

## The simplicity of the form and complexity of normative content of Constitution

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### **Abstract**

*The coding is not only the expression of the political will of the law maker, it firstly is a complex juridical technique for the choosing and systematization of the normative content necessary and adequate to certain social, political, economical, institutional realities. Since Constitution is a law, yet it nevertheless distinguishes itself from the law, the problem is to establish which juridical norms it contains. The solving of this problem needs to consider the specific of the fundamental law and also of the requirements of the coding theory. The determining with all scientific stringency of the normative content of the Constitution is indispensable both for the removal of any inaccuracy in delimiting the differences from the law, for the stability and predictability of the fundamental law and last, but not the least, for the reality and effectiveness of its supremacy.*

*In our study we realize an analysis based on compared criterions of the techniques and exigencies for the choosing and systematization of the constitutional norms with reference to their specific, to the practice of other states and within a historical context. The analysis is aiming to the actual proposals for the revising of the Constitution.*

**Keywords:** *Constitutional norms / constitutional norm establishing criterions / technical - judicial structure / supremacy of Constitution / normative content.*

### **I. PRINCIPLES OF LAW, A POSSIBLE SOLUTION TO THE REQUIREMENT FOR SIMPLICITY IN THE JURIDICAL DOMAIN**

Simplicity is a concept that is constantly to be found in the theoretical elaborations of theology, but in most philosophical doctrines, is associated to the idea of unity of rationality, and generally, of the existence. Understanding the concept of simplicity, involves a comparative report with contradictory accents: simplicity opposes to diversity and composed realities that do not shelter under a law or order. Simplicity does not exclude, however, the complexity of the content, be it rational, of an idea or an objective reality. Simplicity is contrary to uniformity: it is the expression “of one diverse in itself”. In the reality plan, the concept of “person”, for instance, expresses, in our opinion, the dialectical coexistence between simplicity of the form and the inexhaustible depth of the existential content complex.

We consider as significant in philosophical thinking plan, the philosophical ideas of the great Romanian philosopher Constantin Noica: “The pace of history, in

philosophical thinking. The simplicity of pre-Socratic element (that gives the composition of world), the simplicity of self-knowledge, with Socrate, of Idea, with Platon, of the form, logical and substantial, with Aristotel, of subjectivity, with the Christianity, of divine, with medieval philosophy, of simple natures, with Descartes, of perception and representation, with the empiricists, of the monad, with Leibniz, of transcendental conscience, with Kant, of the Self, with Fichte, of the Spirit, with Hegel. The pulsations of history” [1].

In the meanings given above, the simplicity can be accepted as a fundamental aspect of law, mainly in the form imposed by contemporary realities. In the sphere of juridical, the diverse, opposed to simplicity, is mainly made of a multitude of normative regulations that do not answer to a unifying idea and to the unity of the principle expressing the essence. The requirement of simplicity in the sphere of juridical, in our opinion, is best expressed and may be accomplished by the principles of law, as their normative form, simple, preserves at the same time the complexity of the content.

In the followings, we try to make a brief analysis of the notion of principle of law associated both to the idea of simplicity, as to the idea of complexity of content. The normative act that by its nature can highlight better this blend between simplicity of the form and complexity of the content, specific to the principle of law, is the Constitution. That's why we will customize the analysis on the principles of law with referral to the normative content of Constitution.

In philosophy and, in general in science, the principle has a theoretical and explanatory value as it is meant to synthesize and express the foundation and unity of human being, of the existence in general and knowledge, in their manifesting diversity. The discovery and assertion of the principles in any science gives the certitude to knowledge, both by expressing the prime element that exist by itself, without the need to be inferred or demonstrated, both by accomplishing the cohesion of system, without which no knowledge or scientific creation may exist. The principle has multiple meanings in philosophy and science, but for our scientific approach, to remember this one: fundamental element, idea, basic law on which is grounded a scientific theory, a political, juridical system, a behavior norm or the totality of laws and basic concepts of a

discipline”. [2] The common place for all meanings of the term of principle, is the the essence, an important category for philosophy and law.

