LAW AND JUSTICE IN THE AGE OF POSTMODERNISM

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Abstract

This study represents an attempt to highlight, from a legal and philosophical perspective, the most significant contradictions that can affect justice during a period of social crisis, namely the era of postmodernism. The object of our analysis is: normativism and legal formalism, the ideology of globalisation, the contradiction between the consecration and guarantee of citizen rights and the restriction of their exercise through excess of power, the contradictions between law and justice; justice and society and the act of fulfilling justice and what we call the „outward fall of justice". In this context, we refer to some aspects that characterise the person and personality of the judge. This essay is a plea for the principles of law as a possible solution to solve and overcome the crisis of law and justice in postmodernism.

Starting from the difference between „given" and „constructed", we propose the distinction between „metaphysical principles" external to law, which through their content have philosophical meanings, and „constructed principles" elaborated and normatively consecrated. We emphasise the obligation of the legislator, but also of the judge, to refer to the principles of law, including those external to law, in the legislative activity, interpretation and application of the law.

Keywords: *Postmodernism, law and justice, contradictions of justice, the judge, principles of law.*

1. Introduction

Contemporary postmodernism is an era of great existential contradictions in the history of the salvation of man and the world: faith coexists with unbelief, value with non-value, progress with regression. The dominant tendency is recessive, of abandoning man's relationship to God, of dissolving the perennial values of right faith and culture, of transforming man into an individual dominated by technological rationalism and of changing his existential status from the purpose of creation to a mere means, of the perversion of freedom with the illusions of accumulation and consumerism.

We believe that postmodernism is not only a literal or artistic trend, a characteristic of philosophical thought, but more than that it is an existential era or aeon, which includes man, society, the state and law, in a word, an era in the evolution of man and of humanity of culture and civilization.

Postmodernism is the reference term applied to a wide range of developments in the fields of critical theory, philosophy, architecture, art, literature and culture. The various expressions of postmodernism originate from, transcend, or are a reaction to modernism. If modernism sees itself as a culmination of the search for a scientific and rational Enlightenment aesthetic, a rationalised and normative legal ethics and humanism, all of universal value, postmodernism is concerned with how the authority of these ideal entities (called metanarratives) is undermined by the process of fragmentation, the ideology of consumption and deconstruction. Jean-Francois Lyotard [1] described this current as a „distrust of metanarratives"; in his view, postmodernism attacks the idea of universal, monolithic, stable conceptions of man and monolithic existence and instead encourages fractured, fluid and multiple perspectives, promoting value relativism of a scientific, artistic or moral nature. Nothing makes sense, therefore everything is permitted. Existence is individual, concrete, without universals.

Essentially, postmodernism is defined by philosophers and sociologists as a trend in the culture of recent decades that has affected a variety of fields of knowledge, including philosophy. Postmodern discussions cover

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[1] See J.-F. Lyotard, *The Postmodern Condition. A Report on Knowledge*, Manchester University Press Publishing House, USA, 1984.

a wide range of socio-philosophical issues related to the external and internal life of the individual, politics, morality, culture, art, etc. The main characteristic of the postmodern situation was a decisive break with traditional society and its cultural stereotypes. Everything is subject to a reflexive review, evaluated not from the point of view of traditional values, but from the point of view of efficiency. Postmodernism is seen as the era of a radical revision of basic attitudes, the rejection of the traditional worldview, the era of breaking with all previous culture.

All representatives of postmodernism are united by a style of thinking, in which preference is not given to the constancy of knowledge, but to its instability; abstract results of knowledge are not valued, but concrete results of experience; it is stated that reality itself, *i.e.*, the „thing in itself" of which Kant speaks is inaccessible to our knowledge. Contrary to the Kantian conception, even phenomenal reality cannot be known, it cannot be said what reality is. The focus of postmodernist ideology is not on the objectivity of truth, but on its relativity. Therefore, no one can claim to know what the truth is, and moreover, neither a person nor God is the Truth. Every understanding is a human interpretation, which is never definitive. In addition, it is significantly influenced by facts such as social class, ethnicity, race, tribe, etc. belonging to the individual.

A characteristic feature of postmodernism is negativism, „the apotheosis of groundlessness"."[2]. Everything that before postmodernism was considered established, reliable and certain: man, mind, philosophy, culture, science, progress - everything was declared unstable and undefined, everything turned into words, reasonings and texts that can be interpreted, understood and 'deconstructed' but untenable in human knowledge, existence and activity.

However, some philosophers also identify positive aspects of postmodernism. The concern for the philosophical understanding of the problem of language, in its appeal to the humanitarian roots of philosophy: literary discourse, narrative, dialogue, etc., is appreciated as positive. His priority attitude towards the issue of conscience is also considered positive. In this sense, postmodernism is consistent with the development of the entire philosophy of the modern world, which takes into account the problems of cognitive science, including cognitive psychology.

We believe that postmodern society can be characterised by the following ideologies and at the same time ontological realities:

- systems convergence;
- zero economic growth;
- the ideology and practice of globalisation;
- gender ideology;
- the ideology of the superman;
- the ideology of artificial intelligence;
- normativism and legal formalism;
- the morbid contradictions of justice;
- the contradiction between the legal consecration of human rights and their abusive restriction.

