THE PRINCIPLE OF FREEDOM AND EQUALITY

Elena COMŞA*

Abstract
"Principles have such a great influence over our opinions, that we usually refer to them in order to judge truth and to weight probability, to such an extent that what is incompatible with them is so remote and seems probable that we don't even regard it as possible" (J. Locke)[1].
Although specialized literature is consistent in terms of the importance of having law principles, this cannot be said about the number of long established principles or about their grounds.
What is important, say professors Dogaru and Danisor[2], is that "any principle in relation to which all individual relations are sorted is indispensable for maintaining the society; the significance of this principle, what it authorizes and forbids is not indifferent, and what is primordial for the social organism is first of all its existence".
The pursuit in researching the principles of freedom and equality aims to both an incursion in time and the deciphering of the juridical, philosophic and moral connotations afferent to such a vast area as that of law principles. Although an analytical[3] description is intended of these principles, freedom and equality seem so interconnected in terms of their content and significance, as I consider that by undertaking them separately I would diminish their profound understanding and their impact.

Keywords: *principle, value, freedom, equality, discrimination.*

Introduction

"The discussion on principles – initiated in Athens in the 4th century B.C. and still ongoing today, 25 centuries later – is actually a discussion on the essence of the law, on its fundaments"[4].

Any law principle crystallizes social values, defined as "criteria for valuing, standards, milestones"; they are social because they represent in "the human life fundamental principles of choice"[5]. These values are not strictly juridical. They can be juridical, political, moral, religious, esthetic, philosophical, etc.

Values set axiological dimensions for any positive right. Juridical values (equality, freedom, justice) ground juridical rules, they are transposed in law norms; once they become consecrated values are protected, promoted by such. Non-juridical values (good, truth) become or juridical nature and are then protected in the same manner.

Gh. Mihai draws attention on the fact that "people live together, they do not co-exist"[6]; they "collaborate", "get to consensus", they "cooperate". Law involves otherness; whilst coexistence is

* Lecturer, Ph.D. candidate, Law Faculty, "Nicolae Titulescu", Bucharest (e-mail: elena_comsa@yahoo.com).
[1] Quoted by Dumitru Mazilu, Law General Theory (Romanian title: Teoria generala a dreptului), Ed. All Beck, Bucureşti, 1999, p. 126.
[2] I. Dogaru, D.C.Danisor, Gh. Danisor – Law General Theory (Romanian title: Teoria generală a dreptului), Ed. Ştiinţifică, Bucureşti, 1999, p. 62
[3] "analysis" = "general method for researching reality based on decomposing a whole into its components and studying each of them separately" – in Dictionary of Contemporary Romanian Language, (Romanian title: Dicţionar al limbii române contemporane), Vasile Breban, Editura Ştiinţifică şi Enciclopedică, Bucureşti,1980.
[4] Gh. Mihai, *Fundamentele dreptului – Teoria izvoarelor dreptului obiectiv,* vol. III, Ed. All Beck, Bucureşti, 2004, p. 147.
[5] Gh. Mihai, *Fundamentele dreptului,* vol. I - II, Ed. All Beck, Bucureşti, 2003, p. 168.
[6] Idem, p. 163.

possible for flocks, hordes, and anthills, living together is translated by "awareness of values". Each free man has the possibility of choice; however "we are similar by the values we receive, yet different by our valorizing, because any value is particularly valorized by action". [7]

The present pursuit in researching the principles of freedom and equality aims to both an incursion in time and the deciphering of the juridical, and also philosophic and moral connotations afferent to such a vast area as that of law principles.

Literature Review

The specialized literature comprises opinions according to which the changes in the contemporary society have brought too much freedom, to much private independence to individuals; this is translated in more restless in life, as the individual is permanently asking himself "where, how far can and should he go".[8] It is the opinion of the distinguished professor Gheorghe Mihai that this aspects claim for a larger need for the law.

