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A Few Remarks on the Role of the Principle of Legality in the Romanian Legal System

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Abstract

This paper seeks to outline the meaning, the role and the limits of the principle of legality according to the Romanian legal system.

Firstly, a few preliminary questions regarding the nature and the role of legal principles in general have to be answered. This is necessary in order to provide a reader which is not familiarized with this national set of norms with a general understanding of the concepts used during the analysis of the proposed topic.

Having achieved this, one may subsequently proceed to analysing the general understanding of the principle of legality and its main coordinates in the Romanian legal system. One would have to remember that the latter is a European continental (or civil) legal system, belonging to a country which is a member of the European Union, of the United Nations and of the Council of Europe. This translates into the fact that the paper does also have to analyse the impact of the international public law on the way the principle of legality is currently comprehended and applied internally.

All these being said, the third and main section of the paper concentrates on how is this concept applied in a few of the legal domains. The paper is mainly interested in the public implications of the principle; therefore, the analysis will try to discover the main ways in which the rule of law culture shapes the notion of public power and its exercise.

The paper will end with a few final considerations regarding the main ideas discovered during the previous sections.

Keywords: *principle, legality, law, Romanian, legal system*

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Introduction

In this paper we are going to scratch the surface of the Romanian legal system in order to find out how the principle of legality, also known as the rule of law, works. In order to do so, we have to answer a few preliminary questions regarding the nature and the role of legal principles in general. We may subsequently proceed to analysing the general understanding of the principle of legality and its main coordinates in the Romanian legal system. One would have to remember that the latter is a European continental (or civil) legal system, belonging to a country which is a member of the European Union, of the United Nations and of the Council of Europe. This translates into the fact that we will also have analyse the impact of the international public law on the way we now comprehend and apply internally the principle of legality. All these being said, we will then pass to the third and main section of the paper, where we analyse how is this concept applied in a few of the legal domains. We should mention from the beginning that we are mainly interested in the public implications of the principle, so we will try to discover the main ways in which the rule of law culture shapes the notion of public power and its exercise. The paper will end with a few final considerations regarding the main ideas discovered during the previous sections.

Methodologically, this paper has a structure inspired by the French model of the reversed pyramid, which means that we will pass from the more general ideas into the more specific aspects. To do this, we are relying heavily on the Romanian legal theory literature, while also consulting different works from various legal branches. Jurisprudence, especially from the European Court of Human Rights, hereinafter E.c.H.R., will also play an important role.

We are, of course, aware of the fact that it is impossible to analyse exhaustively the principle of legality in the space reserved for a journal paper. Keeping this in mind, our goal is to highlight just a few of the key issues which raise questions regarding the way this concept operates in legal system, under the influence of a rapidly changing international context due to the transformations currently marking the European continent.

A few considerations about the nature and role of principles

A discussion about principles may always begin by remembering that they may be the mark of a balanced, well-developed society, or the apex of an unstable social construct. *Salus populi suprema lex* may sound well, but it is in fact supporting an imbalanced system of values by placing the safety of the group above all else in any possible circumstances. Safety, no matter what the law dictates. The same might be said about *Fiat iustitia et ruant coeli*, a principle which

favours the achievement of justice by any means. One could easily notice that such extremes are never the basis of a truly healthy modern legal system[3]. As a consequence, one may grasp the importance of the development of moderate principles with the observance of the fundamental human rights and of democratic ideas.

However, what are the legal principles and what is their role in the Romanian legal system? As it was previously stated in the legal doctrine[4], the fact that almost everyone agrees that principles and norms are two different concepts had an unfortunate effect. Instead of promoting further studies, it created the false impression that there is no need for an analysis of the differences between the two species. It is a funny paradox, as pretty much everyone is convinced that the two concepts are clear enough, even though no one was able to put forward an unanimously accepted definition for the idea of principle.

Keeping in mind these historical and theoretical limitations, we should start by highlighting the fact that the legal principles are an integral part of the legal system, alongside the legal norms[5]. In fact, these are the two main components of the Romanian legal system. In our opinion, given the French origins of the Romanian legal philosophy, both the principles and the norms are at the same time the expression and the source of the fundamental civil rights and liberties of the citizen, but we will get back to this opinion. For now, we should explore the various definitions proposed by several Romanian authors for the notion of principle.

