# GENERAL PRINCIPLES AS SOURCES OF LAW IN THE MAJOR CONTEMPORARY LEGAL SYSTEMS

*Dobrinka Taskovska*

In the post-war European legal culture, the gradual movement of the general principles of law from a sporadic public international law concept towards a mainstream, even fashionable, category has been brought around mainly through the jurisprudence of the European Court of Justice. The reasons for the latter s interest in the general principles of law, whether they were about the need to remedy the deficiencies of an incomplete and dynamic legal system, or a conscious effort to strengthen the evaluative element of the applicable law, remain for scholarly assessement. Unlike previous European experience, where the common core of various legal systems has been confned primarily to the private law sphere, a range of widely shared constitutional and administrative law principles began to emerge.

Alongside the ECJ s jurisprudence, general principles of law is a rather significant concept for French administrative and German public law. The general principles of law in nowadays European law are a product of a complex and unique interaction of several overlapping legal systems which differ among themselves as to the methodology and substance. Such evolving legal practice invites a research on the changing notion, status and methods of determination of the normative content of the general principles of law. As to their function, the focus shifts from interpretative to gap filling role within a legal ssytem. The interpretative function itself has undergone rather significant changes, whereby the validity control has gained in importance.

Herein we make an effort to provide a glimpse in the attitude of four national (Germany, France, United Kingdom, United States of America) and one supranational (EU) towards general principle soft law as a source of law. The choice is all but a randomly made one. The first three are important European countries, rahter influential. It is also worthwhile to refer to similarities/disimilarities with another major system – USA, belonging to the common law tradition. Needless to explain the reasons for inclusion of the EU law, although a caveat is – only the pre-Lisbon developments have been included in analysis (exactly to pinpoint the judicial input, the later being strongly confirmed and recognized by post 2004-planed and achieved constitutional changes of the EU law).

## 1.France, Germany and the United Kingdom

Regardless of the fact that they all belong to convergent political cultures, the legal systems of France, Germany and the United Kingdom differ profoundly, especially with respect to the sources of law. The differences in the methodology of lawmaking and law application not only reflect, they also generate further specific features of systems belonging to various legal traditions. As to the genral principles of law, the approach is different, not only in terms of continental (France and Germany) and common law (United Kingdom) tradition but there are also serious dissimilarities between the French and the German attitudes.

### 1.1.France

There are several general characteristics of the French system that constitute the framework of lawmaking and interpretation: the much revered principle of *sèparation des pouvoirs*, the dual court structure (ordinary and administrative), extensive regulatory powers of the executive, great judicial deference towards the legislature due to strong historical and cultural factors and the absence of any form of constitutional review until 1958.Until the early seventies, the *Conseil d'Etat* was the only institution which discussed and relied upon genreral principles of law.

It was in the *Aramu* case that the *Conseil dEtat* made its famous statement that an act of the executive is illegal if violates "the general principles of law applicable even in the absence of a text"[1]. Since *Syndicat-Général* case, it seems indisputable that even the autonomous executive regulations adopted not pursuant to legislative delegation but directly on the basis of the Constitution (Art.37 of the 1958 Constitution), could be scrutinized for conformity to general principles of law, which, in that case, enjoy not only adminsitrative law but also constitutional status[2]. Since 1945, the *Conseil dEtat* has broadened the notion of legality to include a dynamic list of principes généraux du droit, the respect of which is a precondition for validity of an executive or administrative act.

