THE ROLE AND PLACE OF THE GENERAL PRINCIPLES OF LAW AMONG THE SOURCES OF CIVIL LAW

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Abstract:
The general principles of the law are of special importance in the process of creating the law, by insuring its unity and coherence, but also in the application of the law and in its interpretation. Their role is highlighted especially when, in the absence of detailed regulations or legislative gaps, they are used to resolve a wide variety of situations given to the courts. Undoubtedly, the principles are the result of social experience and draw the guidelines for the entire legal system, exercising both a constructive action, guiding the activity of the legislator, but also a valorizing one. Starting from these considerations, the current paper aims to emphasize the role and place of the general principles of law among the other sources of the Romanian civil law.
Keywords: *general principles of law, sources, civil law.*

1. About the general principles of law

The law of a society, as ensemble of legal norms in force at a certain given time, is formed by numerous rules stating the most varied social relations. Despite this diversity of norms, the legal system has a series of fundamental rules, guiding ideas or principles, essential, which underlie most of the rules and branches of law in which they are brought together.

The general principles of law are metaphorically defined as being “a heteroclite category of uncertain boundaries, which strongly intrigues the jurists” [1], sometimes being treated either as “a given”, namely as an ideal or base for science, or are assimilated to the “built”, when are drafted or transposed in legal norms through the law-making activity [2].

Etymologically, the notion of principle originates from the Latin principium which means beginning, origin, fundamental element. Thus, every principle is a beginning in an ideal plan, being able to the be in the same time a source, a cause of action.

Therefore, the general principles of law represent the ensemble of guiding sentences to which are subordinated both the structure and the development of the

system. It follows that the general principles of law are normative both in relation to reality and to the system itself, they are principles of structure and development of the legal system [3].

The notion of general principles of the law is permanently invoked not just by the Romanian law, but also by the law of other states, such as the French legal system (principes généraux du droit), German legal system (Grundsatze), the English legal system (leading principles). Moreover, these are included in the international law expressly in the category of the sources of law in Art 38 of the Statute of the International Court of Justice.

Concerning their origin, a part of the general principles of law are stated by the Constitution or by treaties or conventions, having not just material, but also a super-legislative formal value, as the case of the principle of equality, sovereignty, political pluralism etc., others not being expressly stated by normative documents, but the legal texts still apply them.

In legal literature [4], for the general principles it has been proposed, by considering their authority, their division into fundamental principles – as principles imposed to the legislator itself, having constitutional value and general ordinary principles, which do not have this quality.

Also, the general theory of law lists the following general principles: insurance of the legal basis for the functioning of the state, the principle of freedom and equality, the principles of equity of justice, the principle of responsibility.

These general principles are characterized by stability in time and by the possibility to be applied to any system of law due to their high degree of generality. The law can recognize their existence, as it happens, for example in the case of civil law. Also, it has been showed that the general principles of law give measure to the system of law existing at a certain time, because the general principles represent the fundament of the legal system which provides unity, homogeneity, balance, coherence and capacity of the entire social system. The rapidity of transformations in the economy and society, the mobility of current social relations require flexibility and dynamism for legal regulations and, in order to achieve this objective, it is necessary that the general principles show flexibility and dynamism [5].

The subject of the principles of law is extremely vast and complex, it is not relevant for our research to present in detail the principles that govern the rule of law, thus existing, as we have shown above, principles that cover the entire legal system, a subdivision of it or a branch of law. Which is of interest here is their role among the sources of civil law.

2. The importance and place of the general principles of law among the sources of civil law

The analysis of the notion “source of law” has emphasized two meanings of its meanings: source of law in a material sense and source of law in a formal one.

The material sources (social, economic, cultural, ideological etc.) are defined as the entirety of the conditions of the material and spiritual life generating the emergence of a regulation or the entirety of the material life conditions determining the content of the general social will, by forming the infrastructure of any system of positive law.

The formal sources of law the form that takes place or through which the general social will is externalized in order to become mandatory for the individual and the community. In turn, the form of the law can be internal, i.e. what and how the legal regulation is expressed and the external form, i.e. through what the legal regulation is expressed (respectively by law, decree, decision, etc.).

According to Art 1 Para 1 of the Civil Code are sources of civil law: the law, customs and the general principles of law.

The formal sources of civil law are first of all, the normative acts, i.e. the acts emanating from the state bodies vested with the prerogative of legislation.