In one author's opinion[6], principles are the main ideas, the fundamental prescriptions found at the basis of all legal norms. In this capacity, principles have the primary role of explaining the other elements of the legal system, like the legal norms[7]. They are not necessarily directly applicable, serving mostly as guidelines for the legislator and/or public authorities invested with the power to create legal norms. In consequence, if we are to adopt this view, it would mean that norms are punctual expressions of the legal principles.

Other authors prefer to describe the concept of legal principles by dividing the legal system in two main parts. On one hand, there is a more visible, but superficial, strata, composed of norms. They may help solving individual cases; however, one could not expect to find them useful when trying to understand the inner mechanism of the law. On the other hand, there are the principles, hidden behind the norms. They are rules of conduct with a very high degree of

[3] Simon Blackburn, *Ethics. A very short introduction (Very Short Introductions)*, Oxford University Press, Oxford, 2001, p. 76.

[4] Humberto Avila, *Theory of Legal Principles (Law and Philosophy Library)*, Springer, 2007, p. 3.

[5] Lidia Barac, *Elemente de teoria dreptului*, All Beck, Bucharest, 2001, p. 253.

[6] Nicolae Popa, *Teoria generală a dreptului*, III, C.H. Beck, Bucharest, 2008, p. 90.

[7] *Idem*, p. 93.

generality, which means that they are able to influence the creation and/or application of the norms, thus governing the first strata of the Romanian legal system[8]. Hence, a key difference emerges, as according to this second opinion principles have direct applicability.

At the same time, it should be mentioned that there are authors who believe that the principle of legality is not a general principle of the law, even though it is a fundamental one. This conclusion is based upon the way these two categories of principles are defined. The latter category is formed of principles recognised by the Romanian Constitution, while the latter are applicable mainly to the executive branch, thus not requiring a constitutional protection[9]. In our opinion, dividing the fundamental principles from the general principles following these criteria is not a good idea. It would imply that only the legislative power receives a full constitutional oversight, which is certainly erroneous. Consequently, we will not pursue this line of inquiry.

In another author's opinion, the concept should be explained in a much broader context, by analysing the Romanian legal system in comparison with the French and Italian ones[10]. In the French legal system, as a rule, principles are actually norms and one should not derogate from them. In the Italian legal system, principles are not usually norms, but sources of the law. The Romanian legal system combines the two approaches and thus, they may be defined as ideas with a high degree of generality, serving in the development of legal norms and guiding their interpretation when they are unclear[11].

Given the highly abstract and conventional character of the subject, we will not attempt to support one particular definition, at least not based on an exhaustive study of the legal philosophy. Instead, we chose to cut the Gordian knot and we will argue that the last author has proposed the most applicable way of differentiating between the principles and the norms. Such a perspective creates the premises for using the principles, the norms and the sources of law as distinct entities, thus enriching the substance of the national legal system. In turn, this allows us to define more properly to role of each species inside the national legal system, which helps creating more accessible and foreseeable laws.

The nature of the principle of legality

The principle of legality has known a very long evolution before being integrated in the Romanian legal system in the XIXth century. In 1215, Clause 39

[8] Dan Claudiu Dănișor et al., *Teoria generală a dreptului*, C.H. Beck, Bucharest, 2006, p. 156-157.
[9] See Lidia Barac, *op. cit*., p. 254-256.
[10] Simona Cristea, *Teoria generală a dreptului*, 3, C.H. Beck, București, 2019, p. 11.
[11] *Idem*, p. 11-12.

of the Magna Carta Libertatum stated that "*no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we* (n.a. King John) *with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.*"[12] It would seem that, from the very beginning, the principle of legality has been inherently linked to the most powerful legal tool of a state, *ius poenali*. Even though in the XIIIth century no one would have questioned the right of the monarch to punish (*ius puniendi*), at least not according to contemporary notions, it was felt that a limitation should be put in place. Much later, Jeremy Bentham used to say that the public nature of the trial guarantees the correctness of the trial, as it creates a system which allows the public to assess the judge while he judges the case[13].