The general principles of law in French administrative law differ among themselves as to the source, time and level of elaboration by the courts and spheres of application.Both the courts and the doctrine present they own list of such principles that not always coincide fully. The protection of individual rights and liberties,

[1]CE (Ass) 26 October 1945, Rec.213.A police officer in Algeria was removed from office without any reasons for the removal or an opportunity to defend himself.The *Conseil* annuled the removal decision because by infringing the rights of defence the later violated the "principes généraux du droit applicable même en absence du texte".
[2] CE 26 juin 1959.

equality before the law[3], effective judicial protection, non-retroactivity, acquired rights or unjust enrichment have been unanimously and traditionally recognized as general principles of law in France, others, such as the principle of proportionality are vigourously debated upon, both on descriptive and prescriptive level[4]. Any of these principles revolves around one or more of the three general concepts (fundamental values): liberty, equality or justice. The general principles are undoubtedly inspired by constitutional and legislative texts, but their recognition took place through the decisions of administrative courts, primarily the *Conseil dEtat* which, as the *Aramu* statement on the applicability of these principles even in the absence of a text suggest, was very explicit about its own role in the process of initiation of this category in the legal system. As to the legal force, the general principles of law in France apply to any legal act inferior to legislative enactment.

The French Constitution is not only the 1958 text, but also the Declaration from 1789 of the Rights of Man and the Citizen, the preamble to the Constitution of the Fourth Republic of 1946 and "fundamental principles recognized by the laws of the Republic". In 1971, the *Conseil Constitutionel* referred for the first time to such fundamental principles, striking down a statute that, in its view, violated the principle of liberty of association which underlined the provisions of the 1901 law on the contract of association[5]. Some authors argue that the *Conseil* has developed a generic notion of *principes a valeur constitutionnelle* that encompasses the fundamental principles recognized by the laws of the Republic, some general principles and some objectives of constitutional value. In other view, the geenral principles of law, as defined by administrative courts, and the fundamental principles recognized by the laws of the Republic, are two distinct categories which differ with respect to their legal force, origin and foundation. It is indisputable that the phrase "fundamental principles recognized by the laws of the Republic" is rather open-ended and it has been fleshed out by the *Conseil*. The *Conseil* has included, among others, the freedom of movement and the rights of privacy and the freedom of commerce and enterprise into the catalogue of such fundamental rights.

In the course of the last four decades, French public law has developed two concepts of principles – general principles of administrative law and fundamental principles recognized by the laws of the Republic. Each of them receives recognition and normative concretisation in the respective jurisprudence – *Conseil dEtat* and *Conseil Constitutionel*. The two concepts often intersect, since the administrative law principles may draw upon constitutional rules and

[3] Protection of rights and liberties and equality are the most fundamental principles which further generate otehr general propositions – right to strike, freedom of thought and opinion, right to family life or equality before public burdens, equality before the courts, equal access to public service etc.

[4] The preamble of the 1958 Constitution refers to the 1946 Constitution which, in its turn, "reaffirms solemnly the rights and liberties of man and the citizen consecrated by the Declaration of Rights of 1789 and the fundamental principles recognized by teh law of the Republc".

[5] CC, decision du 16 juillet 1971.

values, such as equality, and the constitutional review, on the other hand, takes over doctines elaborated by the administrative judge, for example, the necessity principle. The European law influence is twofold. First, general principles of the EC law, as defined by the ECJ, are authoritative and directly applicable legal precepts on relationships within the Community competence and the national courts are under duty to apply these principles. Second, the encounter with novel principles and concepts via Community law may influence the reasoning of both legislatiors and the courts regarding purely domestic law issues.

### 1.2.Germany

German public law recognizes, as a term and as a concept, the general principles of law (*allgemeine rechtgrundsätze*). In constitutional and administrative law, general principles serve important functions with respect to interpretation, validity review and permissible gap-filling. Unlike France, the decisive influence in such developments has been exerted by the Constitutional Court, leading to the statement of German adminsitrative law being a "concretized constitutional law"[6].

