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NATURAL BASIS AND UNITY OF LAW

Theoretical Article

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Abstract

The philosophical inquiry on the law, as opposed to positive legal sciences is keen to find answers and arguments as nuanced and elaborate as possible to questions and issues such as: the origin and meanings of law, legal phenomenon, the legitimacy of legal rules or the purpose of law.
In this paper we summarize the evolution from a historical point of view of the main theories and thinking on the origin, meaning and purpose of law as an ideological sub-system. Arguments are brought for the contemporaneousness and importance of jusnaturalistic theories because in relation to human and rationality it best explains the unity and stability of the law not only as normative system, but especially as rational reality of value, by establishing certain rights inherent to human being, it demonstrates the timelessness of law, as an expression of rational paradigms valid in all times, which can be determined and understood in the historical evolution and fluctuation of positive law.

NATURAL BASES OF LAW

One of the major concerns of the doctrine and philosophy of law is to answer the question which is the source or origin of the legal phenomenon, what legitimates the legal rule and, implicitly, what characterizes the legal status of man. Answers to these questions are obviously different according to the theoretical guidelines of law schools and of the philosophical doctrine which they embrace.

However, we notice something in common, namely that all the above-mentioned questions have a metaphysical dimension and involve a metaphysical answer whose content and meanings cannot be confined only to specific instruments, to the general theory of law as a positive legal science in the conceptual system of the legal doctrine.

As one tries a systematization of concepts regarding the legitimacy and origin of law, we can divide the views and thus the theories that support them, in the following important guidelines:

Historicist theories, which consider that the legal phenomenon's explanation lies in the very history of legal regulations and of the legal doctrine. Such a concept, at philosophical level, can be met for example in the work of Hegel, for whom history as a whole, including the history of law and of the state, is nothing but progress in the consciousness of freedom. The importance of this theory lies in the fact that it underlines not only changes in the normative and legal system during different historical eras, but, at the same time, the internal dialectics of law, determined by a fundamental concept, such as - in the case of Hegel – the absolute spirit.

Another category of theories trying to answer to existential questions on the origin of the law are the statist ones. Their essence is to support a decisive indissoluble link between the state and law. In other words, the origin and legitimacy of law can be found in the political will manifested as state of the power governors. In this context, law is understood more through the normative system existing at a time given and through the form of expression thereof, respectively through law. The latter is the main instrument for achieving the political will of the state, of the state power and, in a democratic system is the guarantee to limit the state power and to avoid any discretionary form of manifestation of the government's will. Concepts to which we have referred are found in the modern legal doctrine, firstly in the constitutional doctrine, in the conceptual content of the state subject to the rule of law. In reality, the state subject to the rule of law is considered the most important attribute of a democratic state system because of this bi-univocal correspondence between the state and the legal rule, correspondence involving balance and limitation of state power.

Sociological thinking on the origin of law has the merit to identify determinant factors exterior to law and to any legal system, which configures the actual content of a legal system. We note in these concepts the deepening of the complex relationship between society and law, and the focus on the material, economic, political and cultural factors that determine the configuration of law.

Normative theories on law consider that the explanation of the legal phenomenon, of its legitimacy and of specific sources cannot be understood through factors or elements external to the legal rule. Therefore, these theories claim that the origin and legitimacy of law is the legal rule itself, reduced to its positive size by removing any ideal element (moral, of value or ideological). Normative concepts represent the theoretical basis of the current positivist and dominant conceptual system through which the law is interpreted and the legal state of man in the social context is understood. The legitimacy of the right, by itself, has the advantage of focusing on the conceptual and rational specific that such a reality has, and the legal knowledge focuses exclusively on what is called the positive rule, its legal force and, implicitly, the effects it produces.

Moral and ethical thinking argue that the origin of the legal rule and of law is not found in the very internal structure of the system, but in the values having moral character, in relation to which any legal rule can be assessed in terms of its legitimacy. Of course, one notes Kant's conception exposed mainly in his fundamental works: Crit*ique of Pure Reason, Critique of Practical Reason* and *Groundwork of the Metaphysics of Morals*, but also the moral and utilitarian thinking emerging and developed especially under the influence of empirical and pragmatic theories in philosophy.