Of course, they are not the only aspects. For example, another characteristic of postmodern society is the dominance of technologies over man and humanist values, including Christian ones. [3]

In this study we will analyse aspects of law and justice in the era of postmodernism, respectively: normativism and legal formalism; the ideology and practice of globalisation, supremacy of EU law[4]; the contradiction between the legal consecration of human rights and their abusive restriction, and we will identify what we call the morbid contradictions of justice.[5]

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[2] See L. Sestov, *Toate lucrurile sunt posibile (Apoteoza lipsei de temeiuri)* written in 1905, L. Şestov, *Apoteoza lipsei de temeiuri (Eseu de gândire adogmatică)*, Humanitas Publishing House, Bucharest, 1995.

[3] For developments see M. Andreescu, *Postmodernismul. Studii, eseuri și cugetări*, Paideia Publishing House, Bucharest, 2023.

[4] Also see R. Duminică, *A short reflection on the European constraint of domestic law,* in Agora International Journal of Juridical Sciences no. 2/2010, vol. 4, pp. 109-115, *https://univagora.ro/jour/index.php/aijjs/issue/view/84/102*, last consulted on 22.03.2024; R. Duminică, *Criza legii contemporane*, C.H. Beck Publishing House, Bucharest, 2014, pp. 58-67.

[5] Also see A. Neacșu, *Între statul de criză și statul de drept*, Universul Juridic Publishing House, Bucharest, 2010; O. Predescu, *Criză și democrație. Reziliența dreptului, a statului de drept și a drepturilor omului în contextul lumii contemporane*, Școala Ardeleană Publishing House, Cluj, 2022.

2. „Order", whatever its nature, expresses necessity, limit and even constraint, but which cannot be contrary to human freedom as an existential given

The relationship between freedom and necessity, between freedom and law, moral or legal, is a recessive one. Necessity as order, regardless of its nature and configuration, is the dominant term and freedom the recessive one. Of course, freedom does not follow from necessity being determined by such necessity as in the materialist conception. As existing freedom is different from necessity, but in relation to the order of which necessity is the expression, freedom is always recessive and unfulfilled.

In relation to the necessity of an existential order, as a recessive term, freedom is never complete, it is not fulfilled, but is always in precariousness.

The approach to the issue of freedom that we encounter in the legal sciences has multiple conceptual peculiarities and, we would say, many times more important than the philosophical conceptions of freedom, because the legal represents a state of human existence, a characteristic of the social state, distinct from the natural, material state. It is a contemporary state of human existence, namely the „legal state", which includes an existential order based on two realities: the legal norm and freedom.

Law cannot be conceived outside the idea of freedom. The normative system, the most important aspect of law, has its meanings and legitimacy in human existence, the latter having freedom as an essential given.

But what kind of freedom can we talk about in legal normativism and in the categories and concepts of law? Inevitably, it is a freedom of the legal norm, a constructed freedom, and not an existential given. We must emphasise that the legal norm also implies coercion, like any existential order applied to human phenomenology. There is an important paradox that some authors in the field of Christian metaphysics have also pointed out, namely the coexistence of legal constraint, and on the other hand, human freedom, both of which are essential for the order specific to the legal state in which contemporary man finds himself.

Another aspect is also interesting, namely that the legal norm does not show what freedom is, does not define it, does not show its meanings, but only the situations in which freedom is guaranteed or limited. Moreover, it is good to note that, unlike metaphysics and ethics, the legal norm does not express or conceptualise freedom as such, but only freedoms or rights, *i.e.*, the phenomenal aspects of human manifestations in the social environment, by its nature a relational environment. It is obvious that the normative legal system could not even define freedom as such, because it remains only at the phenomenological and social aspect of existence. In the same way, legal doctrine postulates the freedom of man and highlights the content of legal freedoms and their limits, but does not define freedom as a reality, as an essential feature of man as a person, including in the social environment.

The most important expression of social determinism is the social normative system. Normatisation of social life is necessary and has an imperative character, but it is also a restriction of the exercise of man's natural freedom.

The existence of any individual as a social being implies a series of obligations exercised throughout his life cycle, embodied in a series of norms, some of which complement each other, others appear contradictory to the others, being specific to different interest groups. Sorin M. Rădulescu believes that „the diversity of these norms, as well as their specific way of functioning in various life contexts, creates the so-called normative order of a society, based on which the rational development of social life appears re-regulated".

The very freedom and fundamental rights to be guaranteed and respected must be contained in normative systems, but which are based on coercion that is often incompatible with the ontological freedom of man in the social environment.

It is a freedom that unites. In contrast, the social and implicitly legal status of man is based on the distinction between mine and yours that Kant also mentioned, which divides and limits. This is how the philosophical and legal concept of coexistence of freedoms and legal norms appeared.

The limits of social normativism, as opposed to the legal one, are obvious especially in relation to human freedom. Normativist social determinism cannot encompass nor constrain the freedom of man as a person. The existential freedom of man in the social environment is manifested in its phenomenal forms, determined, guaranteed but also controlled by the power of the state, the creator of the social order through laws. It is therefore a freedom whose content is expressed through the forms of culture and civilization, a creative freedom, but a limited, conditional freedom, possibly subject to restrictions imposed by the state. It is a freedom of the legal norm.