Fast forward to the second half of the twentieth century, the emerging international community choses to grant a supranational legal protection to the principle of legality by enshrining it in some of the most important treaties now in effect. As an example, it is given expression in several articles of the Universal Declaration of Human Rights[14], hereinafter U.D.H.R., like art. 8 to 12. It is also mentioned by art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter E.C.H.R. In 1975, it will also be included in the Final Act of the Helsinki Conference on Security and Cooperation in Europe[15]

At this point, we should remember that one might encounter a discussion about the species of principles in the Romanian legal literature. Given the ideas exposed in the previous paragraph, we would argue that the principle of legality is both a fundamental and a general principle of law. In our opinion, the fundamental principles of law are those rules with a very high degree of generality which dictate the very essence of a national legal system. In contrast, the general principles of the law are those fundamental principles which may be encountered in any branch of the law, given their high degree of generality and applicability. As a consequence, a whole-to-part relation may be established between the two, as any general principle is at the same time a fundamental one, however not all

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[12] Rod Green, *Magna Carta and all that. A guide to the Magna Carta and life in England in 1215*, Andre Deutsch, London, 2015, p. 149.

[13] Norbert Ehrenfreund, *The Nuremberg Legacy. How the Nazi War Crimes Trials Changed the Course of History*, 1, Palgrave Macmillan, New York, 2007, p. 202.

[14] The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A). For more information, please consult https://www.un.org/en/universal-declaration-human-rights/, last accessed on the 12th of November 2020.

[15] For example, in Section VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief. The final act may be consulted at https://www.osce.org/files/f/ documents/5/c/39501.pdf, last accessed on the 12th of November 2020.

fundamental principles are at the same time general. For example, the principles which govern the activity of the Parliament are fundamental, but they are hardly general, as they are not directly applicable to several branches of the law. For example, even though these principles influence the content and direction of the banking law, one could hardly argue that they might be directly applicable to such social relations.

Art. 38 c) of the Statute of the International Court of Justice, hereinafter S.I.C.J., includes the general principles of law among the sources of the law which may be used by this jurisdiction in its activity. However, one would not find a list of those principles. Instead, the judges are called upon to extract the relevant ones from the national legal systems[16]. It should be added that the dispositions of art. 38 c) of the S.I.C.J. are unanimously interpreted in the same way. In the opinion of some of the Romanian authors, the general principles which govern the national systems are not directly applicable in the international public law[17]. We agree, but only in part. While there are some national principles which are not suitable to be directly transferred in the international space, there are others which may easily fit the needs of this branch of the law. As we are about to see, the principle of legality is one those latter principles, alongside the principles of equality and responsibility. Naturally, this should not be interpreted as meaning that the principle of legality has the very same implications in the international public law as it has in the national law. It just mean that it is present and remains relevant, even if in a more political context.

The application of the principle of legality

The principle of legality has been envisaged by all the past Romanian Constitutional Assemblies and it was transcribed in all the Romanian Constitutions. Thus, it may be found in art. 16 of the 1866 Constitution, in art. 14 of the 1923 Constitution and so on until nowadays, when it is stipulated by articles 1, 15 and 23 of the 1991 Constitution[18]. Given the infamous political realities of the Romanian Communist Regime, which lasted arguably between 1947 and 1989, we are of the opinion that the fact that the principle of legality was stipulated in the 1948, 1952 and 1965 Constitutions should not be interpreted as indicative of a rule of law-based society. At the same time, the idea that Romania, like any other European country, observed the principle of legality

[16] Dan Claudiu Dănișor et al., *Teoria generală a dreptului,* p. 173.

[17] Raluca Miga-Beșteliu, Drept Internațional Public, vol. 1, 2, C.H. Beck, Bucharest, 2010, p. 68.

[18] Art. 1 par. 3 of Romania's 1991 Constitution: *„Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed."*

before the Second World War, should be interpreted in line with the political and legal coordinates of the time.

In the years of the Romanian Communist Regime, the principle of legality was often defined through the lenses of socialism. If one were to analyse the legal doctrine written in the epoch, one might be inclined to conclude that the rule of law culture existed in Communist Romania. In fact, the principle of *socialist legality* was said to impose the observance of two rules. Firstly, the entire legal order had to be based upon the legal dispositions. Secondly, the definitions of the offences and the punishments prescribed for such acts had to be the object of legal norms[19]. However, we would like to highlight the fact that these words were written in a political context which did not allow the independence of the justice system.