In another view, "the concrete law is not viable but for values and such values are always typically expressed in the enunciation of a law system's principles."[9] Nonetheless, juridical axiology is not about researching only juridical values; it also aims to "give reason for the other social values". Thus, principles represent the area in which law meets philosophy, moral, politics and the other social domains.

This is the reason why in drawing up this paper the guidelines have been followed set forth by professors Nicolae Popa, Ion Dogaru, Gh. Dănişor and D.C. Dănişor as expressed in "Filosofia dreptului. Marile curente" (The Philosophy of Law. Great Currents): "When it comes to law, and not only, it is necessary each time to start with the Greek and Roman antiquity, because that is where the source of the entire European development lays. Even if nowadays society is no longer similar to the one back then, if the institutions governing us are radically different, somewhere in depth, on the level of grounding principles, the universally valid ideas can be found which continue to rule us in the present"[10].

Not least, we have attempted to grasp the manner in which in his encyclopedia "Teoria generala a dreptului"(General Law Theory) professor Mircea Djuvara defined freedom as "a default postulate in any law matter", such that "law without freedom is a contradiction, a meaningless enunciation"[11].

In respect with the principle of equality, "rather regarded as a principle law than a law principle", the referral paper has been that of Simina Elena Tănăsescu – "Principiul egalităţii în dreptul românesc" (Equality Principle in the Romanian Law).

Principle of Freedom

Although an analytical[12] description is intended of these principles, freedom and equality seem so interconnected in terms of their content and significance, as we consider that by

[7] Gh. Mihai, *Fundamentele dreptului – Teoria răspunderii juridice,* vol. V, Ed. C.H. Beck, Bucureşti, 2006, p. 44.
[8] Gh. Mihai, *Fundamentele dreptului,* vol. I - II, Ed. All Beck, Bucureşti, 2003, p. 53.
[9] Gh. Mihai, *Fundamentele dreptului,* vol. I - II, Ed. All Beck, Bucureşti, 2003, p. 167.
[10] N. Popa, I. Dogaru, Gh. Dănişor, D.C.Dănişor - *Filosofia dreptului. Marile curente,* Ed. All Beck, Bucureşti, 2002, p. 3.
[11] M. Djuvara, *Teoria generală a dreptului (Enciclopedie juridică),* Ed. All, Bucureşti, 1995, p. 160.
[12] "analysis" = "general method of researching the reality based on decomposing a whole into its components and on separately studying each of these" – in Dictionar al limbii romane contemporane, Vasile Breban, Editura Ştiintifică şi Enciclopedică, Bucureşti,1980.

undertaking them separately we would diminish their profound understanding and also their impact.

Reflections have always been made on freedom. Regardless if approached as an ideal to be achieved or as a fulfilled reality, freedom transcends law. One can speak of freedom in moral, in art or in relation with the divinity; yet such exceed the theme undertaken hereby.

Nonetheless, entirely understanding freedom as human essence cannot be achieved but for a strictly juridical perspective. Although "freedom is the grounds for law. Without freedom we couldn't understand that it is about law; we face a simple relation of forces which does not make object to law"[13], in the specialized literature it is underlined that law regards freedom upon a restrictive manner: freedom-relation. Law only refers to the person-in-law; it restricts, sometimes hindering, the freedom of the "citizen" by considering other people's freedoms; the finality of law is a social one: optimizing the relations between individuals by coordinating their freedoms and instating by this the juridical order.

Law is not concerned with the individual as a distinctive entity, considered himself; it is not about researching his human self, about improving man, but the structure, the order and therefore, it does not reveal authentic freedom. "The logic is turned over of finalities: instead of improving the individual and therefore, as a consequence, his moral progress, which makes him accept more and more the others' freedom, improving the order, when viewing freedom from a juridical standpoint, we aim to improve order, and only as a consequence of this increased improvement in the logical coherence of the structure, the individual gets to be more protected"[14].

Given the aspects above, the concept of freedom is to be described both from a philosophical view and from a juridical one.

Philosophic literature has always attempted to find answers regarding authentic freedom.