According to the state body from which they emanate and their nature, there are the following categories of normative acts that can be sources of civil law: laws (constitutional laws, organic laws and ordinary laws); ordinances and emergency Government ordinances; Government decisions; orders, instructions and regulations of the heads of central organs of state administration; normative acts issued by the authorities of local public administration. Are included in the category of the sources of civil law the normative acts issued prior to 1990, to the extent to which they are still in force (laws, decrees, decisions of the Council of Ministries, orders and instructions), as

well as international regulations (conventions, treaties, covenants, agreements etc.) to which Romania has adhered or has ratified.

The main source for the Romanian civil law is represented by the Civil Code – Law No 287/2009, entered into force on 1st October 2011. It preserves the classic structure of codifications and is divided into 7 books: Book I – "Persons"; Book II – "Family"; Book III – "Assets"; Book IV – "Inheritance and liberalities"; Book V – "Obligations"; Book VI – "Extinctive prescription, forfeiture and calculation of terms" and Book VII – "Provisions of international private law". Because it can state in every matter and may modify at any time the preexistent rules, the law is the main formal source of civil law.

The Civil Code includes in the category of the sources the usages, namely the custom and the professional usages. The custom represents a long-time practice, rooted and continuous, considered mandatory by the persons applying it. It has a structure formed of a material element and a psychological one. The material element resides in the general and prolonged use in time of a rule of conduct that has not been adopted and imposed by any public authority. The psychological element consists in the faith that the customary rule has a mandatory feature (opinio necesitatis) [6].

Professional uses are rules for exercising a profession, developed in practice and recognized as mandatory by the professionals concerned, regardless of their inclusion in a normative act. Essentially, professional uses are some "specialized customs", reason for which the Romanian legislator has included them in the category of usages, together with the custom. Therefore, their structure and effects are the same with those of the custom [7].

Are recognized as source of law only the usages (namely the customs and professional uses) in accordance with the public order and good behaviors, as it results from Art 1 Para 4 of the Civil Code. The uses may be applied both in the cases in which the law does not regulate a certain situation (Art 1 Para 2, first line of the Civil Code), as well as when the law refers to them (Art 1 Para 3 of the Civil Code).

The quality as source of law of the general principles for the civil law is expressly stated by the Civil Code in Art 1 Para 1-2, where it states that "are sources of the civil law the law, the uses and the general principles of the law". For the cases not stated by

the law shall apply the uses and, in their absence, the legal provisions referring to similar situations, and when such provisions do not exist, the general principles of law".

From the legal provisions it results that these categories of sources are not on equal positions. As such, the legislator enshrines a hierarchy of them. First of all, the law considered in its broad sense will be applied, then if there is no text of law, the customs will be applied, and if there is neither appropriate law nor customs, another law will be applied that regulates a similar legal situation.

The general principles of law are secondary sources for the civil law, in the meaning that they are invoked only in the cases not stated by the law, when there are no uses or similar legal provisions to be applied by analogy. The principles considered as sources of civil law shall be in accordance with the public order and good behaviors.
In the doctrine [8] regarding the importance of the general principles of law within the sources, a distinction was made between their fundamental function and the technical function.

The fundamental function refers to the substantiation on principles of any legal construction, the legal norms cannot be elaborated and cannot evolve, except in accordance with the general principles of law, the legislative activity cannot take place outside the general principles.

The technical function of the principles is emphasized in the area of interpretation and application of the law, especially when, in the absence of detailed regulations or due to legislative gaps, are invoked for solving a wide diversity of situations to be solved by state organs. Thus, the principles of law replace the legal norm. As a conclusion, the judge cannot refuse to solve a litigation by invoking the absence of the legal text based on which he could rule, because he would be accused of degenerating the justice and shall proceed to the solving of that litigation based on the principles of law.

Conclusions

The general principles of law have a constructive and a valorizing role, these two features comprising the objective requirements of society. The constructive role is manifested in the contribution of the principles in the creation and permanent modernization of the law, and the valorizing role consists in their capacity to put in value

and to regulate, as legal norms, new areas [9]. Even if their recognition as direct formal sources of law is not unitary, the general principles are still secondary, indirect sources, because are at the base of the legal norms, which must agree with them, and the application of the rules to concrete situations is done according to the same principles.

The legislative construction cannot be performed outside the fundamental principles of law because “they are normative in relation to the positive system itself; they are imposed as mandatory to the very norms. The general principles not only have the role of filling the ambiguity or non-existence of the law, but also of limiting the law, substantiating it. They regulate the norms, being a kind of super-legality, which is why the control of legislation must be done not only in relation to a written constitution, but also to the general principles, in relation to what is called, through a conceptual unification, a block of constitutionality” [10].

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