A particular segment of these theories is the teleological concepts of law in general, but also in terms of answers to questions on the origin of the legal phenomenon. The purpose of developing, establishing and applying the legal rule is the criterion conferring legitimacy or not. In such a theoretical vision, the legal phenomenon doesn't exists for itself and in itself but only in relation to a destination, a purpose, a moral one expressed in terms of value par excellence, even if in utilitarian theories it takes a concrete and pragmatic form. We note the importance of such concepts in that it highlights deterministic-causal dimensions of the legal phenomenon and establish an important criterion to give meaning and reason to any normative elaboration, respectively their purpose.

There is a conceptual system which, historically, precedes the above-mentioned doctrines, namely jusnaturalistic theories on the law. In a certain sense, these interpretations carry in themselves, not in an eclectic manner, but in a well-structured and

streamlined manner, conceptual elements of other theoretical systems to which we have referred. There is another important aspect that we find in the solutions proposed by these doctrinal guidelines, namely natural and rational foundations of law. In essence, the explanations of jusnaturalism on the legal phenomenon are related to human, because being natural and being rational represent behaviours, in the Aristotelian sense, of the human being, in all that is its complexity at an individual and social level.

In ancient times, these views that we can include in a broader wording in the *"idea of justice"* are met at Aristotel, Platon, Cicero, Plotinus, Seneca and other major representatives of rationalist, stoic or idealistic schools. The *"idea of justice"*, primarily through the categories of justice, freedom, fair extent, equality, this time not only rational but existential as well, is subject to theological reflection, including the Orthodox Christian one. We note, by way of example, the ideas contained in the writings of Reverend Fathers: John Climacus, Thomas Aquinas, Blessed Augustine, Maximus the Confessor, Abba Dorotheus, Varsanufie and John, Mark the Ascetic, Anthony the Great or Isaiah the Hermit. The contemporary and modern period continue these theories either within rationalist schools of law, but also through theological interpretations of the concepts of freedom, justice, equity and justice. We note the work of the great Romanian theologian, Pr. Prof. Dr. Dumitru Stăniloae. It is said with complete justification that the Priest wrote and founded a "Theology of love"; we state that the work of the illustrious professor is also a "Theology of freedom".

In our opinion, as we will try to develop in the following, the explanations made available by the naturalistic and rationalistic concepts focused on the "idea of justice" are the deepest and viable in order to have a coherent conceptual system regarding the origin and meaning of the law, but also of its purpose in the contemporary society. We say this because obviously this doctrine has a moral foundation and therefore the law cannot be explained by itself, but only by external factors of value, determining it (other than material causative narrow determinism) and, at the same time, by the idea of aim of any legal elaboration and which, actually, can only be just moral or even transcendent, if we consider the deep truths of faith, firstly belonging to Orthodoxy, my means of which the true rationality and purpose of law can be understood. We can say that the legitimacy of legal phenomenon as a whole, but also of a particular legal normative construction consists in the degree in which it comprises the existential divine reasons, more important than the mere human moral reasons.

The jusnaturalistic theories in all forms, in addition to the conceptual viability elements shown above, are important in that are detached from the empirical guidelines on the legal phenomenon, highlighting the rational character of any legal structure, that is legitimized through the values representing the source of the existence. The purpose of the jusnaturalistic theories is essentially particular from the empirical pragmatism that legitimizes the law exclusively through the ability of achieving actual goals dictated by society in a historical determined context.

There is an important category, we would say, the cornerstone of the answer to the question of the origin and meaning of law, namely the *freedom*. Except for the normative theories, all the other concepts on the legal phenomenon include considerations, theoretical elaborations, based on understanding freedom as the determining element for the legitimization of law.

We believe that jusnaturalistic and rationalist theories on the law are those that best highlighted the freedom and, with it, the man's natural rights, inherent to his existence. This is because freedom cannot be reduced to the normative expression and even to the one bearing value; it is an ontological and implicitly a natural state of the human. Thus, a rationalistic and natural vision on the law, having at its centre the human being, distinguishes between normative freedoms whose source is the law, and on the other hand the *Freedom* as an essential and existential feature of the human being. Only in an ontological meaning in the sense of the indissoluble link between human existence and freedom can a rational and a comprehensive answer, in our opinion, be given regarding the metaphysical question on the origin and legitimacy of law.

Last but not least, we wish to note the importance of jusnaturalistic and rationalistic conceptions on the law through explanations conferred on the natural state and, respectively, on the man's social status. We mention here the *Theory of the social contract*, which essentially is a core conceptual system of rationalist theories on the law, explaining not only the transition from the natural status to the social or the legal status of man, but also the link between the natural existence and social dimension of the human being.