These being said, we should add that, in a constitutional sense, the principle of legality is intrinsically connected to the notion of constitutional supremacy. The latter concept is not unanimously accepted as having one single clear meaning. For example, in some authors view, any and all legal norms find their origins in the constitution and have to observe its prescriptions[20]. We agree with this perspective only in part, as it is, in our view, tributary to an outdated Westphalian perspective on the idea of statehood. We would argue that, after the end of the Second World War, the role of the constitutional law has been nuanced on one hand by the development of the international human rights law[21] and on the other hand by the introduction of the notion of *jus cogens* norms. For example, art. 7 par. 2 of European Convention of Human Rights, hereinafter E.C.H.R., states that the principle no punishment without law "*shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations*." In turn, this would lead to the conclusion that the principle of legality, as it is recognised in the Romanian legal system, has to be analysed while also bearing in mind its international origins[22].

Nothing of what we have said in the previous paragraph should be interpreted as signifying that the Romanian authorities are free to ignore the Constitution

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[19] George Antoniu et al., *Dicționar juridic penal*, Ed. Științifică și Enciclopedică, Bucharest, 1976, p. 226.

[20] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituțional și instituții politice*, 13th edition, C.H. Beck, Bucharest, 2008, p. 67.

[21] Art. 20 par. 2 of Romania's Constitution of 1991: *"In case of an inconsistency between domestic law and the international obligations resulting from the covenants and treaties on fundamental human rights to which Romania is a party, the international obligations shall take precedence, unless the Constitution or the domestic laws contain more favorable provisions."*

[22] One could also remember Art. 11 par. 1 & 2 of Romania's Constitution: *„**1.** The Romanian state pledges to fulfill to the letter and in good faith the obligations resulting from the treaties to which it is a party.* ***2. T****he treaties ratified by Parliament in accordance with the law are part of the domestic legal order".*

when enacting pieces of legislation. This would clearly violate the whole rule of law culture inscribed in art. 1 par. 5 of the 1991 Constitution, which clearly states that *„in Romania, the supremacy of the Constitution and the observance of the Constitution and the laws shall be mandatory*[23]*"*. However, this does not mean that the Romanian State is free to interpret the constitutional provisions in such a way that would violate its international obligations. This is especially true in those cases where the international obligations of the State are generated by the universal and/or European acknowledgment of the basic human rights and freedoms.

Thus, we may start the analysis of the more concrete aspects of the principle of legality and its application in the Romanian legal system. In the first place, it shapes the way we understand the notion of „law". In the view of the E.c.H.R., the legal nature of a norm enforces the need for qualitative requirements, among which we find the accessibility and the foreseeability[24]. If these two preconditions are not met, the norm should not be able to serve as a basis for the limitation and/or elimination of an individual's fundamental rights or liberties.

A norm may be considered accessible if it was published in a way which ensures the possibility of the public to consult it. In Romania, this rule is observed by publishing the pieces of legislation in the State's Official Journal (*Monitorul Oficial*). The content of this publication may be accessed independently offline and/or online. In our opinion, it is highly objectionable that it is not completely free for any citizen of the European Union (even if it is in Romanian).

From this point of view, if the norm in question is part of a treaty, it should also be publicized in a similar manner. An idea put in practice by Romania, as all the ratified treaties are published in the *Monitorul Oficial*. For example, the E.c.H.R. mentioned that a treaty should be incorporated in a domestic law or published in an official publication, if such a treaty might serve in the future as the basis for a conviction[25]. However, if one were to invoke a norm of the international customary law, then, according to the same Court, in certain circumstances it might be argued that the norm is directly applicable, irrespective of the fact that it was not transposed in a national source of law. An example might help, even though we are oversimplifying it. In a decision from 2005, the the E.c.H.R., relying in part on the jurisprudence of the International Court of

[23] A similar approach would also be considered correct in the German law, according to the German Federal Constitutional Court, First Chamber, Decision from the 7th of April 1964, in Selecție de Decizii ale Curții Constituționale Federale a Germaniei, C.H. Beck, Bucharest, 2013, p. 539-540.

