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The Complementary Function of the Principles of Law in Relation to the Positive Law

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Abstract: Principles of law are the ideal of law pursued by the legislator in the activity of creating law. They express man's highest aspirations: freedom, equality and justice. The question of the principles of law carries with it a real burden of meaning. It raises great questions, with still unexpected answers (Humă, 2011, p. 103). Principles of law are a subject of maximum resonance in legal thought, but also of maximum resistance to relative contingencies and legal positivism. The renaissance of natural law is at the same time a renaissance of the principles of law housed in human nature (consciousness). The individual conscience, especially the legal conscience, is the 'repository' and 'shield' of the inherent principles in the human being, principles which must assert their presence in any positive law: freedom, responsibility, equality, justice, unity, etc. The principles of law determine the existence of the material legal reality as premises of the positive legal order. The principles of law are strongly present in the legal-action framework: in the processes of elaboration and realisation of the law. The principles of the law contribute to the completion of the incomplete positive law in the *analogia iuris* process.

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1. Introduction

Just as there are no ideas of today and yesterday, due to the eternity of ideas, so there are no principles of law valid for hic et nunc; only those principles that go beyond the positivity of law are true principles of law. This is why some so-called 'principles of law' are actually positive legal rules. In the light of the above, the field of principles of law lends itself to the problems, conceptualisation and timeliness of delimitation.

The principles of law determine the existence of material legal reality as premises of the positive legal order. The principles of law are clearly present in the legal-action framework: in the processes of lawmaking and law implementation. The principles of law contribute to the completion of the incomplete positive law in the *analogia iuris* process.

Alongside the domestic legal order, the international legal order is conditioned and substantiated by the general principles of law recognised by the members of the international society. The system of contemporary international law makes civilised nations aware of universal non-perennial values: equality of states, freedom of the peoples, unity and responsibility of states for the future of mankind, justice (justice) between peoples, etc.

The international legal consciousness is marked by general principles of law, pre-existing the fundamental principles of public international law. Domestic and international legal life develops around the guiding precepts of law (Cristea, 2019, p. 85).

A constant field of scientific concern, the principles of law nevertheless imply original visions, discoveries resulting from clearly defined objectives.

2. The Compliancy Function

The problem of gaps in the positive law is about the practice of law. In the process of applying the law, the body responsible for examining and resolving a given case may be faced with the situation of the absence of the rule(s) corresponding to the state of affairs established. In other words, there is nothing for the court to apply; it is faced with a gap in the positive law.

A gap in the law is interpreted as an absence of normative legal regulation, imposed by the given concrete situation, justified both from a theoretical and practical point of view.

A legal gap is a total or partial lack of provisions, the need for which is expressed by the development of social relations and the practical needs to solve political problems, the meaning and content of the legislation in force, and other circumstances and manifestations of the will of the rulers aimed at regulating the factors of life in the sphere of legal influence. The legal gap is the absence of either partial or total absence of the legal norms necessary for the resolution of a case and the adoption of the appropriate decision. The gap in positive law is the absence of either the law, the act subordinate to the law, legal custom or judicial precedent.

In the literature, in addition to the phrase "gaps in the law", which refers to the normative character of the law, we also find the expression "gaps of the law", which refers to the formal character of the law. A gap of the law is also defined as the omission of the law to solve a problem that should necessarily be solved". According to S. Popescu, lacuna as the omission of the law in solving a problem that should necessarily be solved. The expression "the law's lacunae" highlights the main form of expression of contemporary law, the law in the broad sense of the word. We do not see a fundamental difference between these two expressions used by the legal scholars, which is why we will insist, in the remainder of the text, on "gaps in positive law". Gaps in positive law always signify the absence of rules in relation to facts and social relations that are within the scope of legal regulation.