As early as 1958, the Bundesverfassungsgericht has clarified in an unambigous and authoritative manner, the role of principles in constitutional law, by making an unusually bold statement on the Basic Law as a value-oriented order[7]. The basic constitutional principles are laid down in the Art. 1-3 of the Basic Law (the human dignity, equality and freedom) and the provisions on the *Rechtstaat* (Art.20), democracy and social state (Art. 28(1)) thereof. By virtue of the Art 1(3) of the GrundGesetz, the basic rights bind the legislator, the executive and the courts as directly enforceable law. The BFG has established an internal hierarchy of constitutional norms, declaring some of them as enjoying a fundamental or supraconstitutional status[8]. A conflict between constitutional principles is resolved by a process of weighing of such principles rather than, as in case of conflict of rules, complete prevalence of one over another. Thus, constitutional principles, as interpreted by BVG, are intended to serve both promotive (guidance in legislative and executive decision-making) and controlling function, when the courts are controlling the validity of legal acts or interpreting and applying the law in general.

---

[6] F.Werner, "Verwaltungsrecht als konkretisiertes verfassungsrecht" (1959) DVBI, 527, cit. in Schwartze, 1992, 117.

[7] "It is correct that the basic law, which does not purport to be a value-neutral order, has established an objective order of values in its part dealing with basic rights ..." *Lüth*, 7 BverfGE 198, 205 (1958).

[8] There are constitutional principles that are so fundamental that they bind also the framers of the Constitution and otehr constitutional provisions that do not rank so high may be invalid if they contravene these principles.Any constitutional provision must be interpreted in the light of those elementary principles. *Southwest State Case*, 1 BverfGE 14 (1951), accepting a 1948 ruling of the bavarian Constitutional Court.

In post-war Germany the principles of administrative law have been developed mainly under the influence of constitutional law.Most of these principles have been introduced by the courts as concrete application of fundamental constitutional principles, notably the *Rechtstaat* principle[9]. Principles developed by the courts have been incorporated in legislation, such as Administrative Procedure Act in 1976. While tha nature of these principles, in sense of whether they are legal sources *sui generis* still stirrs much controversy among academics, it is also true that, having regard to the well established case law on these principles, the issue presents hardly any practical relevance".

The particular concept of general principles of law is certainly regarded as one of the most significant German contributions to the dialogue of legal cultures taking place within the European Union. The principle of proportionality and the protection of legitimate expectations (*Vertrauensschutz*) have extensively inspired the ECJs jurisprudence.

### 1.3.United Kingdom

Contentions that the English law does not have a developed doctrine of general principles of law, a term which even "sounds alien to English lawyers" (Brown, 174) capture but one side only of the problem. The attribute general may be a novelty, but legal principles, as opposed or adjoined to rules, are a well known category to English common law. Normative statements of relatively high generality and expressive of values the law seeks to promote have been a powerful tool for English courts in the interpretation and the development of law. The genuine novelty, however, is the concept of public law itself, at least in sense of the latters well settled meaning on the continent. In the course of the last few decades, due to various internal and external influences, the public law concept has received recognition in academic and judicial circles in the U.K. The public-private distinction is necessary, among other things, "because of the separate principles and standards which the courts will require of public as opposed to private bodies" (Lord Woolf, 273).

Uncodified and unfamiliar to any form of constitutional review, English constitutional law rests upon several political doctrines and legal precepts of various backgrounds. The most fundamental are the doctrine of the sovereignty of parliament and the rule of law principle. They contribute to the creation, though parliamentary legislation and common law of the next level principles such as the presumption of freedom[10] or the principle that the actions

[9] " In Germany, general administrative law and the law of administrative procedure have for a long time been in the realm of jurisprudence and judge-made law". Röl, 16.

[10] "England, ..., is not a country where everything is forbidden except what is expressly permitted; it is a country where everything is permitted except what is expressly forbidden". Sir Robert Megary in *Malone v. Metropolitan police Commissioner*, [1979] 1 Ch 344 at 357.

of all public bodies must be justified by positive law[11]. Another distinctive characteristic of the UK constitutional law is the absence of a modern and comprehensive Bill of Rights which causes a tension between domestic law and the obligations that the UK has adhered to under international treaties, most importantly in the European Union and under the European Convention.

