81;
- Victor Duculescu, Georgeta Duculescu, *Justiția Europeană. Mecanisme, deziderate şi perspective*, Lumina Lex Publishing House, Bucharest, 2002.

[34] François Terré, *Introduction générale au droit*, 7th edition, Dalloz Publishing House, 2006, pag. 15.
[35] Paul Roubier, *op. cit.*, pag. 100.
[36] Mircea Djuvara, *op. cit.*, pag. 228.