[24] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, p. 12.

[25] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, p. 13.

Justice, concluded that in 1953, the criminalization of genocide was accessible enough for a citizen of U.S.S.R., even though the crime was not transposed in a national publication[26]. The two jurisdictions argued, in fact, that the norm was directly applicable, as it was so serious and its condemnation so universal, especially in a post-Nuremberg context[27].

The second prerequisite, foreseeability, is also defined by the E.c.H.R., but mainly in a criminal sense: *„an individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission[28]".* However, if we ignore the last part of the idea, we should be able to extract the two key elements of the concept in order to render it applicable to any branch of the law. Thus, in order for a national or international norm to be considered law in accordance with the E.C.H.R. standard, an individual should be able to understand or gain an understanding of the said norm, thus obtaining the ability to predict the legal effects of his or her conduct in relation to that norm. We would argue that this is a realistic approach to the European socio-cultural environment. It might be possible to draft a law which may be understood by all the citizens of a rich, homogenous and small State. Still, it might be an impossible task in the more diverse and economically challenged States, like Romania or other Central and Eastern European countries. This is why we cannot completely agree with those authors who argue that the law should be worded in such a way that *anyone* might understand it. In our opinion, this is completely unrealistic and unfortunately it will remain so in the near future. Financial and educational equality are societal aspirations, not the current *status quo.*

In light of the previous two paragraphs, we would propose that the principle of legality, regardless of which branch of the law we are analysing, creates a general obligation for the State to create the premises for the direct or indirect access of each citizen to the content of the law. As the E.c.H.R. highlights, such an indirect way of discovering the law might even involve the interpretation of the rule of conduct by a specialist or even by the courts of law. Yet, we would also state that there are several fields, like the criminal law, where a more accessible approach has to be embraced, in an attempt to create the clearest, easily understandable and predictable dispositions. This stems from two particularities. On one hand, a branch like the criminal law contains the legal grounds to both

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[26] European Court of Human Rights, Grand Chamber, Decision in the Vasiliauskas v. Lithuania case, 20th of October 2015, Application no. 35343/05, par. 167.

[27] *Idem*, par. 168.

[28] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, p. 13.

protect and violate the most important values a society holds. On the other hand, every single individual has to observe these provisions, which means that every single individual has to be able to grasp and appropriate their meaning. Even so, even the E.c.H.R. acknowledges that, in some cases, the principle of legality is not violated if a person requires legal aid in order to understand the full extent of a criminal law[29].

The idea that the law should be a barrier, limiting the use of power by an individual or an organisation, is probably best implemented in the administrative law. If there is to exist a clear separation between the executive branch and the legislative one, then, as a rule, the State has to make sure that the executive branch is only implementing the dispositions adopted by the legislative branch. This actually means that the separation of powers hinges on the observance of the principle of legality. As a consequence, the rule of law actually translates into the fact that the shaping of the ways in which the Executive is able to wield its power has to occur through the use of legal norms. In fact, the German Constitutional Court stated in 1958 that the interventions of the executive power in the public life should be clearly limited through legal dispositions, thus rendering them quantifiable and manageable[30]. Such a perspective is entirely compatible with the constitutional role of the Government, according to art. 102 par. 1 of the 1991 Romanian Constitution[31].

At the same time, we should add that it is accepted by most authors and jurisdictions[32] that the apparition of unclear norms, which have to be interpreted by the courts of justice, is unavoidable. Still, we would like to highlight the fact that this should not be interpreted as meaning that the phenomenon should be anything more that a simple accident. In fact, it implies that State has to use all available means to prevent such an anomaly. In our opinion, this would suggest one might find that the practice of other public authorities might prove even more useful than that of the courts of justice, depending on the specific traits of the branch where the unclear norm is found. For example, in the administrative law, an early intervention from a central authority like a Ministry might prove

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[29] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, p. 13-14.

[30] The German Federal Constitutional Court, The Second Chamber, Decision from the 12th of November 1958, 2 Bvl 4, 26, 40/56, 1, 7/57, in Selecție de Decizii ale Curții Constituționale Federale a Germaniei, C.H. Beck, Bucharest, 2013, 538.