Throughout history, English law has been focused on procedure and remedies rahter than substantive rights[12]. This general approach has had an impact on the legal framework regulating the state action vis-à-vis the individual. English courts have been traditionally very demanding regarding compliance with procedural requirements by public authorities. Such requirements were conceived as safeguards of ancient liberties of a "freeborn Englishman" long before the contemporary human rights protoection language became so pervasive. The set of essential procedural safeguards come to be known as a "principle of natural justice", controlling not only of the conduct of public authorities but infliuential upon other areas of law as well. The rules that "no man a judge in his own cause" and on fair hearing form the core of the natural justice, around which the courts have gradually concretized further procedural safeguards of the private citizen against the adminsitration[13].

The expansion of judicial review of administrative action in post-war Britain has not shifted in a significant way the focus from the procedure of decision-making as a precondition for validity, even in cases where administrative discretion substantially interferes with individual rights. Procedural propriety and the *ultra vires* principle are the main grounds for judicial control of the administrative decisions, leaving the additional, *Wednesbury*[14] reasonableness principle as the only one coming close to substantive review. The sharp distinction between substance and procedure or the merits and the legality of the decisions has been a consequence of constitutional awareness of proper roles for the judiciary and the executive. Substantive principles of administrative law, which would base the control of administrative discretion upon general principles of law rather than on pragmatic intervention of the *Wednesbury* kind in cases where individual rights are at stake, are currently a favorite topic of discussion among scholars and high courts judges[15].

The contact of the UK law with the other European systems within the European Union and the ECHR system could be described as interaction rather than reception. The ECJ has relied upon the principle of natural justice in declaring the right to be heard as a

[11] *R v Somerset CC, ex parte Fewings, [1995]* 1 All ER 513.
[12] "... typically, English law fastens not upon principles but upon remedies", *per* Lord Wilberforce in *Davy v Spelthorne B.C.* [1984] A.C. 262 at 276.
[13] For an argument as to the equivalence between natural justice and general rules of procedure as *principes généraux du droit* in French law, *see*, Lefas, 745-775.
[14] *Associated Provincial Picture Houses Ltd. V Wednesbury Corporation* [1948] 1 K.B. 223.

[15] *See*, Jowell and Lester, 1988, 368-382; Craig, 1989, 296-305; Lord Irvine of Lairg, 59-77.

general principle of law[16], on methodological level, its jurisprudence reflects certain common law influences, like greater reliance to past decisons and discursive style of judicial reasoning. In other direction, the general principles of Community law which could be termed as of a public law character (proportionality, legitimate expectations) and are directly applicable before domestic courts upon relations with Community dimension, are the most debatable ones as to their extension to areas of purely domestic law.

## 2.General principles of law as a source of law in the EU legal system

> *The European Court, (...), has utilized general principles of law to cloak the nakedness of judicial law-making* [17].

The EU legal and institutional landscape and, respectively, the role of the general principles of law, is far more complex than this straightforward remark indicates. Any explanatory framework of the general principles of law within the EU law context must include: 1)the evolution of the objectives and the methods of European integration; 2)the hybrid nature of the EU; 3)the unique institutional structure where rule-making and rule-implementation are entrusted to organs with a background different from the one of their counterparts on nationall lever; 4)the autonomy and the incompleteness of the EU legal system and 5)the ECJs well defined and amazingly stable perception of the integration process and its own role in it[18].

The only explicit reference to the general principles of law in the 1957 EEC Treaty is Art.215(2) under which the non-contractual liability of the Community shall be governed by "general principles common to the laws of the Member States". But, this reference is not an explicit recognition of general principles as a source of Community law, it means only identification of the sources where the rules governing a very specific issue (non-contractual liability of the Community) should be looked for. Some indirect textual support to the claim that the Community law is a concept broader than the treaties and the acts of the Council and the Commission could be found in Art 164[19] and Art.173 (1)[20] of the EEC Treaty.

---

[16] *Transocean Marine Paint Association*, Case 17/74 [1974] ECR 1063.