Plato believed that freedom could be obtained only by education; it is only this way that man would get away from appearances and would free himself by truth; the essence of freedom resides in revealing the truth by education.

For Aristotle also the most important was the improving nature of the human being. Freedom had to be searched by means of contemplation (theoria), and intuitive knowledge was regarded as the one able to raise man from his actual stage (praxis). Practice had to be subordinated to theory; intuitive wisdom was the one researching principles; by action (praxis) man would be able to get higher towards principles, could he "reach" freedom[15].

Pufendorf considered that if man consented to the establishment of society he understood that by such he wouldn't become lower, but he would gain increased freedom. For Montesquieu, freedom in a state is ensured by fundamental laws, however in relation to the citizen, and a decisive role is played by morals, habits[16].

Rousseau considered that in the nature stage people had lived isolated from one another, yet being free and equal. The shift from the nature stage to the civil society represented a fall of the individual. He understood however to cease his natural freedom and "the unlimited right of obtaining everything that drew him and what he could touch" in order to obtain in return another type of freedom – civil freedom. This freedom as understood need represented the grounds of law in Rousseau's opinion, because "the excessive impulse of wishing represents slavery, whilst obeying a law which you have established for yourself means freedom"[17].

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[13] M. Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)***,** Ed. All, Bucureşti, 1995, p. 160.
[14] I. Dogaru, D.C.Dănişor, Gh. Dănişor - *Teoria generală a dreptului,* Ed. Ştiintifică, Bucureşti, 1999, p. 65.
[15] Apud N. Popa, I. Dogaru, Gh. Dănişor, D.C.Dănişor - *Filosofia dreptului. Marile curente,* Ed. All Beck, Bucureşti, 2002, p. 49.
[16] Idem, p. 121.
[17] J.J. Rousseau, *Contractul social,* Ed. Ştiințifică, Bucureşti, 1957, p. 107.

Thus, at the basis of the social contract Rousseau put the free will of individuals. "Social pact establishes such equality between citizens that everyone subject to the same conditions and will enjoy the same rights"[18]. This is a consequence of the equivalence in renderings: if a citizen ceases to the whole a part of his natural freedom, then every body will enjoy the same treatment from the society.

The finality of the social contract is mainly juridical security. By the social pact, freedom and equality as natural rights are maintained and moreover guaranteed, and citizens' security is ensured.

For Kant "law is the set of conditions y which one's arbiter can get in agreement with another's arbiter, following a general freedom law". This is the idea of freedom-relation mentioned at the beginning. If law is about other people's freedom, then the law imposes, it constraints. And then freedom in the field of law is not authentic. "Freedom, in its absolute sense, is not possible otherwise but in the field of Ethics"[19].

However, to this standpoint we oppose the assertion of Montesquieu: "Freedom is the right of doing what the laws allow; and if a citizen could do what they forbid, he would no longer have freedom, because the others could do the same"[20].

This way, the intransigence in the Kantian belief is considerably attenuated. In essence, it is about apparent (or at least justified) limitation of freedom by law imposed by the need of ensuring juridical order by harmonizing the freedoms of all individuals.

The law uses this subtle mechanism, limiting one's freedom, in order for everyone's freedom to triumph. Actually, this is "a confirmation of freedom and not a limitation of"[21].

"Between law and morale no scission can exist. At the basis of law there lays humanity", says professor Djuvara, considering that the idea of individual right is losing ground nowadays in favor of social solidarity theory.

From this standpoint, individual's freedom is translated by the idea of duty. Law involves otherness and thus duties, respecting other people's freedom. By what mechanisms can law act over individuals in order to make freedom triumph, which actually is profitable precisely to them?