Regarding the complex relationship between the normative legal system, and society on the other hand, it can be noted that nowadays the legal system tends to have its own functional autonomy, apart from the objective or subjective determinations that society transmits. Legal autonomy tries to transform itself from a secondary, phenomenological and ideational structure into one with its own reality, with the power to impose its order on the social and natural order. In this context, normatively established legal freedoms try to determine the existential freedom of man, explaining it, ordering it and conditioning it. It is a situation contrary to natural reality; the phenomenology of the legal must be conditioned, determined, by the existence of man, as a person, and by the particularities of social existence and not the other way around. It is an expression of dictatorship by law even in democratic societies, because the legitimacy of the legal norm lies, in such an unnatural situation, only in the will and interests of the rulers who express themselves, paradoxically, in the name of the people[6].

The reality described above, specific to contemporary society, has negative consequences, in the sense that man, as a person, the only holder of existential freedom, is no longer aware of his own freedom and expects that the normative order, the state or even justice, will grant him freedom that he needs. It can be said that, in such a situation, not being aware of his own freedom, contemporary man does not exist authentically, but lives by delegation, his existence being externally determined by state and legal normativism, abstract, impersonal and, often, devoid of value.

The legal norm, especially under the conditions of the will of „legal regulation" that contemporary society knows, is increasingly moving away from human values. It is an abstract, general and impersonal structure whose legitimacy is not a value one, but a formal recognition within the normative system in mind. The abandonment of values, including Christian values, results in normative relativism based almost exclusively on the pure will of the legislator.

The doctrine of legal normativism recognized and applied in almost all states is an embodiment of what was shown above.

Normativist theory, as a current of legal positivism, is reflected in the main work of the American jurist Hans Kelsen, „Pure Theory of Law". In the given doctrine, the author proposes to study the law only in the hypothesis of its existence. According to Kelsen, the science of law must be limited to the research of law only in its pure state, without ties to politics and morality. Otherwise, it will lose its objective character and turn into an ideology.[7]

Kelsen analyses legal norms under the aspect of validity, and then of effectiveness, in a manner that can be called „pure" because it leaves aside any other extrinsic elements, which are not strictly legal (for example, politics).

The theory of law aims to eliminate the subjective law - objective law dualism, arguing that objective law represents the legal normative framework through which subjective law is exercised. Kelsen also relativizes through his theory the dualism of private law - public law, stating that this dichotomy should not be seen as separating two opposing branches of law. The notable difference between the two branches, Kelsen believes, can be analysed ideologically, not theoretically.

The central place in the pure theory of law is occupied by the legal norm, which, formally, has a pure character, unlike the moral norm, which has a content. Through his system of norms, Kelsen supports the theory of the creation of law in cascades. Thus, the authority of a judicial decision originates in a presidential decree; this, in turn, in a law adopted by the parliament, and this having its origin in the constitution. All legal norms belong to a given legal order, they justify their validity by referring to a fundamental norm.

In case of non-compliance with the higher legal norm, the legal regulation does not achieve its goal. The theory of law has the task of deciphering the relationship between the fundamental norm and the lower norms. It is not the science of law that has to assess whether the fundamental norm is good or bad; political science, ethics or religion pronounces itself in this regard.

Kelsen's normativist theory purifies the law of all foreign elements: psychology, ethics, sociology, theology. Thus, he determines the content of the law as totally normative. It can only be deduced from legal norms and not from social facts. Norms are broken by social life, by relationships between people.

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[6] Also see R. Duminică, *The legislative construction of reality. A short reflection,* in vol. The International Conference CKS, Pro Universitaria Publishing House, Bucharest, 2011, pp. 684-694, *https://cks.univnt.ro/cks_2011.html*, last consulted on 22.03.2024.

[7] For developments see H. Kelsen, *Doctrina pură a dreptului*, Humanitas Publishing House, Bucharest, 2000.

We appreciate that the „pure doctrine of law" as a theory is not convincing, since law cannot be separated from social reality, seen as objective reality, and above all it cannot be devoid of moral values, from its foundation which is the justice. The normative system cannot subordinate the man.

The principle „No one is above the law" is written in all democratic constitutions. This is valid only in the formal relations of man with the law and in accordance with the social determinism in which freedom is a given of the law and conditioned by it.

Law has numerous political, historical, economic and sociological implications that are intrinsic to it, arising naturally from human relations and from the citizen-state relationship. Although the status of law as an autonomous science cannot be denied, a rule of law cannot be analysed without placing it in a historical context, without correlating it with the political and economic factors that led to its promulgation, and without assessing the social impact which he produced among the population by applying it.

So for social normativism we believe that the words of Immanuel Kant are applicable: „Only the law of becoming really explains the permanence of existence, making it intelligible according to empirical laws".[8]

3. Ideology and practice of globalisation

The supremacy of European Union law are also features of state and legal postmodernism.

Globalisation in all its variants characterises society in the era of postmodernism. Is this the last stage in the evolution of humanity?

The traditional culture of societies is disappearing or turning into spectacle and merchandise. Humanist culture is increasingly eliminated by the invading techno-science and transformed into a pseudo-science. The world or globalised man, the man centered only economically, risks becoming the atomized man who lives only for production and consumption, emptied of culture, faith, politics, meaning, consciousness, religion and any transcendence.

Legal postmodernism can be characterised by formalism and positivism, but also by the dominance of supranational systems and organisations and supranational law over the domestic legal order. This reality leads to the drastic limitation of national sovereignty, the supremacy of the Constitution and the entire domestic legal order. CJEU has shown unequivocally in several recent decisions that the EU legal order is superior and applies as a priority to the internal legal order, including the Constitution.