Loopholes in law are divided into: a) true and b) false; c) "excusable" and d) "non-excusable". The true lacuna consists in the absence of the applicable rule, which would regulate the social relationship of a legal nature the false lacuna consists in the existence of the rule, which is considered unsatisfactory; when a social relationship without a legal nature would claim unfounded legal regulation. True gaps require filling; false gaps do not require filling, being inferred even from an extensive interpretation of a rule. Excusable' gaps, also called primary gaps, are conditioned by the absence of the need for legal regulation of a social relationship. Non-excusable" gaps, known as subsequent (posterior) gaps, arise in the process of drafting a legislative act when the legislator needs to foresee new social relationships requiring legal regulation.

Not every shortcoming in the law is a shortcoming. The imperfection of the law is not the same as its shortcoming. The imperfection is of a moral, social and economic

nature, whereas the shortcoming is of a logical or systematic nature, i.e. it results from a lack of logical coherence in the positive legal system.

The causes that lead to the occurrence of gaps are: 1. The legislator's failure to regulate a problem, conditioned by the "globality" of the problem, the legislator's inability to grasp all its aspects; 2. Internal contradictions of the law, i.e. the existence in the law of provisions which cancel each other out, causing a de facto absence of regulation; 3. The legislator leaves certain problems open, considering them too delicate to be regulated legally at the moment; 4. The legislator's desire to leave certain issues to be defined by the implementing body. 5. The non-existence of a problem at the time of the regulation, which is subsequently raised by the law enforcement officer. This is justified by the dynamism of the social relations.

The problem of resolving loopholes in the law involves answering at least a few questions: Who can establish and who must resolve the loopholes? What are the permissible limits to the removal of the loopholes by state bodies? What is the "matter" used to fill the gaps?

Firstly, loopholes can be found in the interpretation of legislation by the state bodies as well as by the private individuals. In particular, loopholes can be detected directly by the state bodies within the limits of their competence. However, loopholes can only be closed within the official framework; only the legislative and executive bodies of the state can close loopholes in legal acts. According to the argument a major ad minus, the legislative body adopts laws, which implies the authentic interpretation of the texts of laws, but also the removal of loopholes in laws, detected in the process of interpretation. So, the legislature must remove loopholes in laws by initiating the legislative procedure. In fact, each state body with regulatory powers must remove loopholes in its own enacted legislation. The other organs of the state mechanism can also "overcome" gaps in legislation: the executive and the judiciary, as law enforcement bodies.

Secondly, the bodies that regulate can close the loopholes in their own legislation, within the limits of their powers. Thus, the rules of competence outline the boundaries of the work of the state bodies in closing loopholes. The law enforcement bodies only participate in the elimination of legal loopholes within the limits expressly laid down by the law-making bodies and stipulated in the texts of legal normative acts.

Thirdly, the 'matter' used to fill the gaps is compatible with the 'matter' of the legal act. The gaps in positive law are filled by legal rules. Another question, with what

kind of legal rules? The legislator, obviously, will operate with rules from laws to fill in the gaps in the law, adjusting them to the field of regulation. Other bodies with regulatory powers will operate with rules from acts subordinate to the law to fill in the gaps in acts subordinate to the law, also adjusting them to the scope of the regulated relations. Thus, the bodies that regulate the social relations (the legislature, the executive) have the primary vocation of resolving the gaps in the legislation.

However, in order to overcome the shortcomings detected in the process of dispensing justice, the law enforcer, in particular the courts, cannot resort to any legal rule, only to an analogous one. Moreover, Gh. Mihai, quoting Raulph, states that "a fact that cannot be found in a type of facts is not allowed to be treated by analogy, as this would be an act of creation of the law or a qualification against the intention of the legislator (Mihai, 2000, p. 324)".