A good systematization of the meanings which the notion of principle has is done in a monography [3] : a) the founding principle of this domain of existence; b) what would be hidden to the direct knowledge and requires logical-epistemological processing; c) logical concept that will allow knowing the particular phenomenon.” This systematization, applied to law means: a) discussion on the essence of law; b) whether and how we may know the essence of law; c) operability of settlement in the phenomenality of law, correlated or not with the essence.” [4] The need of the spirit to climb up to the principles is natural and particularly persistent. Any scientific construction or normative system need to relate to principles to guarantee or substantiate them.

The law, as it implies a very complex ratio, between essence and phenomena, and a specific dialectic to each of the two categories in terms of theoretical reality, normative but also social one, cannot be outside the principles. Mircea Djuvara states: “All science of law consists not in reality, for a serious and methodical research, other then in releasing from the multitude of law provisions, of their essential, meaning just the ultimate principles of justice from which the other provisions derive. Thus the entire legislation becomes of a greater clarity and what is called the juridical spirit, is being captured. Only then is done the scientific development of the law.” [5] The words of the great philosopher Kant are still actual, which we propose for meditation to any contemporary legislator: “It’s old the desire, which, who knows when?, will it ever be fulfilled: to be discovered for once, instead of the infinite variation of the civil laws, their principles, as only in this will reside, as one says, the secret to simplify the legislation.” [6] In our opinion this is the starting point for understanding the principles of law.

In the literature in specialty, there is no unanimous explanation with regard to the definition and significances of the principles of law. [7] One can identify a series of common elements which we emphasize in the followings: a) the principles of law are general ideas, guiding postulates, fundamental requirements or foundations of the law system; b) The general principles of law configure the structure and development of the

law system, ensure its unity, homogeneity, balance, coherence and developing capacity; c) The authors distinguish between the fundamental principles of law, which characterize the entire law system and reflect what is essential within the respective law system and the valid principles for certain branches of law or juridical institutions.

One of the great problems of juridical doctrine is the ratio between the principles of law, law norms and social values. The views expressed are not unitary they differ depending on the legal concept. The natural law school, rationalists, Kantian and Hegelian philosophy of law admit the existence of some principles outside the positive norms and superior to them. The principles of law are grounded on human reason and configure in term of values, the entire juridical order. Contrary, the positivist law school, Kelsian normativism considers that the principles are expressed by the law norms and in consequence there are no law principles outside the juridical norms' system. Eugeniu Speranția established a correspondence between the law and the principles of law: "If the law appears as a total of social norms, mandatory, the unity of this totality is due to the consistency of all norms related to a minimum number of fundamental principles, they themselves having a maximum of logical affinity between them." [8] In connection to this problem, in Romanian literature in specialty is stated the idea that the principles of law are fundamental prescriptions of all juridical norms. [9] In another opinion, was considered that the principles of law orientate the elaboration and applying of juridical norms, they have the force of superior norms, to be found in the normative act texts, but can be inferred from the "permanent social values" when they are not expressly formulated by the positive law norms. [10]

We consider that the general principles of law are delimited by the positive norms of law, but undoubtedly there is a relation between the two realities. For instance, equality and freedom or equity and justice are foundations of the values of social life. They need to find their juridical expression. In this way appears all kind of juridical concepts that are expressing these values, which concepts become foundations (principles) of law. From these principles the juridical norms derive. Unlike the other normative regulations, the general principles of law have an explanatory value as they contain the grounds of the existence and evolution of law. [11]

Alongside other authors[12] , we assert our opinion, that the juridical norms are related to the principles of law in two ways: the norms contain and describe most of the principles; the principles are then accomplished by putting into practice the conduct prescribed by the norms. In relation to the principles, the juridical norms have a teleological, explanatory value, more restricted, the scope of the norms being the preservation of the social values, not to explain the causal reasoning of their existence. We may say that the most general principles of law coincide with the social values promoted by the law.

One can identify several most important features of the principle of law:

A) Any principle of law must be of the order of essence. It cannot be identified with a specific case or an individual appreciation of the juridical relations. The principle needs to represent the stability and balance of judicial relations, regardless of the variety of normative regulations or particular aspects specific to judicial reality. Consequently, the principle of law must be opposed to randomness and express the need as essence. Being of the essence order, the principles of law have a generalizing character, both on the variety of judicial relations, as well as for the norms of law. At the same time by expressing the essential and general of judicial reality, the principles of law are the grounds for other normative regulations.

There are important principles of law that do not depend on their consecration through judicial norms, yet the norm of law determines their definite content, in relation to the reference historical time.