In this idea-related context, in the desire to mark the viability of rationalist and jusnaturalistic theories especially in terms of value bearing, humanist concept on the law, we make a few brief references to the ideas of certain important supporters of these theories. Firstly, we note the distinction that the illustrious philosopher Kant made between the ideal moral and the achieved moral. The achieved moral in the conception of the great thinker, is the very law, because it is only a segment of metaphysics, whose foundation is the practical reason, and which is based on the categorical imperative of duty, but also the supreme moral value of freedom. In the distinction made by

Kant, the ideal moral is based solely on freedom and the achieved moral, the law or legality, embraces not only the freedom, but also the coercion (History of Modern Philosophy, 1938: 158-159).

Neo-Kantian conceptions continue in the same line in the sense of seeking rational connections between the moral dimension of human and the law. The School of Marburg believes that the origin of the "moral self" is in "the idea of one's neighbour". Self-consciousness implies a correlative, respectively another consciousness. The "Neighbour" is the condition in relation to which the ego's consciousness is not even possible. The representatives of this important philosophical school argue that in no other part is more precisely achieved the self-consciousness than in the *"legal person"*, because in such a structure is obvious the intimate correlation between the self and another self, as the legal person is not isolated individual of the psychology, but the man in his social state as a subject of law. Of course, the concept of "*legal person*" is a theoretical expression, but corresponds to a reality of the man as a social being. Moreover, this abstract concept highlights as well characteristic dimensions of the self-consciousness of and of the ego. The ego is possible as unity and self-consciousness only in communion with other persons. The consciousness of self is all the stronger as the consciousness of another more vivid. It is the development of man as a person of a social totality. Members of this school argue that the transition from the natural to the social status of the man can be achieved only by ethics, which, in its turn, is the foundation of law. In this theory, the legal status of the man includes at the highest degree the ethical foundation, precisely because it excludes the existential isolation of man and places him from an ontological point of view in relational structures with his neighbour and, through it, with the entire society. This explains the rational and ethical origin of law but, at the same time, the ontological foundation of any legal system that carries within itself the rationality of the moral values (Popa, Dogaru, Dănişor, D.C. Dănişor, 2002: 103).

Such a view, of course, rationalist, or within the limits of reason such as Kant would have said, is, however, as we notice, very close to the deeper meanings of Orthodox theology on man's understanding, through the categorical refusal of an exacerbated ego closed into the destructive selfishness and, consequently establishing the ontological and perennial dimensions of the human being through relationships of communion, very different, we say, from the mere legal relations, relations between free people, through the supreme Person. Such a communion is the merciful love which exceeds the judicial and the legal relations, but may give it the true legitimacy and purpose.

The rationalist and jusnaturalistic philosophical concepts have lead up to defining the "natural law", as opposed to legal positivism, in other words to reducing the legal existential condition of man only to the written norm and to constraints resulting therefrom. The natural law takes into account the timelessness of principles and values considered legal because they are closely linked to the human being, of her perennial and rationally existential features. Consequently, the theory of natural law opposes to legal relativism as well, to historicism and to the exclusive dependence of human behaviour to the legal norm, itself subject inevitably to the fluctuations through the more or less arbitrary will of the government. The natural right sets the man above the state constraints and legal norms enacted by the state, considering that the rational and immutable human rights, closely linked to him, are independent from their normative dedication and transcend the legal normative status required by the state. The result: it is not the man for the state, but the state for the man. The intangible, immutable and transcendent character of natural law corresponds to the perennial spiritual value of man, as a person and as an individual, being founded on rational and moral categories and concepts and is closely linked to the rational dimension of human existence.

In this respect, Hugo Grotius said: "The natural law consists of rules of the right reason, showing that an action is morally right or wrong as it fits or not to the rational nature of man" (Grotius, 1968:84). We note two aspects: firstly the concept of the "right reason" is very close to what the Orthodox theology and patristic writings consider to be the "fair measure or gift of discernment, of the right judgements" which essentially expresses the reasonable existential dimension of the human being as well, this time determined not by itself but by the work of grace. The second aspect refers to the fact that the rules of the natural law do not belong to the human will, much less to the will of government underpinning the enactment of positive laws. There are rules that exist by themselves. According to natural law, the actions are prescribed, permitted or forbidden, because by their nature they fall within these coordinates. Consequently, the foundation of rules of natural law is the very *freedom* as a priceless divine gift given to man and as a result ontological rather than legal freedoms whose source is the positive norm. What is established by human will or by written laws, inherently involve the coercion, limitations, conditionings, a fractioned freedom and not a rational, relative and contingent one.