If in the Roman law the judge could withdraw from a case not regulated by rules, under the formula REM SIBI NON LIQUERE, then in the contemporary law, the judge cannot do so. According to the Article 3 of the Roman Civil Code, "the judge who refuses to judge, on the plea that the law does not provide, or that it is obscure or unreasonable, may be prosecuted, as guilty of denial of justice". By virtue of that provision the idea of the completeness of the legal system is affirmed, but not of the system of legislation. The prohibitive rule of the Article 4 of the Roman Civil Code stipulates that "the judge is forbidden to pronounce, in the decisions he gives, by way of general provisions and regulations, on the cases submitted to him". This provision prohibits the judge from substituting himself for the legislator, in other words, from issuing erga omnes judgments. The judge is not the creator of the law, but the servant of the legislator; the solution drawn up by the judge, in the event of a loophole in the law, is binding inter partes and valid only for the case decided.

In the case of a search for the legal rule corresponding to the factual situation established by the judge, but which is unsuccessful, the analogy of the law is admissible. Analogia legis is a logical procedure, used by the law enforcement agency when a loophole is established, whereby a legal rule governing a social relationship is applied to another social relationship similar to the one governed, for which there is no legal rule. The solution of legal loopholes by analogy legis is not absolute. The application of the analogy of the law is not admissible in criminal law, which is subject to the principle of the legality of the offence and the legality of the penalty. The judge may not declare new offences or establish penalties other than those provided for by the criminal law.

In the absence of the corresponding rule, as well as of similar rules, the gap is amplified, and the law enforcement body will use the logical procedure analogia iuris, appealing to the principles of law in order to solve the gap. In the implementing act, in the reasoning part, the need to use analogia iuris will be justified, the principle will be named and the relevant explanation given. Genuine principles of law are taken into account in the analogy of law. In other words, general principles of law such as freedom, equality, justice, equity and responsibility. The general principles of law are not to be confused with other principles of law: branch, inter-branch, legal institutions, as well as method-principles, rule-principles of law-making, interpretation, legal responsibility. "It is not the names of the principles that are used, but their statements, which are not unanimously formulated in theory, nor expressly provided for in legislation (Mihai, 2000, p. 326)". S. Popescu points out that when the general principles of law are not included in the text of the law, they become applicable through their recognition in the judicial practice (e.g.: the judicial practice of the USA, Germany, France) (Popescu, 2002, pp. 165-166).

Analogia iuris holds superiority over analogia legis, as general principles of law "... have greater longevity compared to the legal rules".

In the literature, a delicate issue is addressed, that of the collision of the principles of law in the process of law enforcement. The solution to collisions between the principles of law is deduced from the very purpose of principles of law. Each principle of the law pursues a specific purpose. In a conflict situation involving the application of one of two or more principles, the principle which has the greater purpose will prevail over the others. Thus, the priority of application of a principle of law depends on the weight of the finality (purpose) of the principle of law, the value enshrined in that principle.

The question of the priority of the principles of law is also difficult because of the uncertainty about the assessment of the purposes of the principles of law. Accepting the axiological criterion of the purpose of the principles of law, the hierarchy of legal values must inevitably be accepted. We believe that potential conflicts of priority of legal principles in legal practice will be effectively resolved by knowing and accepting the hierarchy and system of legal principles. For example, in case of collision of criminal or civil procedural principles with constitutional (fundamental) principles of law, the priority of application will be after the latter. However, in order to prevent and effectively resolve conflicts between principles of law, they must obviously be explicitly and unambiguously stated by the legislator so that they can be used without doubt.

3. The Principles of Law Applied in *Analogia Iuris*

In *analogia iuris*, the person applying the law may invoke only a principle enshrined in the law in force as a legal basis for closing the loophole. Priority is given to the general principles of law, then to the principles of common law or of a legal institution belonging to civil law. As Gh. Mihai, "... a principle of law that is not enshrined in this or that law cannot constitute the basis for a particular court decision (Mihai, 2000, p. 202)". Otherwise, "invoking a principle in conflict with the law in force would only call into question the validity of the law, which would undermine the act of realising the right determined (Mihai, 2000, p. 203)".

As techniques for supplementing the law, *analogia legis* and *analogia iuris* must be expressly provided for by the legislator. Examples of these are: the French Civil Code (art.4, 5), the Romanian Civil Code (art.3, 4) etc.