B) The principles of law are consecrated and recognized through constitutions, laws, customs, jurisprudence, international deeds or formulated in the judicial doctrine. With all variety of ways of consecration and recognition of the principles of law, it is obvious the necessity of at least of their recognition in order to be characterized and applied to the law system. This consecration or recognition is not enough to be doctrinaire, yet it must accomplish itself through norms and jurisprudence. It should however be applied a distinction between the consecration and recognition of law principle, and on the other side, on their application.

C) The principles of law represent values for the law system, as they express both the judicial ideal, as the objective requirements of society, have a regulatory role for the

social relations. In case the norm is unclear or it does not exist, the solving of litigations can be achieved directly based on the general or special principles of law. As an ideal, they represent a basis for the coordination of the work for lawmaking.

The principles of law, by their nature, generality and depth, are themes for reflection, primarily for law's philosophy. Only according to their construction in the sphere of metaphysics of law, these principles can be applied in the general theory of law, can be normatively consecrated and applied to jurisprudence. Moreover, there is a dialectic cycle as the "meanings" of the principles of law, after the normative consecration and jurisprudential development, are to be elucidated also within the law philosophy.

Such a finding imposes nevertheless the distinction between what we may call: constructed principles of law, and on the other side "metaphysical principles of law. The distinction we propose has as philosophical substantiation, the distinction between 'constructed" and "given" in the law.

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

The metaphysical principles of the law may be considered as a "given" related to the judicial reality and by their nature are outside the law. At their origin they don't have a legal, normative, respectively jurisprudential, drafting. They are a transcendental 'given" and not transcendent of the law, therefore they are not "beyond" the sphere of law, but are "something else" in the justice system. In other words, they represent the

essence of values of the law, without which this constructed reality cannot have an ontological dimension. Not being constructed, but being a metaphysical, transcendental 'given' of the law, they need not be explicitly expressed through judicial norms. The metaphysical principles may have an implicit existence, discovered and exploited in the work for interpretation of law. As an implicit "given" and at the same time as a transcendental essence of law, these principles need to be found, at last, within the content of each judicial norm and in any act or manifestation that represents, where appropriate, the interpretation or application of the legal norm. It should be emphasized that the existence of the metaphysical principles grounds also the teleological nature of law, as any manifestation in the legal sphere, in order to be legitimate, needs to be adequate to such principles.

In our opinion, the metaphysical principles of the law are: principle of justice; principle of truth; principle of equity and justice; principle of proportionality; principle of freedom. In a future study, we will expose extensively the general considerations that allow us to identify the principles above mentioned as having a metaphysical and transcendental value in relation to the legal realities.[13]

## **II. CONSTITUTIONAL PRINCIPLES AND NORMS**

The constitutional norms are provisions containing the formulation of the general principles of law or constitutional law. These norms legitimate the power of state, bases and organizing of the power, define some of the institutions or consecrate principles applicable to the fundamental rights. In this context we emphasize that the constitutional regulations containing the formulation of some law principles cannot be excluded from the sphere of the concept on judicial norm because here we find all features specific to them. [14]

The compliance of entire law with the fundamental Law is an important consequence of supremacy of the Constitution, and it should be understood not only through the correspondence in content and form of the lower norms as legal force with the constitutional ones, but also through the need to translate the constitutional regulations and rules (within their spirit and letter) in other judicial regulations.

To note as an important feature of the constitutional norms that arises from the principle of supremacy of fundamental law, the possibility and even the necessity to be translated, concretized through normative regulations, in other branches of the unified system of law. In relation to this element of specificity of the constitutional law norms, is necessary for the constituent legislator to establish a synthetic content, generalizing these norms' content, and not an analytical, procedural one. In the event that, when in the normative content of a constitution would prevail the descriptive, procedural character of the norms, this would lose too much of its constitutionalism finality, the one of being an essence, generalizing factor, for the whole law system. However, the generality of the constitutional law norm's formulation, would not exclude its clarity and precision. Therefore, any codifying work in the matter of constitutional law, is difficult as it should combine dialectically the generality specific to some norms containing law principles, and on the other side the clarity and precision, the last one absolutely necessary to ensure their correct application and to avoid thus, the arbitrariness or possibility for asserting in the name of some constitutional values, of any partisan political interests. This requirement's fulfilling, can be verified in the practice for transposing and interpretation of the constitutional norms met in all state authorities.