First of all, by constraint; the individual is imposed to adapt his behavior to legal provisions, otherwise being subject to correction. This way, perturbed juridical order is reinstated by applying the sanction. Yet, as specialized literature shows[22], this way the action is made over the effect, by ignoring the cause; before breaching a law norm, the individual breaches a principle; his inner self is affected. He has to be helped to recover his sociability. How? By education, the second mechanism by which the law can act over the individual. This implies making the individual moral, improving him. The effect is a long term one, because the moral individual does not have to be constrained to respect the other's freedom, he makes it because that's how his inner self dictates it.

By getting away from his sollen area and focusing on his sein area, the concept of freedom approached from a strictly juridical view seems to be an ideal.

From a juridical standpoint, the notion of "freedom" has two senses: we speak of freedom in a general sense, as a guiding principle of law, and from the standpoint of juridical technique, as subjective law.

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[18] Idem, p. 127.

[19] Apud N. Popa, I. Dogaru, Gh. Dănişor, D.C. Dănişor - *Filosofia dreptului. Marile curente,* Ed. All Beck, Bucureşti, 2002, p. 221.

[20] Montesquieu, *Despre spiritul legilor,* Ed. Ştiinţifică, Bucureşti, 1964, p. 193.

[21] M. Djuvara, *Teoria generală a dreptului (Enciclopedie juridică),* Ed. All, Bucureşti, 1995, p. 122.

[22] I. Dogaru, D.C. Dănişor, Gh. Dănişor - *Teoria generală a dreptului,* Ed. Ştiinţifică, Bucureşti, 1999, p. 69.

As a general law principle, freedom implies on one hand a just limitation of the individual's freedom of action so that by coordinating all freedoms juridical order would be ensured (as mentioned above, it is an apparent limitation; actually, it is a confirmation of such), and on the other hand, it is a break in front of a potential excess in the society's freedom in disfavor of individuals. This way, if others' freedom is respected, the individual gets the necessary guarantees regarding his own freedom.

"Freedom is this way an implied postulate in any law problem. Law without freedom is a contradiction, a meaningless enunciation"[23].

The state provides juridical warranty of the individuals' freedom, stipulating in art. 23 of the Constitution that "Individual freedom and person safety are inviolable". The constitutional text considers "the person's physical freedom, his right of freely behaving and moving, of not being held in slavery or in other kinds of servitude, of not being retained, arrested or held in custody but for the cases and in the forms which are expressly stipulated by the Constitution and by laws"[24].

The general principle of freedom is dispersed in the law areas in the form of individual freedoms: the freedom of conscience, religious freedom, the freedom of speech, the freedom of meeting, economic freedom, the freedom of entering contracts, the freedom of communicating, the freedom of getting informed, the freedom of getting associated, the political option freedom.

The human and citizens rights' statement proclaims freedom of person, providing that "people are born and remain free and equal in rights", freedom being defined as "the power of doing something that does not harm another".

The universal statement of human rights stipulates that "each individual is entitled to life, freedom and personal freedom".

The subjective right to freedom is considered an essential right for citizens, and its inalienable nature is constantly underlined in the E.C.H.R.: "No one can waive it"[25].

"Waiving one's freedom means giving up one's human nature, his human rights, even his duties…"[26].

Principle of Equality

Regardless how different people are in terms of gender, race, nationality, language or religious belief, they all have the same essence. Thus, equality is considered an inborn right and inherent to human beings. Professor Gh. Mihai speaks of the principle of "anthropological" equality: "people are equal meaning that no one is more or less a bio-psycho-social person, under no aspect, and this qualitative equality leads to identify, because people are essentially identical"[27].

The Universal Statement of Human Rights stipulates that "All human beings are born free and equal in dignity and rights". Referring to the nature as "human being", and not citizen, the text ascertains a natural equality of people, and not a juridical one. However, in order to be efficient equality has to be guaranteed from a juridical standpoint.