EU legislation is mandatory for Romania, a fact that has not happened in our history. The legislation of the empires that dominated the Romanian countries was never imposed on their territory. The more important normative acts to be adopted by the Parliament must now first be approved by the bodies of the European Union. Romania's political independence is limited because Romania's internal and external policy is carried out in relation to the political decisions of this supranational organisation.

Decision no. 80/16.02.2014[9] is relevant to the legislative proposal regarding the revision of the Romanian Constitution. Concerning the interpretation of the provisions of art. 148 regarding integration into the European Union, the Court notes that: „constitutional provisions do not have a declarative character, but constitute mandatory constitutional norms, without which the existence of the rule of law, provided by art. 1 para. (3) of the Constitution, cannot be conceived".

At the same time, the Fundamental Law represents the framework and extent in which the legislator and the other authorities can act; thus, the interpretations that can be brought to the legal norm must take into account this constitutional requirement, included in art. 1 para. (4) of the Fundamental Law, according to which in Romania „respect for the Constitution and its supremacy is mandatory".

In the opinion of our constitutional court, to consider that the law of the European Union is applied without any differentiation within the national legal order, not distinguishing between the Constitution and the other domestic laws, is equivalent to placing the Fundamental Law in a secondary plan compared to the EU legal order. The legitimacy of the Constitution is the will of the people itself, which means that it cannot lose its binding force, even if there are inconsistencies between its provisions and the European ones. Moreover, it was emphasized that Romania's accession to the European Union cannot affect the supremacy of the Constitution over the entire internal legal order.[10]

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[8] I. Kant, *Întemeierea metafizici moravurilor*, Humanitas Publishing House, Bucharest, 2007, p. 189.

[9] Published in the Official Gazette of Romania no. 246/07.04.2014.

[10] CCR dec. no. 80/16.02.2014, previously cited.

By the Decision of December 21, 2022,[11] CJEU ruled that Union Law opposes the application of a jurisprudence of the Constitutional Court to the extent that it, in conjunction with the national provisions on prescription, creates a systemic risk of impunity. The Court, gathered in the Grand Chamber, confirmed its jurisprudence resulting from a previous decision, according to which the CVM is binding in all its elements for Romania.[12]

According to the Court, the effects associated with the principle of the supremacy of Union law are imposed on all organs of a member state, without the internal provisions, including constitutional ones, being able to prevent this. National courts are bound to leave unapplied, *ex officio*, any national regulation or practice contrary to a provision of Union law which has direct effect, without having to request or wait for the prior elimination of that national regulation or practice by legislative means or by any other constitutional procedure.

On the other hand, the fact that national judges are not exposed to procedures or disciplinary sanctions for having exercised the option to refer the Court under art. 267 TFEU, which belongs to their exclusive competence, constitutes an inherent guarantee of their independence. Thus, in the hypothesis in which a national common law judge would come to consider, in the light of a Court decision, that the jurisprudence of the national constitutional court is contrary to Union law, the fact that this national judge would leave the mentioned jurisprudence unapplied cannot engage his disciplinary liability.

We consider that this legal act of the European court is a serious violation of national sovereignty, even exceeding the provisions of the accession treaty of Romania to the European Union.

The Constitutional Court of Romania, in a press release[13] stated the following, with reference to these Decisions of the European Court of Justice:

„According to art. 147 para. (4) of the Constitution, the decisions of the Constitutional Court are and remain generally binding.

Moreover, the CJEU also recognizes, in its Decision of December 21, 2021, the binding character of the decisions of the Constitutional Court. However, the conclusions of the CJEU Decision according to which the effects of the principle of the supremacy of EU law are imposed on all organs of a member state, without internal provisions, including those of a constitutional order, being able to prevent this, and according to which national courts are required to leave unapplied, *ex officio*, any regulation or national practice contrary to a provision of EU law, presupposes the revision of the Constitution in force.

In practical terms, the effects of this Decision can be produced only after the revision of the Constitution in force, which, however, cannot be done as a matter of law, but exclusively at the initiative of certain legal subjects, in compliance with the procedure and under the conditions provided for in the Romanian Constitution itself".

We fully agree with the opinion expressed by the Constitutional Court. Our Constitution enshrines the obligation to respect the Fundamental Law and its supremacy in art. 1 para. (5), „In Romania, compliance with the Constitution, its supremacy and laws is mandatory."

The provisions of art. 148 para. (2), regulates the principle of priority of EU law, „As a result of accession, the provisions of the constitutive treaties of the EU, as well as the other binding community regulations have priority over the contrary provisions of internal laws, in compliance with acts of accession."

Therefore, the supremacy of the Constitution and the principle of priority of EU law have different legal nature. The supremacy of the Constitution is a quality of it determined by the social, economic and political realities of the Romanian people and their traditions. It expresses and substantiates at the same time the characters and attributes of the Romanian State, national sovereignty. The supremacy of the Constitution and the obligation to respect it is not exclusively the embodiment of the will of the constituent legislator, but is determined objectively, historically.

In contrast, the principle of priority of EU law is derived from the supremacy of the Fundamental Law because it is established by the will of the constituent legislator and by the international treaties to which Romania is a party.

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[11] The decision in the related cases C-357/19 Euro Box Promotion and others, C379/19 DNA- Oradea Territorial Service, C-547/19 Association „Forumul Judecătorilor din Romania", C-811/19 FQ and others and C-840/ 19 N.