One of the most important problems to elucidate the specific of the constitutional norms' aims the answer to the question if all constitutional provisions contain legal norms. The constitutional provisions that aim the economical, social or financial system are norms of constitutional law with the value of a principle, and not mere political goals, as they regulate the conduct of the law subjects taking part in specific social relations. Likewise, the constitutional norms in question establish genuine legal rights and obligations for the law subjects. For example the constitutional obligation for the derived legislator (Parliament or Govern) like in the process of law making to comply these constitutional regulations, otherwise may intervene the sanction of unconstitutionality of the normative acts in question. We note in conclusion that all constitutional provisions contain legal norms because they have the essential features of a norm of law: prescribe the conduct of the subjects to whom they address and generate legal obligations, and such obligations' breaching may attract legal sanctions specific to constitutional law.

The logical-formal structure of the constitutional law needs to contain all three elements: hypothesis-provision-sanction. The main feature of these norms lies in the way the sanction is being expressed. Thus, for several provisions a single sanction may be present. Also there are specific sanctions in the constitutional law, for instance declaring as unconstitutional a legislative act or revocation of a state body. Given the structuring role of constitutional law for the entire law system, the logical-formal appreciation of the constitutional norms must also be made by reference to other categories of legal regulations. For the regulations of principle or of maximum generality contained in the fundamental law, some sanctions are included in the norms of other branches of law (civil law, criminal law, administrative law). In this regard, the solution of principle was correctly mentioned into the doctrine: "I think that sanctions are to be found even in the constitutional norms for the violation of any provision provided that the obligation or entitlement is exactly identified, in other words the conduct of the subjects of law." [15]

Another element of particularity for the principles with legislative value of the constitutional law refers to the regulation subject. Without going into detail, we retain the idea contained in the contemporary doctrine, according to which the common element and proper only to social relations that form the regulation subject of the constitutional law norms, is that they appear in the process for establishing, maintaining and exercising of state power.[16]

All norms contained in the constitution are norms of constitutional law, and also principles of law, even if some of these regulate also the social relations specific to other law branches. Having into consideration that the constitutional law, in particular the constitution, contains norms with value of principle, referring not only to the organizing and functioning of state authorities but also referring to the social and economical system. In consequence, the subject for regulation of the constitutional law is formed by the social relations that appear during the process for the establishing, maintaining and exercising of state power, but also those referring to the bases of the power and bases for power organizing. These categories refer to the sovereignty of the people, characters attributed to the state, to the territory of population, included those referring to the fundamental features of social economical system.

From the technical, juridical point of view, the regulation object of the norms with principle value of the constitutional law and implicitly of a constitution, can be split into two categories of social relationships: a) specific relations of constitutional law that relate to the organizing and exercising of state power and cannot be a regulatory object for other juridical branches; b) double legal natured relationships, governed both by the constitutional law norms and by the norms of other law branches.[17] The existence of such legal relationships justifies by because between the branches of the law there is no rigid demarcation. One needs to consider also the superior legal force of the constitutional law norms, the criterion differentiating them from other norms of law, which confers a structuring value for entire law system.

### **III. NORMATIVE CONTENT OF CONSTITUTION**

Constitution is a law, but at the same time through its juridical force and content distinguishes from all other laws. At the same time, the fundamental law supremacy confers to it the quality of a primary formal source for all other branches of law.

In a comparative analysis of the regulations contained in the contemporary constitutions is noticed that the historical, political, national, cultural, religious etc. diversity of the states, does not directly result in a diversity of the legislative content for the fundamental laws. The content of the modern states' constitutions present many resemblances and sometimes wordings almost identical with some of the institutions regulated.[18] This resemblance is determined mainly by the identity of the regulatory object of the constitutional norms.

On the other side, the diversity in the normative content removes the idea of uniform standards generally valid for the contemporary constitutions. The diversity of normative content is a consequence of the fact that the fundamental law of the state is determined in terms of the content of social, political and economical realities, on the characters and attributes of the respective state, historically expressed and at the same time on the will of the constituting legislator, essentially a political will, at a certain historical moment.