The article 38(1)(8)(c) of the Statute of the International Court of Justice provides for "general principles of law recognized by civilized nations" as one of the means of settling disputes submitted to the Court. These principles are accepted (enshrined) domestically, part of all national legal systems, but regrettably are not named or enunciated by the international high court. We consider this to be a shortcoming of the International Court of Justice which complicates the administration of international justice. But general principles of law are necessary in particular to "fill in" the gaps in international law. In the same Article 38(2), a general principle accepted in domestic law is referred to as equity (ex aequo et bono), whereby the Court, with the agreement of the parties to a dispute before it, may settle the case. The principle of equity has a manifold application in the practice of the International Court of Justice. The suppletive function of equity is to fill the gaps in the public international law (equity "praeter legem"). The moderating function of fairness ("*infra legem*" fairness), which allows international rules to be adapted, would lead to abnormal or unreasonable results if applied automatically. The political function (equity "*contra legem*") involves refusing to apply the rule considered unfair. This last function of equity is the most controversial, arguing that there can be no equity outside the law.

The risks involved in fairness relate to the establishment of exceptions to the rules of international law which can lead to a weakening of respect for international law and to the subjective nature of the invocation, as measured by the judge against a moral system.

The nalogy of law, like the analogy of the laws, carries a certain degree of risk in the national law. The negative implications relate to the danger of judicial interference in lawmaking, which would disturb the balance of powers in the state. For the purposes of preserving legality, the following requirements apply to the use of the analogy: 1. The gap must be effective. 2. *Ubi aedem est ratio, aedem solutio esse debet*: factual relationships, which are of the same essential character, must be subject to the same rule of law. 3. Analogy must not be expressly prohibited by law. 4. Exceptional rules apply in exceptional situations. 5. The solution of the loophole must not contravene positive law. 6. Analogy implies a search for a similar rule within the same branch of law, and in the absence of such a rule, recourse to other branches of law, to the law as a whole, and ultimately to the general principles of law.

The judicial bodies, in addition to the noble mission of dispensing justice, even in the absence of regulatory law, contribute directly to the confirmation and development of the principles of law. The work of the supreme judicial bodies of the state is particularly important in this respect.

The international case law, which is more frequent than the domestic case law, confirms the principle that the international law cannot exist unless its primacy in relation to the national legal order is recognised. In a number of cases the International Arbitration has ruled that the provisions of the Constitution cannot be invoked to justify the failure to comply with international obligations and thus the supremacy of the international law.

The domestic and international justice is a fertile framework for the principles of law. They are interpreted, affirmed or confirmed, invoked or developed, with the force and role of the underpinning judicial decisions in the case of gaps in positive law. In this context, the constitutional courts, having been seised, interpret the principles of law enshrined in the Constitutions, and in the process of constitutional review contribute directly to the triumph of the general principles of law by invoking them in the grounds of the operative part. Thus, the Constitutional Court of Romania has on numerous occasions interpreted and affirmed the principle of the separation of powers.

Obviously, the Constitutional Court can only invoke and interpret the principles of law expressly enshrined in the Constitution, as well as those deduced through the way of interpretation from the text of the Constitution.

4. Conclusions

With regard to the above, we can summarise:

(a) The positive (legal) law and the system of legislation are deficient; natural law and the legal system as a whole do not admit of gaps;

(b) The solutions to the gaps are normative regulations adjusted to social relations;

(c) The provisional but effective remedies for overcoming gaps in the process of applying the law are *analogia legis* and *analogia iuris*;

(d) Filling gaps by *analogia legis* and *analogia iuris* is not universal, the application of these techniques is limited, especially in private law;

(e) The general principles of law, in particular the principles of the civil law, are applied in *analogia iuris*;

(f) The general principles of law are the legal basis for the resolution of cases in the domestic and international case law;

(g) The principles of law are affirmed, confirmed, interpreted and developed in the domestic and international judicial practice;

(h) The judge does not replace the legislator, but contributes to the jurisprudential development of the law.

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