[12] See Decision of 18 May 2021, Association „Forumul Judecătorilor din Romania" and others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (see also CP no. 82/21).

[13] Press release of the Constitutional Court of December 23, 2021, *https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021*, last consulted on 22.03.2024.

Contrary to this reality, the CJEU jurisprudence establishes the principle of the supremacy of the EU law, and not only its priority, including in relation to the internal constitutional order.

These specific solutions cannot be accepted because they seriously affect the national sovereignty, the legislative independence of the Romanian State. That is why, in no case, the EU law in relation to the internal constitutional order cannot be supreme, and the generally binding legal force of the decisions of the Constitutional Court, including against the legislation and jurisprudence that makes up the EU law, does not cease.

The provisions of art. 147 para. (4) of the Fundamental Law enshrines the general binding nature of the decisions of the Constitutional Court, an aspect that results from the very supremacy of the Fundamental Law.

In accordance with the provisions of art. 142 para. (1), „The Constitutional Court is the guarantor of the supremacy of the Constitution". To accept the possibility of non-compliance by the state authorities with the decisions of the Constitutional Court in relation to the alleged and assumed supremacy of EU law is equivalent to an act of violation of the Fundamental Law and internal constitutional order, with a serious infringement brought to the supremacy of the Constitution.

The Constitutional Court correctly showed that these CJEU decisions can produce legal effects in Romania only, as a result of the amendment of the Fundamental Law through an internal constitutional procedure, but not through decisions of an international court.

4. The contradiction between the legal enshrinement of human rights and their abusive restriction is an important aspect of contemporary political and state reality

The restriction and abolition of human freedom by those who exercise government is as old as the world, since the days of slavery. Social postmodernism is characterised by a major contradiction between two realities: the first reality, the proclamation of fundamental rights, their consecration in constitutions and in international legal instruments, and on the other hand, the excess of power of the rulers who restrict these rights through legal and political means, thus violating the principles of legality and legitimacy of the supremacy of the Constitution.

The excess of power of the rulers in postmodernism regarding man as a person created in the image of God and the condition of man in society and in relation to the state is manifested by: the contradiction mentioned above, by restricting the exercise of fundamental rights and freedoms, including freedom of conscience and religious freedom, through discrimination, the goal being that the postmodern man becomes a „happy slave".

Exceeding the limits of discretion means violating the principle of legality or what is called „excess of power" in legislation, doctrine and jurisprudence.

The excess of power in the activity of the state bodies is equivalent to the abuse of law, because it signifies the exercise of a legal competence without a reasonable motivation or without an adequate relationship between the ordered measure, the factual situation and the legitimate goal pursued.

The exceptional situations represent a particular case in which the state authorities, and especially the administrative ones, can exercise their discretionary power, there being obviously the danger of excess power.

The excess of power can be manifested in these circumstances at least through three aspects: a) the assessment of a factual situation as being an exceptional case, although it does not have this meaning (lack of an objective and reasonable motivation); b) the measures ordered by the competent state authorities, by virtue of their discretionary power, go beyond what is necessary to protect the seriously threatened public interest; c) if these measures excessively, unjustifiably, limit the exercise of constitutionally recognized fundamental rights and freedoms.

The existence of crisis situations - economic, social, political or constitutional - does not justify the excess of power. In this sense, professor Tudor Drăganu states: „the idea of the rule of law requires that they (exceptional situations, *n.n.*) find appropriate regulations in the text of the constitutions, whenever they have a rigid character. Such a constitutional regulation is necessary to limit the areas of social relations, in which the transfer of competence from the parliament to the government can take place, to emphasise its temporary nature, by establishing some terms of applicability and to specify the purposes for which it is carried out."[14]

[14] T. Drăganu, *Introducere în teoria și practica statului de drept*, Dacia, Cluj, 1992, p. 106.

The restriction of the exercise of some fundamental rights or freedoms, by law, represents an interference of the state in the exercise of these rights and freedoms, justified by the achievement of a legitimate goal. In order to avoid arbitrariness or excess of power on the part of the state authorities that adopt such measures, it is necessary to have guarantees provided by the state, which are adequate to the constitutional purpose pursued, that of protection of fundamental rights and freedoms, in the concrete situations in which they could be harmed. The principle of proportionality is such a constitutional guarantee that allows the sanctioning by the constitutional court of the arbitrary interference of the Parliament or the Government in the exercise of these rights.

Therefore, the measures adopted by the state restricting the exercise of some fundamental rights or freedoms in order not to be abusive must not only be legal, i.e. ordered by law, or by a normative act equivalent in legal force to the law, but also legitimate (fair), i.e. necessary in a democratic society, non-discriminatory, proportional to the situation that determines them and not affecting the substance of the right. Proportionality and necessity in a democratic society are criteria, both for the legislator and the judge, for assessing the legitimacy of restricting the exercise of some fundamental rights and freedoms.[15]

Discrimination, as the opposite of equity, is defined as the illegal practice of treating some individuals less favorably than others because they are different in sex, race, religion, etc. It means treating one group less favorably than another for an unjustifiable reason.