[17] T.C.Hartley, *The Foundations of European Community Law* (2nd ed.), Oxford, 1988, p.129.

[18] In order to present more clearly the crucial role of the courts, notably the ECJ, in the introduction of the general sources of law in the EU law, herein we entirely omit the pre- and post-Lisbon developments, namely the legislative explicit validation of the decade long judical output. The latter is extremely interesing but merits a separate and indepth analysis.

[19] "The Court of Justice shall ensure that in the interpretation and application of this treaty *the law* is observed" (italics added).

In 1957, the ECJ pronounced that, in the absence of Community rules on revocability of administrative acts generating subjective rights, it has to decide upon the matter, if it is to avoid denial of justice, "drawing inspiration from the rules recognized in the legislation, the academic authorities and the case law of the Member States"[21]. The following period confirmed that the Courts determination to include the general principles of law[22] among the normative sources on which its jurisprudence relies upon. It recognized, among others, proportionality[23], non-discrimination[24], right of defence[25], good faith[26], legal security[27], fundamental rights[28], legitimate expectations[29], right to effective judicial protection[30] as general principles of Community law. Finally, the Maastricht Treaty on European Union (Art.F (2)) explicitely recognized this judicial development by stipulating that "The Union shall respet fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Memebr States, as *general principles of law* (emphasis added).

The inclusion in the Community legal system being undeniably carried out through the Courts case law, the real issue is about methods of identification, selection and elaboration of the general principles of law by the ECJ. The first stage – identification – refers to the sources of the principles and the methods of their discovery. International law, domestic laws of Member States and the system of the Community itself are the three sources where the Court looks for general principles. As to the last category, a distinction should be drawn among principles derived from explicit treaty provisions (for ex., non-discrimination) and principles judicially developed through systtematic and teleological interpretation of the Treaties, from the overall legal framework, nature of the Community and, especially, its objectives (eg.for principles of supremacy and direct applicability of Community law).

---

[20] "The Court of Justice shall review the legality of acts of the Council and the Commission otehr than recommendations and opinions. It shall for this purpose have jurisdiction in actions brought by Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringememnt of this Treaty or *any rule of law* relating to its application, or misuse of powers" (italics added).

[21] Joined Cases 7/56 and 3-7/57, *Algera and otehrs v Assembly* [1958 and 1959].

[22] Although the term itslef does not appear before the 1960: Joined cases 43, 45 & 48/59 *Lachmüller et al. v. Commission* [1960] E.C.R. 463 at 472. the Court jurisprudence is rather terminologically inconsistent: "generally accepted rule", "generally accepted principle", "basic principle of law", "general principles of law" and "fundamental principle".

[23] Case 1/59, *Macchiorati Dalmas e figli v. High Authority* [1959].

[24] Case 14/59, *Société des fonderies de Pont-à-Mousson v. High Authority*, [1959].

[25] Case 20/59, *Italy v. High Authority* [1960].

[26] Joined Cases 43,45 & 48/59 *Lachmüller et al. v. Commmission* [1960].

[27] Joined Cases 42&49/59 *SNUPAT v. High Authority* [1961].

[28] Case 29/69, *Stauder v. City of Ulm, Sozialamt*, [1969].

[29] Case 74/74, *CNTA v. Commission*, [1974].

[30] Case 222/84, *Johnston v. Chief Constable of Royal Ulster Constabulary* [1986].

Following its own concept of the Community as an autonomous legal order, distinct from traditional international organization, the Court has not relied much on public international law for guidance while identifying general principles of law which should be incorporated in Community law. One significant use of international instruments are the treaties on human rights, especially the European Convention on Human Rights[31]. In cases of principles specific to the Community, the Court simply deducts the principle from certain Treaty provision (s): four freedoms, solidarity, non-discrimination on the basis of nationality, Community preference etc.