Samuel Pufendorf, a famous philosopher and jurist of the 18th century, emphasized the importance of "*equality*" as the basic concept of natural law. The author claimed that, as far as the natural law implies the equality of all people relative to dignity

and attracts the responsibility of each, the man must take upon oneself the coexistence with others, under the obligation to sociability that the natural law requires. The equality the natural law requires thus meets the sociability resulting from the natural state of the man (Popa, Dogaru, Dănişor, D.C. Dănişor, 2002: 108-114).

Therefore, the natural law does not preclude man's social status, as the appearance is trying to show. On the contrary, the values and categories of natural law justify the natural state of man in the phenomenality of the social status.

Montesquieu, another important representative of the theory of natural law, subordinates the positive law to the moral and rational values inherent to human existence representing the foundation of its freedom: "To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal. The relations of justice are but equity relations antecedent to the positive law" (Montesquieu, 1964:11). The same author highlighted, in our opinion with reasoned justification, that "Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied." (Montesquieu, 1964:17).

The report between the values and reasons of natural law and, on the other hand, the legal reality resulting from the positive norm, can lead to some contradictions or even paradoxes that same author pointed out: "It may arrive that the state organization is free, and the citizen not, or the citizen may be free and the state system not. In these cases the regime will be free as of law and not as of fact; the citizen will be free as of fact and not as of law" (Montesquieu, 1964:203).

Such a rational analysis substantiates the conclusion that the origin, meanings, and purpose of the law understood as a coherent system of legal rules, direct expression of the will of state, system subject causal, temporary and historical determinism, and, therefore, relative, can only be rational and moral values, timeless and inherent to human existence as permanent and individual dimension of the human through which he adapts in relation to all forms of existence. Natural law expresses the human nature and it is normal that the source of any positive elaboration, result of human will, to have its legitimacy and rationality in what is called the natural dimension of man, that is, by its essence, "eternally good", as shown grounded in the Orthodox theology, the man being the image of God.

Thomas Aquinas, by trying to ensure the dignity of the human being in the created universal space, defined the law as "proportion of a thing with another thing. This proportion has to establish equality which is the object of justice" (Andreescu, 2007: 22-23). The same great theologian and philosopher, follower of rationalist and naturalistic conceptions about the origin and meanings of law, argued that in his seek for justice the man is served by the "right reason", which is nothing else but reaching an existential harmony. The right reason is balance, and as balance is "caution". In the author's conception, prudence brings the human being back to balance, because it is a dimension of his ordinary nature and is set up as a counterweight to absolute freedom, understood as legal libertinism. Prudence limits the free will and implies awareness of the limits imposed by the presence of other people having the same rights.

Later on, Hegel argued that the law is rightful when it ensures individual's freedom, but this freedom is all about understanding the social existence of the reason of human and, hence, of the state. For Hegel, reason is timeless, is the absolute spirit manifesting itself in the existence of society and state.

In Giorgio del Vecchio's concept, a prominent representative of the juridical rationalism, the neo-Kantian ideas constitutes as a reaction to juridical positivism and empiricism. Giorgio del Vecchio builds a philosophy of law starting from an a priori principle, which is the ultimate limit on which the whole edifice of law rests. This fundamental principle is the principle of justice, which is essentially the natural existential state of man transposed into his social phenomenality. The author makes an analysis of the Aristotelian conception on justice, criticizing the fact that different species of justice appear in the Aristotelian theory, that are not derived from a single principle. "What is essential – claims Giorgio del Vecchio – in any species of justice is the element of inter subjectivity, or correspondence between many individuals, to be found in the final analysis, even there when he does not show at the first hearing" (del Vecchio, 1936: 64).

Justice, as an a priori concept of natural law involves a harmony, congruence and a certain proportion, also referred to by Leibnitz. However, the great legal expert said, "not any congruence or correspondence is doing – in a proper way - the idea of justice, but only the one that verifies or can be checked in the relationships between several people; not any proportion between objects, but only the one which, in Dante's words, is a *hominis ad hominem proportio*. Justice, in its meaning, is the coordination principle between subjective beings" ((del Vecchio, 1936: 33).