The Declaration of Equality Principles is a particularly important document adopted on April 5, 2008 in London by human rights lawyers and experts in international human rights law and equality law, which states, among other things:

- „The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of eco- nomic, social, political, cultural or civil life. All human beings are equal before the law".[16]

- „The right to non-discrimination is a free-standing, fundamental right, subsumed in the right to equality."[17]

- „Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, eco- nomic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds".[18]

In Romanian legislation, the principles of equality and non-discrimination are enshrined in the Constitution:

- „Citizens are equal before the law and public authorities, without privileges and without discrimination".[19]

- „The state is based on the unity of the Romanian people and the solidarity of its citizens".[20]

- „Romania is the common and indivisible homeland of all its citizens, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin."[21]

5. Justice should be a harmonious system to be in its truth and reality

„Truth is real only as a system" said Hegel [22] and confirming this statement, justice is in its truth only to the extent that it fulfils this condition. The system means coherent order, functionality, suitability to the real and to its purpose, but above all unity in its diversity, a concrete universal in which each part expresses the whole and it legitimises the component parts through the created order. The system, including that of justice, manifests dialectically, transforms, becomes, has a historical being, without losing harmony and coherence. The thinker from Jena emphasised that „the truth is the whole. The whole is only the essence that is fulfilled through its development"[23]. Like any system, justice has components or subsystems: ideals, values; the normative,

[15] See M. Andreescu, *Principiul proporționalității în dreptul constituțional*, C.H. Beck Publishing House, Bucharest, 2007; M. Andreescu, A. Puran, *Drept constituțional. Justiția constituțională-garant al supremației Constituției. Doctrină și jurisprudență*, C.H. Beck Publishing House, Bucharest, 2023.

[16] Art. 1 of the Declaration of Principles on Equality, *https://www.equalrightstrust.org*, last consulted on 22.03.2024.

[17] *Idem*, art. 4.

[18] *Idem*, art. 5.

[19] Art. 16 para. (1) of the Constitution.

[20] Art. 4 para. (1) of the Constitution.

[21] Art. 4 para. (2) of the Constitution.

[22] G.W.F. Hegel, *Fenomenologia spiritului*, Romanian Academy Publishing House, Bucharest, 1965, p. 18.

[23] *Ibidem*.

jurisprudential (justice act), institutional subsystem and perhaps the most important component, the man as the creator but also as the beneficiary of the justice act. The truth of the judicial system presupposes the realisation in its entirety but also by each component of its own existential purpose which is also its being, namely *justice* as a value ideal but transposed into the concrete reality.

To the extent that the functions, we would say the purpose of justice, fulfil and express at the same time the functional harmony of a system, which at any moment tries to adapt to its purpose as a value, the realisation of justice, justice is found in the truth or, in other words, gives itself its own legitimacy, without waiting for it to be given to it, in sometimes inadequate forms, from the outside. Contradictions and, in general, any dysfunction in the coherence of the system or inadequacy for the purpose are diseases, deficiencies of justice, which distance it from its purpose and truth. When the diseases of justice become chronic, but with manifestations that lead to exacerbation, we can speak of a crisis of the justice system. Our justice system is obviously in such a chronic crisis with worsening tendencies. The main cause is the morbid contradictions of the system. In contrast to the beneficial contradictions that give the becoming, the unhealthy ones tend to further distance justice from reality and its truth. In what follows, we try to highlight the morbid contradictions of the justice system specific to the crisis in which it finds itself.

5.1. The fundamental contradiction of justice, the expression of the deep crisis in which this is between law and justice

There is an essential break between the value order that should constitute the purpose and essence of justice, and on the other hand the constructed order of norms and jurisprudence. Fairness, justice, no longer represent the goals and truth of justice, replacing these values with law, norms and jurisprudence, which want to find legitimacy in themselves, in abstract forms, ephemeral realities, precarious interests and goals, but not in the ideal and reality of justice. Of course, even in the situation of a justice system that is harmoniously functional and does not have this disease, there is not always a formal overlap between law and justice. Within the healthy justice system, between justice and law there is a one-sided contradiction in the sense that the law could contradict justice but it does not contradict the law. The crisis of the judicial system sometimes expresses in acute forms the inadequacy in absolute terms between justice and the law.

The mentioned contradiction gave free rein to the „will to power" of the governors to impose their own order and legitimacy on justice by regulating and legislating in the senseless and illusory attempt to create an „order of norms" that would replace the being and truth of justice: righteousness. Reality demonstrates that this false order often proves itself incoherent, contradictory and above all, inadequate to the realities for which it is intended. The simple accumulation of norms, even codified laws, does not lead to the establishment of man, the social and justice in their being and purpose if the norms do not express the essence as a phenomenon: the higher order of the values of justice, equity, truth, proportionality, tolerance. Jurisprudence is also manifested in the exclusive preoccupation to correspond to itself or norms, to be sufficient by itself and not by referring to the higher order of values mentioned above. The act of justice carried out by the magistrate obstinately seeks legitimacy exclusively through the legal norm and not through the value order that should be its own.

This morbid contradiction is confirmed, but not made aware by legal technique and formalism. A court decision is not pronounced in the name of righteousness, but „in the name of the law", that is, in the name of an order built by a temporary political will to achieve such temporary interests immersed in their particularity and often contrary to the common good, and not so as if natural in the name of the given and not constructed order of values external to justice but which represent its truth and purpose.