Far more interesting are the cases in which the Court incorporates a general principle already existing in the municipal law(s) of Member State (s) into Community law. Is it necessary that a certain principle exists in the laws of (1)all; (2)the majority; (3)some or (4)at least one Member State? As opposed to such quantitative approach, some authors or even Advocats General to the Court have argued for a more substantial approach, in sense that the Court should adopt the best or the most progressive solution, regardless of the intensity of its presence in the member States laws (Akehurst, 33-35). The academics are divided among themselves as to the right answer to this dilemma, but they all argue that an objective criterion for selection should be found. The ECJ has adopted its own approach, based much more on the compatibility of a certain principle with the nature of the Community, its overall legal framework and, above all, its objectives than on quantification of the presence of a principle in teh laws of the Memebr States. As illustration, the principles of proportionality and protection of legitimate expectations which, at the time of their adoption in Community law, were explicitly recognized in the law of only one Member State (Germany). Furthermore, there are examples of the Court recognizing as a general principle of law a right that did not exist at all in the constituttional laws of Member States, as it did with respect to the right aginst self-incrimination[32].

Once the ECJ has identified a general principle of law and recognized it as a general principle of Community law, there remains the problem of concretisation of its normative content. Not infrequently, national laws as a source of inspiration for the Court contain different terms covering similar concepts[33] or, *vice versa*, quite different legal concepts are hidden behind identical terms. Even when a principle is widely accepted and there are no major disagreements on conceptual and terminological level, a difference in detail still remains which, on the other hand, may lead to diffeernt results when applied to a specific factual situation. The task of the ECJ is, therefore, an evaluative comparison of the Member States

[31] "fundamental human rights form an integral part of the general principles of law ... In safeguarding these rights the Court is bound to draw inspiration from constitutional traditions common to the Member States ... Similarly, international treaties for the protection of human rights on which Memebr States have collaborated or of which they are signatories can supply guidelines which should be followed within the Community law." *Nold v. Commission*, Case 4/73 [1974] ECR.

[32] *Orkem SA v. Commission*, Case 374/87, [1989] ECR 3283.

[33] The heated debate over the (dis)similarities between the EU and the German concept of proportionality and the English notion of reasonableness is very illustrative for this type of situation.

laws. Here again the Court is faced with the choice whether, in the course of elaboration of a certain concept, to reduce it to the lowest common denominator i.e. to give to it only the content present in the legal systems of all or at least the majority of Member States or to search the solution that suits best to the overall legal framework of teh Community and its objectives. The ECJ has seemingly adopted the latter approach. Once the Court has identified and incorporated a principle, there is a tendency to invoke the principle by citing the previous judgement of the Court rather than the national laws wherefrom that principle was originally derived. It is also worth noting that sometimes the Courts understanding of a specific general principle has varied over time or depending on the legal and factual setting within which the principle is being applied.

The status of general principles of law in the EU legal system reflects the undoubtedly complex and not quite settled hierarchy of norms in this system in general. Within the EU legal system, written principles on the settlement of conflict of norms are lacking, so certain instruments such as division of powers (Art. 4 EC), clear separation between constitutional and legislative procedures and judicial control of legality of acts supply the vertical structure of the system. Once again, it is the ECJs case law that provides the guiding principles as to the hierarchy of various norms (Bieber and Salomé, 911). The only undisputed distinction is the one between *primary* (the three constituttive treaties) and *secondary* (legally binding acts of Community institutitons: regulattions, directives and decisons; trade and associations agreements with third countries) sources of law, the primary enjoying the status analogous to the constitutions in domestic legal system. Within the group of secondary sources, there is a set of complicated hierarchical relations, which differs siginificantly from the relatively simple dichotomies such as legislative/executive and general/individual acts in national laws.