Therefore, the natural right brings together harmoniously the ontological dimension of the human nature with the rationality of a priori concepts. Accordingly, it is one of the few theories in which rational a priori principles coexist with the natural existential condition and, we would say

sensitive, of the human existence. Unlike Kantian philosophy, the legitimacy of rational concepts and of the principles of pure reason in the doctrine of natural law emerges only from their connection to the natural existential dimension of the human being. That is why natural law, by its very nature, is a rationalist conception, even an a priori one on the legal phenomenon.

In this short argument for the importance of natural law as explanation and foundation of the origin and meaning of positive law, we also note the contribution of the great jurist and Romanian philosopher Mircea Djuvara who analyzes the principle of justice, the basic component of an a priori rational system of the natural law. For the illustrious philosopher, *justice,* as a principle, has a transcendent dimension, in the sense that it transcends the normative system of the positive law. Justice may be or, where appropriate, may be not ensured by applying the law. Law, as a system of legal rules, is not always equivalent to the principle of justice. Mircea Djuvara split the "characteristics of justice" into rational and factual elements. As rational elements he suggested: a) equality of the parties; b) by the objective nature (rational) and logic of the justice; c) the idea of equity that establishes a balance of interests in essence; d) the idea of proportionality in the development of justice (Djuvara, 1998: 268; Andreescu, 2007: 31).

Of course, the conceptual themes to which we made reference and that were reviewed briefly do not exhaust the extremely interesting issue of jusnaturalistic theories and of the natural law. We think that doctrinal elaborations in the matter may lead to the following ideas:

a) the legal phenomenon and, implicitly, the legal status of man, indissolubly linked to his social status, cannot be reduced only to the positivity of law. In other words, the positive normative system cannot be considered as lawful in itself, because it is relative, temporary, subdued to the will of man, of governors, of circumstantial determinations, and the freedoms they generate bear in their content, inevitably, the coercion, the contingent, the conditional and the determination external to the human will;

b) natural law represents the transposition into metaphysical and legal concepts and categories of the natural and rational state of man, of his eternal good nature, as created by God. Rationality of the natural law lies in the very existential reasons of man, eternal reasons that the divinity transposed into the real existence of the human being;

c) the normative positive system of law has its legitimacy not in its own construction and not even in the formally built principles of a fundamental law, but in the transcendental and metaphysical principles of the natural law. Correspondence between internal reasons of positive law and, on the other hand, the rationality of legal and moral values of the natural law represents, as a criterion for legitimacy, the positive rules;

d) under a theoretical aspect, the natural law includes concepts and categories of pure reason having an a priori and, therefore, timeless nature, but which includes in itself the natural existence of man;

e) the link between the natural state and social state of man, often seen, especially in the *Theory of the Social Contract,* through a relationship of opposition, is well marked by the theory of the natural law, for which the natural state of man can be found entirely in his social phenomenality, and more than that it represents the very rational foundation on which is built the entire social structure the man cannot refuse and which also constitutes his essence. In other words, the social status of man is an expression of his natural state as it involves relations between free persons without which one's self-awareness would lead to a solitary life, locked in an absolute selfishness, contrary to the natural and rational state of man.

f) the concepts and categories of the natural law can also have a specific legal form which expresses, as we will try to show below, the unity and timelessness of the law. Such a form, contrary to the relativism and historicism specific to the legal positivism, is embodied in what is usually considered to be man's natural rights, immutable and intangible, but that can be expressed in concepts and in legal categories and established in legal instruments.

g) usually, theorists and followers of the natural law, especially in the context of specific philosophical Enlightenment of the 18th and 19th centuries, have also marked a separation, unjustified in our opinion, of man from God. By separating man from divinity, the theorists of the natural law have placed as the centre of theoretical concerns the human being, thus making it the only source of law. Along with other authors, we have in mind particularly the exceptional work of Pr. Prof. Dr. Dumitru Stăniloaie, and we consider that the rationality of the natural law is given by divine reasons, as they were conferred by creation to the human. Otherwise, the natural law would remain to a pure and empty rationalism, lacking openness needed to defeat any form of man's isolation, would mean the reduction of man to the status of individual, as often happens through the positive legislation enacted by the State and, implicitly, to placing the man in the natural constraints of the temporary and material determinism where, inevitably, the human reason, considered within its limits, exists and manifests itself.

h) natural law is the only one who can establish and explain the unity and timelessness of law, by reporting itself to the eternally human values, in the first place: dignity, freedom, equality and identity

as being, all bearing the seal of created divine rations implanted in man, the only being who bears the image of God and is called to acquire the likeness to God.