The doctrine states that the judge pronouncing a decision „says the law". It would be great to be so. In fact, most of the time, the magistrate through the pronounced court decision „says the law" - when he does it - trying to include his sentence in the order of the law, which is not necessarily the order of justice. The Judge, if he is aware of the realisation of an act of justice respecting his moral and professional status does not contradict the law, although there are situations when he should and could do it in the name of a higher order formed by the values subsumed by the concept of righteousness. For such an act, which is not only justice, but also righteousness, courage is needed. The magistrate must take the risk of overcoming the imperfect order built by the law in order to legitimise the act of justice he performs in the higher value reality of the metaphysical principles of law. Such a departure from the normality of forms inadequate to the concrete reality is risky for the judge because the constructed order of the law can impose its coercive force.

Contemporary justice is dominated by the order of normativity, of forms that are not abstracted from reality but abstract from it.

The morbid break between law and righteousness (the law as an expression of the will of the legislator, of the temporary power being the one that wants such a separation), should be reflected in the legal education plan. For a correct adaptation to the crisis of justice highlighted by this contradiction, but also to reflect the order of the law and not the law that is taught to students, the profile faculties should no longer be called „law schools", but „Faculties of Laws" as it used to be.

5.2. The contradiction between justice and „world", understanding by „world" both man in his individuality and society as a whole

It seems that the saying „*pereat mundus fiat justitia*" is more and more present in the actuality of justice and put in place of honor. It is not a simple saying; it is a tragic reality, a disease of justice consisting in the inauthentic legitimization of the separation of justice from man and the world. Justice cannot live, triumph, be if the world dies. There is a one-sided contradiction between the world and justice: justice can contradict the world, but the world cannot contradict justice, because the world is the environment, the element that justifies the manifestations of justice. Righteousness through justice involves man both as the creator of the act of justice and as the beneficiary.

In its contemporary manifestations, the justice in crisis realises more and more the saying „*pereat mundus fiat justitia*" trying to become a closed system, existing for itself, and in some cases even more seriously directed against man, the only beneficiary of the act of justice, thus denying his own reason for being. The crisis of justice, through this disease, is also found in the contentless rhetoric of the proclamation of the „abstract man" through equally abstract rights with the intention of giving a teleological form to his manifestations. But the true existential meaning of justice and its finality at the same time is man considered in his human dignity. The rhetoric specific to the separation between justice and the world in favor of the abstract, impersonal man has obvious manifestations. In front of the court, in a judicial decision, the man is no longer in the concrete of his dignity as a person, but becomes „*the named*", at most identified by an equally impersonal procedural quality.

The existential rupture between justice and the world, rather the attempt of justice to deny its own environment that justifies its reason for being, cannot confirm the natural, dialectical order that should characterise a good establishment of justice in its truth, but could it had, at the end of the road, nothingness, justice as an empty form, devoid of the fullness that „just" confers, existing only in relation to human dignity.

5.3. The contradiction between justice, understood even in the sense of the normative order of the law, and on the other hand the act of justice and the magistrate who carries it out

In philosophy we speak of an autonomous world of values existing in itself and for itself, independent even from man. As we stated, justice is indisputably a reality and a normative institutional system as well as a value. Unlike other value systems: moral, religious and in general cultural, the essence of justice consists in its achievement and fulfilment in and through the act of justice of the magistrate, without which the justice system cannot close. At most, we can talk about the autonomy of the law understood as a value system, but not the autonomy of justice outside of the act by which it is concretized. Unlike other value systems or other systems, justice is the clear example of a concrete universal achieved through the act of justice whose expression is primarily the judge's decision.

Therefore, the act of justice can confirm or deny the normative order of justice and, equally, law as a value system. It is a similar situation to the relationship between experiment and scientific theory, the first being able to deny or confirm the theory as the case may be. However, in the sphere of scientific theories, an experiment can disprove a theory by legitimising a new, higher order that includes the old one, as happened with the theory of relativity elaborated by Einstein. In contrast, the act of justice, if it is contrary to the normative order or the value order of the law, is nothing but a judicial error, intentional, necessary, or accidental by the magistrate who denies justice itself and implicitly the right thus abolishing the legal order and the legal order having as its finality not another order, but disorder, chaos. And how many judicial errors are today known or unknown?

It should also be emphasised that the act of justice cannot be dissociated from the person of the one who carries it out, the magistrate. Even an anonymized court decision is not anonymous: the act of justice includes in itself the person but also the personality of the magistrate. It can be said not only that the magistrate is the

author of the judicial act, but also that the judicial act „makes" the magistrate. When judicial errors become obvious - the cause being the magistrate's abandonment of the moral, social and professional status, this colluding with the disorder specific to existential non-values - there is a habit of saying that they are isolated cases that do not characterise the justice system and the order of law. Not true. Justice as a value system must be confirmed in its being, proven, by every act of justice, by every court decision. A single judicial error, a single corrupt or immoral magistrate, negates, sending into nothingness, into non-existence, the juridical and the legal order. Contemporary reality continues to offer far too many examples of such situations that you wonder if there is anything left of the valuable being of justice. Here is a chronic manifestation of the justice crisis.

Justice, found in its being and its truth, imposes on the magistrate, as a fact of conscience, the object of judgment: the deeds of man, not the man, that is, the phenomenal characteristic of the human in man. Being aware of the principles of law and implicitly justice as a specific value of a higher order than the normative one, the judge, performing the act of justice, must still relate teleologically to the concrete person even if he will pronounce only on his facts (actions and omissions). In contrast, in the case of a sick justice, the judge imagines that he has the power to judge the man and not only his deeds.

5.4. The fall in exteriority

Of course, the justice made by man and for man is profane, „according to man's standards", but sacred values are part of his being.