[31] Art. 102 par. 1 states that *"In accordance with its government program approved by Parliament, the Government ensures the implementation of the domestic and foreign policies of the country and is responsible for the general management of the public administration."*

[32] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf., p. 15.

more beneficial for the stability of the legal environment than to wait and hope for an effective court decision in a time-consuming trial.

The last example is also useful for the indication of the perils of depending too much on the judiciary system. One should not forget that the Romanian Courts of Justice play a limited role in comparison with their Anglo-Saxon counterparts. According to the continental view, these authorities and their judges are the „mouths of the law" (*les bouches de la loi*), as they apply the law, but they do not create it. The effect of this perspective is that the Romanian judiciary is not properly trained to understand, foresee and manage the more broadly effects of their rulings. In fact, the magistrates are trained to respect at all time the particular borders of the trial that they are currently judging. As a consequence, we would argue that the legislative and executive branches of the State are better fitted to quicky and decisively act for the clarification of a problematic legal text.

In the same sense, the idea that the principle of legality should prevent any intrusion of the Government in the activity of the Parliament is not an absolute rule. From a legislative point of view, in the Romanian legal system, the Executive plays what we could call a "supporting role". According to art. 108 par. 3 from the 1991 Constitution, this body has the right to issue ordinances (in Romanian, *ordonanţe*) under the provisions of a special enabling law, when and if such an act is adopted by the Parliament. As such, the ordinances are a part of what art. 115 of the same constitution calls *delegated legislation.* The same may be said about emergency ordinances (in Romanian, *ordonanţe de urgenţă*), which may be used by the Government in order to fill in for the Parliament in extraordinary cases. This way of enacting legislation should only be used when and if there is an urgent need for the adoption of a legal norm and the Parliament is unable to solve the issue in due time. Additionally, all emergency ordinances have to be validated by the Parliament, which retains the power the change their norms or to reject them[33].

The principle of legality is also mentioned *expressis verbis* by art. 7 of the Romanian Civil Procedure Code, which states that a civil trial is governed in all aspects by the legal dispositions. Here too, if a the national law contradicts the human rights treaty signed by Romania or a norm adopted by the EU, the judge is allowed to prefer the latter. This is why the EU legislation and the human rights treaties are accepted in the Romanian doctrine as sources of the civil procedure[34].

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[33] Art. 115 par. 8 of the 1991 Constitution: *„The law approving or rejecting an ordinance shall regulate, if necessary, the required measures dealing with the legal effects produced by the ordinance during its application".*

[34] Alexandru Dimitriu, *Art. 7 Legalitatea*, in Gheorghe Piperea et. al., *Codul de procedură civilă. Comentarii şi explicaţii*, C.H. Beck, Bucureşti, 2019, p. 17-18.

These being said, maybe we should proceed to analysing the most famous expressions of the principle of legality. In one author's words[35], the principle of legality is one the most important limitations of the State's *ius puniendi* (right to punish) through the means of the *ius poenali* (criminal law). The principle of legality is unanimously accepted as one of the most important principles of the field[36]. It is also the point of origin for the three famous Latin expressions: *nullum crimen sine lege, nulla poena sine lege* and *nullum judicium sine lege.* The first saying means that no one can be accused of having committed a crime (*infracțiune* in Romanian) if the said crime was not included in the criminal legislation when the action or inaction of the perpetrator occurred. On the same note, a sanction may be applied for a certain crime if such a sanction was not prescribed by the legal norm when the crime was committed. The third expression is more commonly applicable in the criminal procedure, as it states that a criminal trial may be conducted only if the law is observed to the letter. As it was previously stated in the legal doctrine[37], these expressions are not mere principles, but fundamental guarantees offered by the state to its citizens. They exist in order to prevent any abuse of authority and/or power through the means of the criminal law[38].

However, Romania ratified in 1994 the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the Romanian law, with the observance of art. 7 of the E.C.H.R., the idea that no punishment may be applied without legal grounds means that the State is obligated to put in place "*effective safeguards against arbitrary prosecution, conviction and punishment*"[39]. The notion of legal ground has to be defined in this case based on what the European Court of Human Rights, considers "law", be it national or international. The former has been analysed by the Court "as a whole", taking into account all the sources of law recognised by a certain State. The latter is formed by the treaties ratified by the State, as well as by the international customary law. One of the most interesting effects of this way of understanding the concept of law is that the perpetrators may be prosecuted and convicted for certain crimes (ex. genocide) even if they were not included in the national legislation when they were

[35] Florin Streteanu, Daniel Nițu, *Drept penal. Partea generală*, Universul Juridic, Bucharest, 2014, p. 35.