Ever since the antiquity there can be noticed at Plato and Aristotle a modern conception of democracy; it is grounded on freedom and equality. "If freedom and equality – said Aristotle – are,

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[23] M. Djuvara, *Teoria generală a dreptului (Enciclopedie juridică),* Ed. All, Bucureşti, 1995, p. 160.
[24] I. Muraru, E. S. Tănăsescu, *Drept constituţional şi instituţii politice,* ediţia a 12-a, vol. I, Ed. All Beck, Bucureşti, 2005, p. 166.
[25] C. Bârsan, *Convenţia europeană a drepturilor omului. Comentarii pe articole,* vol. I – Drepturi şi libertăţi, Ed. C.H. Beck, Bucureşti, 2005, p. 287.
[26] J.J. Rousseau, *Contractul social,* Ed. Ştiinţifică, Bucureşti, 1957, p. 91.
[27] Gh. Mihai, *Fundamentele dreptului,* vol. I - II, Ed. All Beck, Bucureşti, 2003, p. 185.

as often said, the two fundamental basis of democracy, the more complete such equality in political rights, the more pure democracy will exist in all its purity"[28].

The same opinion also had Alexis de Tocqueville, who thought that the equality of conditions was the basic principle of democracy, and Montesqieu for whom "love for democracy is love for equality".

Numerous discussions take place in the doctrine in respect with the juridical nature of the equality principle. Opinions vary between considering equality as an objective law principle, or a fundamentally subjective one.

In the French law, equality is qualified as an objective law principle, with the particularity of providing it with a strengthening role over the effectiveness of the other citizen rights. In the German doctrine, the view is undertaken of subjective public law right.

In our law system it is stated[29] that although under the appearance of qualifying it as subjective right, the principle of equality is more than that: it is "a fundamental right with the value of a general principle for the field of fundamental rights", it is an objective law principle regarding the equilibrium of law and moreover "it is rather considered as a principle right than as a law principle", because it accompanies and guarantees the use of the other rights. Sometimes it has also been interpreted as a distinct set of rights, composed of different specific realities.

"Equality can only exist between free people, and freedom only between people the equality of which has been juridical ascertained"[30].

The principle of equality finds its juridical expression in the Romanian law by its being consecrated in the fundamental law. Its provision under a few of the Constitution's texts does not affect the unitary nature of the concept.

In its general form, the principle of equality can be found in art. 16 of the Constitution, consecrating "The Equality in Rights": "Citizens are equal in front of the law and public authorities, with no privileges or discrimination". It is an "equality of chances" for all citizens[31]. This provision, in order to complete the content of the principle, should be correlated with the one comprised in art. 4 par. 2, where it is mentioned that "Romania is the common and indivisible country of all its citizens, with no differences regarding race, nationality, ethnic origins, language, religion, gender, opinion, political belonging, wealth or social origins".

The other constitutional provisions are only applications of the principle of equality in various areas and they refer to: the right to identity for national minorities, non-discrimination in terms of salary rights for women and men, equality of spouses, just settlement of fiscal duties, equality of vote.

Essentially, equality in its general form resides in each citizen's right of not being subjected to discrimination and of being treated equally, both by public authorities and by the other citizens. This is about an "equality in rights", opposed to the concept of "actual equality".

Simina Elena Tanasescu explains this opposition stating that "social life produces differences of which the lawgiver should take account when it attempts to impose a certain behavior to these law subjects. The versions at the lawgiver's disposal are two: either it calls for juridical equality, establishing the equality in rights of all subjects, or it grounds on a material equality, referring to an equality of the results"[32].

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[28] Apud N. Popa, Ion Dogaru, Gh. Dănişor, D.C. Dănişor - *Filosofia dreptului. Marile curente,* Ed. All Beck, Bucureşti, 2002, p. 63.

[29] S. E. Tănăsescu, *Principiul egalităţii în dreptul românesc,* Ed. All Beck, Bucureşti, 1999, p. 4.

[30] N. Popa, M. C-tin Eremia, S. Cristea, *Teoria generală a dreptului,* ediţia a 2-a, Ed. All Beck, Bucureşti, 2005, p. 107.

[31] M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Constituţia României revizuită – comentarii şi explicaţii,* Ed. All Beck, Bucureşti, 2004, art. 16.