Being a component of the temporary human reality, justice understood in its value dimension involves the relationship between the transcendent and the transcendental referred to by Kant and Heidegger. As a reality of man and society, justice should not be transcendent, *i.e.*, „beyond" man and the world, nor beyond his own reason for being. If this happens, we are in the presence of a morbid manifestation specific to the crisis of justice, first of all by separating it from the „world" as we have shown above. Justice must be and remain in its transcendental being, *i.e.*, „beyond" the existential precarities of this world and outside conflicts and political interests of all kinds, without implications in the struggle for power or in power games. The transcendental of justice is its being in its value dimension, it is the law as righteousness manifested phenomenally through the act of justice.

The contemporary crisis of justice means the fall from the immutability of the own transcendental value and existence in the social and political externality with the consequence of the diminution or even the loss of the being, of the right as a value. The examples are unfortunately far too many: conflicts and contradictions within the institutional system of justice; the transformation of justice into a tool for political or other actors; the involvement in the struggle for temporary power or in the power games of both the judiciary as a whole and the magistrates; the transition from the mediatization of judicial acts, to media justice, carried out first by the mass media; the abandonment by the magistrates of the professional and moral status for the illusory gain conferred by the involvement in the precarities, sometimes the miseries of the world; the arrogant and aggressive rhetoric of baseless forms through the random use and especially for the satisfaction of often immoral selfish interests of the sacred name of justice and law: „in the name of the law", „in the name of the right" become simple formulas to legitimise which is illegitimate. The fall in externality is a painful manifestation of the crisis of justice felt perhaps not so much by the judicial system but especially by those who are its beneficiaries: man, people, society.

We talked about the justice crisis. There is also a justice of the crisis consisting in the illusion of the system to exist through the morbid contradictions exposed above in a world that is not in the realisation of „progress in the consciousness of freedom" as Hegel believed, especially in a process of dissolution, of abandonment of the valuable cultural being and its replacement by the elements of civilization, excessive technologization, in a word by the dominance of the forms of civilization over culture and not the other way around as would be normal. Socially and politically, the process of the dissolution of the world manifests itself through the democracy of the masses and democratic individualism with the consequence of ignoring man as a person and personality, man becoming an „individual" in a social, normative economic or political order in which he does not confirm his „self" because it has become a simple number taken over by the rhetoric of empty forms and ideals.

The justice of the crisis cannot exist because it is outside the truth and its purpose, as well as the society of the crisis, to which it tries to adapt. There cannot be an adequate relationship between the justice in serious morbid contradictions and a society in crisis with the aim of legitimising the existence of a justice of the crisis.

The justice of the crisis can still be a reality but devoid of truth, of being, because not everything that exists also *is*.

6. One of the possible ways to overcome the shortcomings of excessive normativism and postmodern legal formalism and to solve the morbid contradictions of justice, is to return to values and general principles of law, in the activity of developing legal norms and their application

We support the higher order, in the sphere of values, that the concept of justice should confer on justice and the act of justice so that they do not remain only in the formal order of the normative. Righteousness as a value is legally expressed primarily through the principles of law that must be found in the rules of law.

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: publicity of the court session, the principle of adversariality, 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 eventual 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 for the subjects of 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 EU law, adopted in the legislation of many European states, including Romania.

The metaphysical principles of law can be considered as a „given" in relation 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 as the transcendental essence of 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 emphasised 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 specialised 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 emphasise 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 issue exceeds the scope of this study. However, some considerations are necessary. Contemporary ontology no longer considers reality by referring to the classic 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" that Platon spoke of.[24]

The normative dimension of legal reality seems to correspond very well to the findings formulated by Ernest Cassirer. What else is legal reality than a set of social relations and functions that are transposed into the new ontological dimension of „legal relations" by applying 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.[25]

7. Conclusions

In conclusion, we would like to note the relevance of the words of the great German philosopher Kant, which we propose for meditation to a contemporary legislator: „Is old the desire which - who knows when? - it will be fulfilled sometimes: to discover once, instead of the infinite variety of civil laws, their principles, because only in this can lie the secret of simplifying, as they say, the legislation".[26]

Herman Hesse, laureate of the Nobel prize for literature, the author of the novel „The Glass Bead Game", remarks very wisely: „The more extensive a man's culture, the greater his privileges, the greater they must be in case of need the sacrifices he makes. But he is no less a coward and a traitor who betrays the principles of spiritual life for the sake of material interests, who, for example, is ready to leave it up to the holders of the power to decide how much two times two do. It is treason to sacrifice to any other interests a sense of truth, intellectual honesty, devotion to the laws and methods of the spirit. Times of terror and deepest disaster may come. If any happiness is still possible in the disaster, it can only be a spiritual one, which looks back with the desire to save

[24] For developments see C-tin Noica, *Devenirea întru fiinţă*, Humanitas Publishing House, Bucharest, 1998, pp. 332-334.
[25] *Idem*, pp. 327-367.
[26] I. Kant, *Critica raţiunii practice*, Univers Enciclopedic Publishing House, Bucharest, 1999, p. 186.

the culture of the past, which looks forward with the determination to represent serenely and steadfastly the spirit in a period that would otherwise could fall completely prey to matter".

The era of postmodernism is for man, for his social condition, for true faith, a period of fear, of deep disaster, of trial, as the writer Hermann Hesse anticipated.

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