PARADIGMS OF LAW'S TIMELESSNESS AND UNITY

There is what lawyers call the law tools, meaning positive expressions of rationality of natural law through which rational and moral values of the human being, considered in their ontological permanence can be found. We call them *paradigms of law*. In the following, we want to materialize this reality with a few succinct references to what scholars call "human rights", rights that do not overlap entirely within the scope of "citizens' rights" or of basic constitutional rights. Human rights are immutable and intangible and are based on a priori categories and concepts of the natural law and, especially, do not depend on their consecration by the written law and the Constitution.

Human rights, essentially natural rights, require the existence of a certain rational conception whose basic principle is the man's existential identity regardless of any actual aspect, conferred by the social, historical, political, cultural, ethnic or religious determinism. The first principle of such rationality is the *equality of all people*. It is not about equality before the law referred to by the positive law, but about the equality of men considered from the point of view of their natural identity as being, and through the invariable "dignity" of human being, always the same, regardless of the historical, social or political context. Elder Arsenie Papacioc, referring to priceless dignity of the human being said that "man values as much as the flesh of Christ values".

Man, regardless of his political status, of the degree of culture or civilization, race or religion, is believed to be everywhere the same, irrespective of the actual forms of existence. We note in this regard the deep roots of such a conception of equality, respectively the *principle of identity* of all people that is common both in the Christian Orthodox doctrine, and for the natural law, we would say. According to Christian doctrine, the origin and the end being common to all men, all men participate equally to the dignity which he founds: we talk about affirming the equality of all people, endowed with the same dignity, as formulated by St. Paul, the Apostle, in the Epistle to the Galatians (III, 28): "There is no longer Jew or Gentile, slave or free (…)" (Sudre, 2006: 45-49).

The principle of equality under this form that we have presented is the essence of the theory of natural law in what we call human rights. Natural law dominates the solemn and systemic proclamations of some important political and legal instruments developed in the contemporary period. Thus, the Virginia Declaration of Rights drafted on 12 June 1776 states that "All men are by nature equally free and independent". In the preamble to the Declaration of Independence of the United States of America of July 4, 1776 is proclaimed that: "All men are created equal; they are endowed by their Creator with certain unalienable rights".

In regard to predecessors, there is today a distance or even a more increasing reluctance to make reference to the sacred, to God, in the Constitution and laws, preferring the contingent profane and regarding exclusively finite measures, materially and temporary determined, of human.

"The French Declaration of the Rights of Man and of the Citizen" passed on August 26, 1789 aims at exposing the "natural, inalienable and sacred rights of man". This document recognizes that human nature being the same for all people, they benefit without distinction of the rights arising from the specific of the human nature. Equality conceived as existential identity for dignity, in other words ontological and not legal equality, is the first rational principle, an a priori one, we would say, of any construction on the natural rights of men.

"The Universal Declaration of Human Rights" adopted by the United Nations on 10 December 1948, is a more than legal instrument, but unfortunately almost ignored by practitioners and politicians in their excessive concern for the legal positivism imposed by the globalization era, era which is the opposite of unity and harmony and leads inevitably to a uniform diversity set under a false and ephemeral form that is intended to be consistent. It is an important document which, in our opinion, represents the most pregnant contemporary consecration in legal terms of the natural law.

The preamble of this legal instrument establishes "the unity of the human family" and proclaims in the first article that "all human beings are born free and equal in dignity and rights". We emphasize once again that it is established the ontological equality of human beings, bearers of divine creative reasons, and not the formal legal equality before the law.

Human rights, stated in the above-mentioned legal instrument, refer to the universal identity of the human being and thereby have a value that transcends the politics, the relativism and historicism specific to the positive law. It is about the identity of being the human has, which does not exclude, but rather implies and explains the existential diversity, without which one cannot conceive unity. Following the Trinitarian model, the man is unique in being but diverse in its hypostasis. Only then can there be freedom and not in general uniformity, as the current era of globalization tries to impose it. The unity and timelessness, as ration of the human being, as

understood by Orthodox Christian theology, represents the cornerstone of human rights' constancy and, therefore, the existence of a segment of the human condition that transcends the temporary, causal and relative determinism of the legal phenomenology.

It is remarkable that in many international legal instruments in the matter, human rights appear as "recognition" or what is almost the same as "statements" of rights. If the formulation of rights is contingent and depends on political decisions - being, therefore, in constant evolution – it means that it is not an activity of creation, but of recognition of "the right to be human", permanent value and prior to any political act.