[36] Constantin Mitrache, Cristian Mitrache, Drept penal român. Partea generală., Third edition, Universul Juridic, Bucharest, 2019, p. 50.

[37] C. Mitrache, C. Mitrache, *op.cit.*, p. 52.

[38] Their constitutional expression may be found in art. 15 par. 2 of the Romanian Constitution of 1991: *„The law produces legal effects only for the future, with the exception of more favorable criminal or administrative laws".*

[39] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, p. 5.

committed, as long as they were forbidden by *jus cogens* norms[40]. Alas, this is not the place to conduct an *in extenso* review of this concept and its implications[41].

Regarding the notion of penalty, we should highlight the fact that there are some differences between how the notion is interpreted by different authors. In one opinion, expressed in the Romanian legal doctrine[42], the *nulla poena sine lege* should be applicable to all the legal institutions which exist in the criminal law and limit or eliminate at least one fundamental right or liberty. In turn, this would mean that no such norm should be applied retroactively, which would set a higher standard of protection for the constitutional rights of the individual. However, we should also mention that there are some measures which are not considered penalties in accordance with art. 7 of the E.C.H.R. The Court has already compiled a list[43] which may serve as a starting point for any analysis on the topic:

„– *preventive measures which may be necessary in those situations where a person is lacking criminal responsibility;*
– *preventive measures in those case where the perpetrator has to be treated for a mental disorder;*
– *the inclusion of a person in a public registry of sex or violent offenders, if such a registry is kept by the police or by the judiciary, in those cases where such a person has been found guilty of such a crime by a court of law;*
– *the DNA profiling of an individual convicted for a crime;*
– *preventive measures which include the the detention of an individual, when such measures are meant to prevent an individual already prosecuted for a crime from getting involved in more criminal activity;*
– *a prohibition of residence justified according to a criminal law disposition, if such a limitation is imposed alongside a prison sentence;*
– *a prohibition of residence or an expulsion order, when such measures are imposed according to an administrative law disposition;*

[40] As this is meant to be a short introduction to the principle of legality, as it included in the Romanian law, we have chosen to limit the explanations offered on this subject. However, in the interest of preserving the scientific accuracy of our claims, we would like to highlight the fact that verifying if an international criminal law norm is foreseeable is actually a more complicated process. It involves analyzing the international standards in the field, by taking into account the treaties in effect at the time, the existent customary law and the case-law of the international jurisdictions. For more information, please refer to European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, p. 7 and 14.

[41] We do explore this subject in our thesis, which may be consulted in the archives of the Faculty of Law, University of Bucharest. A commercial version is under way, but we are unable to provide the exact details at the time of writing this paper.

[42] F. Streteanu, D. Nițu, *op.cit.*, p. 36.

[43] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, p. 9-10.

- *the transfer of a sentenced person to another country, if such a transfer is lawful according to the Additional Protocol to the Council of Europe Convention on the transfer of sentenced persons;*
- *the confiscation of property, when and if it is considered a preventive measure and in relation to cases involving mafia-type organisations;*
- *special police surveillance and/or house arrest in those cases where such measures are needed in order to prevent the commission of a crime by a violent perpetrator;*
- *the confiscation of property when and if it is necessary as part of the criminal proceedings conducted against third parties;*
- *the rescinding of the mandate of a Member of Parliament (MP), accompanied by the ascertainment that he or she is ineligible, following the dissolution of a political party;*
- *the impeachment of a President, if and when the said President is found guilty of serious violations of the Constitution;*
- *the suspension of the pension of a civil servant, if a lawful disciplinary action occurred;*
- *the social isolation of a prisoner, if such an isolation is the result of the extraordinary circumstance that the he or she is the only prisoner kept in that prison;*
- *a tax reassessment if it is the result of a forfeiture of favourable tax treatment, if this is not a penalty imposed on the applicant company;*
- *the revocation of a licence (for ex., in the field of insolvency proceedings);*
- *the disciplinary suspension of a professional athlete".*