Along with other authors, we believe that the scientific definition of constitution is the main criterion for identifying the normative content. Such a criterion ensures the

generality necessary to give a scientific character to the scientific elaborations in the matter and it explains at the same time the regulatory unit but also the constitutional normative diversity.

For the purpose of this scientific approach, we retain the essence of every attempt to define the fundamental law namely: "The Constitution is a political and legal fundamental establishment of a state"[19] . In the legal acceptance, the fundamental law is the act through which it is determined the power statute and therewith all legal rules, having as object the regulation of the bases of power and bases for power organizing.

The legal concept of constitution can be expressed in two different meanings, respectively in a substantial and a formal meaning. Analyzed separately, the formal and material acceptance cannot be a sufficient criterion for identifying the normative content of the fundamental law. Accepting the formal criterion has as a consequence that the fundamental law could regulate any social relationship, regardless of their importance or object of regulation.[20] The material criterion is also unilateral as it excludes the procedural elements, required for a scientific characterization of the fundamental law. The scientific approach regarding the identification of the normative content of the constitution must consider cumulatively both the formal and the material acceptance to which the political dimension referred above, is added. Therefore, we consider one may identify three criteria in order to establish the normative content of a constitution:

The establishing of the normative content of constitution is made according to the specific, importance and value of the social relation regulated. We share the view expressed in the literature that, unlike other categories of legislative acts, the norms contained in the constitution should regulate the fundamental social relations that are essential for the establishing, maintaining and exercising of power, but also those referring to the bases for the power, respectively the bases for power organizing. Therefore, the constitutional norms are always principles of law having a decisive role in establishing and functioning of the government bodies and in determining the form of the state, namely its character and attributes.

The normative expression of the constitutional principles, themselves simple as a normative form, but complex in nature and in the content determined by the object of regulation, constitutes a source and the normative-value ground of the unity and

simplicity of entire legislative system of the state. The reporting of legislator to the constitutional principles, not only for guaranteeing the simple formal correspondence between the judicial norm and the fundamental law, but mainly to legislate in respect to these principles and having as a finality their content, is a prerequisite to eliminate the diversity of norms, a natural consequence of the governors' excess of power in legislative matters. There are therefore two ways through which the power can legislate: the first that is disregarding the teleological reporting to the constitutional principles and in general to the principles of law, aiming only the formal correspondence with the constitutional norms, and the second one teleological oriented to the content, meaning and limits imposed by the principles of law. In the first case, the result is the normative diversity, lacking a rational, unifying factor; in the second hypothesis there is at least the possibility of achieving the simplicity and unity of the normative system within the content's complexity.

#### **IV. CONCLUSION**

It is important to underline the constitutional dynamism. The fundamental law is a dynamic, opened act, and in a continuous crystallization process. The constitutional status is achieved through a continuous and complex process of interpretation and application of the texts contained in the body of the constitution by state authorities. Furthermore, the constitutional norms cannot and must not provide definitions. For instance also in Romania's constitution exist such concepts, definable by way of interpretation and forming an object of analysis for the Constitutional Court: "spirit of tolerance and mutual respect" (article 29, paragraph 3); "identity" (article 30, paragraph 6); "private life" (article 30, paragraph 6); "lawful state principles" (article 48, paragraph 2); "public interest" (article 44, paragraph 3); "proportionality and public moral" (article 53) or "extraordinary situations" (article 115, paragraph 4).

The normative content of constitution needs to be understood and determined by having into consideration the teleological criterion highlighted in the above stated definition. Namely, the fundamental law's structuring role for entire social, political and state system, guarantor of fundamental rights and liberties. The fundamental law must achieve the social dynamic balance but also the stability and institutional harmony, the

efficient guaranteeing of the fundamental rights, essentially the real constitutional democracy requirements based on the values of the lawful state, on institutional and social balance and on proportionality [21].

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[19] I Deleanu, Instituții și proceduri constituționale, "Institutions and Constitutional Procedures" C.H. Beck Publishing House, Bucharest, 2008 p.88

[20] For example Switzerland Constitution, by article 25 bis states rules for cattle sacrificing

[21] For development regarding the application of the principle of constitutionality and proportionality in state organization of power, see M. Andreescu, Principiul proporționalității în dreptul constituțional, "Principle of proportionality and Constitutionality" C.H. Beck Publishing House, Bucharest, 2007, pp.267-298.