The notion of human rights transcends recognition by means of the positive rules. The legitimacy of positive rules exists to the extent that they do not create human rights, but they acknowledge them, transposing them into legal categories, and also granting a proper protection regime. In this respect, the Universal Declaration of Human Rights, to which we made reference, proclaims in its preamble the "recognition of the dignity inherent to all members of the human family and of the equal and inalienable rights." This is the foundation of freedom, of justice and peace in the world.

The reasons of this document found in the entire philosophy of the natural law place, first and foremost, the man, and the state and the society are subsidiary existences finding their legitimacy only insofar as they guarantee for the man the realization of his rational and natural being. Some authors consider that the Universal Declaration of Human Rights has therefore an individualistic character, because of the reduced role granted to society in regard to the man. In our opinion, this international instrument fully expresses the human sociability, but as a *spiritual and free person* that determines the very configuration of state and society. Pr. Prof. Dr. Dumitru Stăniloae said in this regard that "it shouldn't be man for the nature, but nature for man". Particularly interesting is the phrasing in art. 29 paragraph (1) from this important document, according to which "the individual has duties only to the community in which the free and full development of his personality is possible".

CONCLUSIONS

These modest considerations are meant to serve as a start for a wider plea regarding the origin, meanings and natural purpose of the positive law, which, in the pragmatic sense, would mean to resort to rational and moral values of the natural law, firstly the principle of equality, of identity and of human dignity in relation to any act of justice, values poorly established and developed in various normative forms of the current legal civil or penal positivism. We do not want to dwell on this, but we note that the current Criminal Codes, legal instruments extremely important to human freedom, do not include almost anything that signifies eternal, timeless values, expressed by the theory of natural law.

In the new Criminal Codes, there are quite a few omissions regarding the acceptance and implementation of principles of the Constitution of Romania, whose reasonable ground, in our opinion, is the natural right and consequently essential for the legal status of human in his social dimension and subjected to constraints of positive rules of the Criminal Law. Here are some examples:

Human dignity is a constitutional principle explicitly established in article 1 paragraph 3 of the Constitution, being considered defining for the rule of law. The recognition as principle and constitutional value of human dignity results in the legal obligation of state authorities, including the judicial ones, to respect the human dignity, to refrain from any actions or measures likely to harm human personality, both in its biological dimension, as well as spiritual, rational or moral and, in the same time, the positive obligation to apply the measures necessary to comply with this important dimension of human existence. This is especially important in the case of criminal proceedings and generally for the entire criminal law which regulates and involves the application of restrictive and specific coercive measures to criminal investigation which may restrict, limit or impose mainly values such as personal freedom, possession and the right of ownership. According to the principle of respecting the human dignity, any coercive or restrictive measure of penal nature can not affect the existential elements of the human being, by means of which the very quality of man is defined. We consider both the biological dimension and the spiritual, rational and moral dimension of man.

The legislator didn't establish the human dignity as principle in the Criminal Code, nor did he institute the normative obligation to comply with this value.

The provisions of article 1 paragraph (3) of the Constitution, concerning the characters of the Romanian state, lists, among others, as an essential component of the rule of law, **the consecration of civil rights and freedoms as supreme values, understood by reference to the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989**. According to the same constitutional rules, the civil rights and freedoms, as supreme values of the rule of law, are guaranteed.

In regard to these constitutional provisions, we consider that the principle of ensuring and respecting the civil rights and liberties - which is basically a principle of the natural law - is essential for the material penal law, but also for the criminal proceedings. For the reasons outlined above, we

believe it would have been helpful if, in a chapter dedicated specifically and exclusively to the general principles of criminal law and criminal proceedings law in the new Criminal Codes, the legislator would have expressly regulated the principle according to which compliance and guarantee of the civil rights and freedoms is an obligation of the judicial authorities in applying the criminal law. In case of failure, specific sanctions could have been regulated in the chapter "nullities" in the Code of Criminal Procedure.

The constitutional principle of equal rights and the non-discrimination principle, established by the provisions of art. 16 paragraph (1) and, respectively, art. 4 paragraph (2) of the Constitution - obviously classical principles of natural law, as well - were not taken over and hence recognized as legal principles specific for the criminal law and criminal proceedings law in the two criminal codes. No need to underline the importance of the two constitutional principles, particularly for the criminal process and the need for their legal consecration both in the Criminal Code and in the Code of Criminal Procedure, making use of the doctrine and jurisprudence on the matter. As an example, we consider a particular aspect of the principle of equality, respectively what the doctrine and jurisprudence calls "equality of arms", essential element to the proper conduct of the criminal trial.