Switching to another branch of the law, the criminal procedure, we would argue that the *nullum judicium sine lege* principle is also of great interest for our topic. It allows us to discuss the different ways in which the principle of legality governs the application of the law in time, as a difference has to be created between the substantive law and the procedural one. The former must not be applied retroactively, at least if it is not in the favour of the perpetrator[44], while the latter may be of immediate application. This principle is, in part, reproduced by art. 15 of the 1991 Romanian Constitution. However, there are some circumstances when, according to the E.c.H.R., the procedural law should be governed by the same principles as the substantive law. For example, if in a case a procedural norm has an effect on the severity of the penalty, such a disposition will be deemed substantive by the Court and it will not be of immediate application[45].

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[44] Article 2 of the 2014 Romanian Criminal Code states that: *"(1) Criminal law establishes applicable penalties and educational measures that can be ruled against persons who committed offenses, as well as security measures that can be ruled against persons who committed actions covered by criminal law. (2) No penalty, educational or security measure can be ruled that was not stipulated in criminal law at the date when the violation was committed. (3) No penalty can be ruled and enforced outside the law's general limits".*

[45] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, p. 10.

The duality substantive-procedural is also relevant in such cases where a State chooses to extend the limitation periods (in Romanian, *termenele de prescripție ale răspunderii penale*). In the opinion of the E.c.H.R., such an extension does not breach the principle of legality, so long as there is no arbitrariness and it is not applied to an alleged offence which was already a subject to limitation when the law changed[46]. Basically, the State must not extend the statute of limitation for those crimes which were already time-barred when the State decides to lengthen the period. Moreover, in a recent judgement against Romania, *Borcea v. Romania*[47], the Court reminded the applicant that the rules which govern the statutes of limitation are procedural if they are only imposing a precondition for the assessment of a case by a court of law and, at the same time, they do not define an offence and/or its penalty[48]. We should highlight the fact that the Court is assessing in such cases the legal nature of the norms, not the actual place of the said norms in the national legal system.

Conclusions

In view of all the considerations addressed in the previous sections, we would argue that the Romanian legal system employs a slightly outdated version of the principle of legality, given the general perspective on the role of the State with reference to the society. Obviously, the principle of legality is intrinsically linked to the legal order of a State, as the latter contains the majority of the norms which limit the ways in which the public power may be wielded by the public actors. However, if one reads the Romanian legal doctrine, one would remain with the distinct impression that the domestic law is enough, that we have everything we need in the Constitution and in the other important legal documents. *It would falsely appear that we do not need the international law.*

No, the Constitution is not enough, it never was. Just ask the victims of the totalitarian and authoritarian regimes, but also those who suffer because they live in a demagogical democracy. The fact that the meaning of the principle of legality should be primarily extracted from the domestic law is a very false impression. Unfortunately, it is deliberately created by a few authors who continue to agree with

[46] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, p. 10.

[47] European Court of Human Rights, Third Section, Decision from 22nd of September 2015 in the *Cristian Borcea v. Romania*, Application no. 55959/14, par. 65. The Romanian version may be downloaded on http://ier.gov.ro/wp-content/uploads/cedo/Cristian-Borcea-impotriva-Romaniei.pdf, consulted on the 10th of November 2020.

[48] European Court of Human Rights, Guide on Article 7 of the Convention – No punishment without law, Updated on the 31 of August 2020, https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf, p. 10.

an outdated, Westphalian model of legal order. To support such a model is to ignore the tragedies and injustices of the last three centuries.

We would argue that we should cherish the fact that we live in a time and space where the Romanian general principle of legality is, in fact, determined by both the international and national law. Even Hans Kelsen and his followers (later known as the Vienna School of Law) argued during the 1940s that the power of the State has to be limited above all else through the means of the international law[49]. They were right. We now have too many examples from all over the globe of States where the constitutional protection of the basic fundamental rights and freedoms was easily annihilated by the political interests of one faction. This very experience is the reason why we believe that the protection of the human dignity should not entrusted solely to the State, but also to the international community. Thus, the definitions of the principle of legality must not remain in the monopoly of one single Government.

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