[32] S. E. Tănăsescu, Principiul egalităţii în dreptul românesc, Ed. All Beck, Bucureşti, 1999, p. 17.

Thus, the lawgiver provides an equal juridical framework for all citizens, ascertaining a formal equality; it is concerned with ensuring equal laws for all citizens, yet without guaranteeing equal results; "if positive right was the exact reflection of the natural right, then juridical equality should impose to the lawgiver to not make discriminations which nature would not make"[33]. However, actual inequalities are inherent to the social life, says the author "this framework only has the vocation of universality; it does not comprise all law subjects in the same time"[34].

At the other end there is material equality, actual equality or equality by law; it refers to all concrete cases ("it rejects vocation to the universality of the principle"[35]) and considers the existent differentiations, aiming for a concrete equality of the results.

Also referred to as "positive discrimination", the principle of material equality aims either to correct actual inequalities, or to attenuate some existent juridical inequalities, concretized in (negative) discriminations, faced only by certain categories of persons.

This strategy involving not only a vocation for equality, but an effective, touchable equality, and also certain obligations from public authorities, was less used by the Romanian constitutional judge.

The different significances of the two equality standards are suggestively exemplified by Ch. Perelman[36] when he referred to the following: "when we consider merit, all people are equal, meaning they all disserve; but when we apply merit, equity interferes, which asks for everyone to have by its merits, which means establishing a hierarchy of inequality, without damaging equality".

In respect with the notion of "discrimination", it is considered in general that it should be understood as unjustified, illegitimate, arbitrary differentiation.

The discrimination criteria are stipulated in art. 4, par. 2 from the Constitution: their area of coverage has increased considerable when in the jurisprudence of the Constitutional Court the idea was included that not only non-discrimination criteria that are expressly stipulated by the fundamental law should be complied with; there are considered discriminations any arbitrary exclusions of law subjects.

The jurisprudence of the Constitutional Court also registered an evolution in respect with admitting a relative version of the equality principle. In a first phase there has been settled that equality was not about uniformity. Thus, equality does not imply equal treatment in any circumstance; some equal situations there should have equal treatment, whilst in different situations *maybe* different treatment exists. Ulterior, the Constitutional Court considered that different situations *call* for different juridical regime; however, an objective and reasonable motivation should exit. Thus a differentiation right has been admitted.

The next step was to consecrate a new fundamental right – the right to difference "as expression of citizens' equality before the law, incompatible with uniformity"[37].

Conclusions

Law principles cannot be dissociated by the evolution of human society. According to the observations of Locke, inborn respect for principles "is so large and their authority is so suzerain

[33] Idem, p. 19
[34] Idem, p. 20.
[35] Idem, p. 24.
[36] Quoted after Gh. Mihai, Fundamentele dreptului, vol. I - II, Ed. All Beck, Bucureşti, 2003, p. 185.
[37] I. Muraru, M. Constantinescu, Curtea Constituțională a României, Ed. Albatros, Bucureşti, 1997, p. 113.

that not only other people's testimony, but also the evidence of our own feelings is often rejected if a contrary testimony is given to these defined rules"[38].

Throughout the society's evolution, values viewed as universal have influenced the history of human rights and human principles. The current community order is a testimony of this aspect. The Treaty establishing an European Constitution, by which it is aimed to create an area of human freedom and hope, in ensuring a climate of peace, justice and solidarity throughout the world, proclaims the protection of the values of respecting human dignity, freedom, democracy, equality, lawful sate and respect for human rights, including the rights of persons belonging to minorities. "These values are common to member states in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men".

"In all juridical relations a value is established, and that is why it can be said that entire law is nothing but a research of values. They are structured in higher and higher hierarchies of values, which are of the same nature as the idea of obligation itself, being un-conditional values" [39].

[38] Apud D. Mazilu, quoted paper., p. 126
[39] M. Djuvara, Teoria generală a dreptului (Enciclopedie juridică**),** Ed. All, Bucureşti, 1995, p. 216.