The principle of proportionality, which evokes the very idea of "justice and equity", categories in regard to which the entire rationality of natural law is expressed, is established explicitly or implicitly by the constitutional rules. In its explicit form, the provisions of art. 53 of the Romanian Constitution establish it as a condition in case of restriction of the exercise of certain rights. We note, however, that proportionality is a general principle of the internal law, but also a fundamental principle of EU law. The most important procedural dimension of this principle refers to the idea of correspondence, fair adequacy of the decision of a state to the situation as of fact and the legitimate aim pursued. Compliance with this principle confers not only legality to the measures of the state authorities, but also legitimacy, materializing in this way the dimension in terms of value of state's action with specific reference to core values, such as justice, fair extent, fairness, and respect for diversity of the situation as of fact in the generality of the legal norm, meaning that the proportionality is the principle whereby general and impersonal normative regulation is materialized (see also Apostol Tofan, 1999; Lazăr, 2004; Andreescu, 2007).

To substantiate it, Ion Deleanu states: "Thus said and briefly, the installation of proportionality - contextualized and circumstantial - the shift from rule to metarule from normativity to normality, the legal norm hypostasis before the discovery and appreciation of its meaning and purpose. Benchmark in such reasoning which is, above all, the ideals and values of a democratic society, as the only political model considered by the Convention (Convention 'European' Human Rights and Fundamental Freedoms) and, otherwise, only one compatible with it" (Deleanu, 2008: 367).

The purpose of applying this principle in criminal proceedings is avoiding and, we would say, sanctioning the excess of power from the judicial authorities. Penal institutions in which the principle of proportionality must have a common application represent the individualization of criminal penalties and application of preventive measures. This principle is not established as a general principle nor in the Criminal Code or in the Code of Criminal Procedure, as would have been natural, in our opinion, taking into account the constitutional dimension of proportionality. However, there are regulations evoking implicitly or explicitly the proportionality. For example, the provisions of art. 202 paragraph (3) from the Code of Criminal Procedure refer to proportionality as general condition of choice and implementation of preventive measures. Instead, the provisions of art. 74 of the Criminal Code, regulating the general criteria of individualization of punishment, do not refer explicitly to the requirement of proportionality. However, implementing such a requirement could result from a systematic interpretation of the general criteria of individuation to which this legal text makes reference.

For the reasons outlined above, we consider it necessary, under the principle of supremacy of the Constitution, but also of rational values of the natural law closely linked to man, the explicit and normative consecration of the principle of proportionality as a general principle in both the Criminal Code and the Code of Criminal Procedure. In this way, it would have been made a systematic embodiment of procedural aspects of the principle in relation to the two penal institutions to which we made reference above.

The provisions of art. 53 of the Fundamental Law, having the marginal name of **"Restriction of exercise of certain rights"**, establish an important guarantee in case of application of measures to be considered as limitations, conditions or restrictions and which concern the individual rights and particularly the fundamental constitutional rights. The Constitutional rule establishes the fundamental guarantee, according to which any restrictive measure concerning a subjective right may only apply to *its exercise and cannot affect the very substance of the right*. In our opinion, this constitutional requirement implemented in the criminal law is an important guarantee for observing the subjective rights and particularly the

fundamental human rights, especially where, through coercive measures, their exercise may be restricted, conditioned or limited.

Neither of the two Criminal Codes takes over from a normative point of view this constitutional requirement. We appreciate it would have been useful, given the reasons outlined above, that in a social chapter, dedicated to general principles of criminal procedure, to be expressly provided that "any preventive measure must not affect the substance of the subjective right, as it can only target the exercise of the right." Practically, an important guarantee of the subjective rights and freedoms is established, particularly of the natural rights of man, of his personal freedom, where, through preventive measures, their exercise is restricted or limited. Specifically, an essential criterion is created for assessing the reasonableness of the length of preventive measures.

These are just a few examples that demonstrate that the metaphysical and existential rationality of the natural law, and thereby timelessness, may result in positive and historical rules of law with the consequence of getting the act of justice closer to man, who should be its first beneficiary, especially under the form of commutative justice which distributes "what is mine" and "what is yours", as Kant said (Kant, 2013: 112-119).

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