A general principle can not override a treaty provision (Akehurst, 30). General principles of law have a status superior to that of secondary legislation (Kutscher, 38; Berman et al., 27). Only *fundamental* general principles of law (non-discrimination, proportionality, protection of legitimate expectation) can override the acts of Community legislation (Akehurst, 40-46; Usher, 129). Some other authors are even more cautious. The structure and the meaning of each individual principle of law determine the relationship of the principle to written norms of Community law within the framework of the hierarchy of norms under the Community legal order (Schwartze, 70).

The status of the general principles of law in the EU law is closely related to problem of their classification and the functions they perform in the system. There are various attempts for classification of the principles forming a part of the EU law. Early writings on general principles of Community law usually distinguished only between fundamental and ordinary principles (eg. Akehurst, 40). The basic difference is between normative nad principles of interpretation, the former being further divided according to the presence – explicit, implicit, silent or even non-

existent of principles in written law (Papadopoulou, 8-21). Isaac distinguishes among fundamental human rights, other principles of fundamental character and technical principles (Isaac, 146-150). Much cited is also the classification of Boulois: principles inherent to all organized legal systems, general principles common to the laws of Member States and principles deduced from the nature of the Community (Boulois, 222-225). The criteria for classification are similar – source, importance, functions, area of application, the issue is whether the chosen criterion has been consequently applied or the classification is actually based on more than one criterion. A classification on principles stemming form the supranational character of the Community[34] and principles derived from and applicable to domestic legal systems seems more consistent[35]. Notwithstanding the unique character of the Community legal system, the traditional private-public law distinction could also be identified, leading towards a demarcation between principles governing Community and Member State action in relation to private persons and principles applicable to private conduct only.

General principles are used in several different ways. They are used to interpret the Treaties and acts adopted by the institutions of the Communities, to fill gaps in the Treaties or the acts of Community institutions and as a criterion for assessing the validity of acts adopted by the Community institutions (Akehurst, 29-30). General principles of law are a method of interpreting or determining the validity of acts of Community institutions, as a control mechanism over the actions of Community institutions, as a control mechanism over the acts of national authorities when they are acting within the scope of Community law and for filling the gaps in the Community legal order (Usher, 2).

## 3.Legal principles in the US legal system

The reasoning from principle has been, along with reasoning from precedent, a widely used judicial method for resolving disputes before the American courts. At the early stages of American law, judges extracted legal principles from lines of well established precedents, referred to old English common law maxims or turned directly to relevant social and moral considerations, moulding them into general legal precepts. As the age of codification followed, the courts have relied more on principles explicitly or implicitly laid down by statutory law, all in an effort to provide greater coherence of a system which recognizes several different types of legal sources.

American legal science has adhered to the standardexplanation of the rules/principles differences through the higher level of

[34] Supremacy, direct applicability, subsidiarity, the four freedoms. These principles are, to a certain extent, inherent to any of the so called divided-power systems, including federal states.

[35] *Inter alia,* fundamental rights, legal certainty, non-discrimination, proportionality, legitimate expectations.

generality and underlying important values of the latter[36]. Principles serve explanatory and justificatory functions in the process of rule application. Thanks mainly to Ronald Dworkin, principles, judges and the *Riggs v Palmer'"* type of cases became a recurrent topic in American jurisprudence. The difference in degree approach[37] is vigorously opposed to the thesis that there is a logical distinction between rules and principles[38]. Principles require the mediating role of more specific rules, they can produce legal consequences even without the aid of rules[39] or play a direct role as one of the relevant factors in reaching a particular legal outcome at least[40]. Another source of difficulty is the blurred line between interpretative and gap-filling functions of legal principles[41].

The single court structure contributed to a slower separation of private/public law principles. Private law is covered by a network of, at least originally, judicially developed principles, such as the *Riggs* one that "no man can profit from his own wrong" or the negligence principle in tort law[42]. The criminal law principles (legality, *metis rea,* prohibition of retroactivity and analogies) were the oldest general precepts designed to channel the exercise of public power with respect to private citizen.

American constitutional adjudication has been constantly troubled by the perennial issue on general principles (if any) embodied in the Constitution on the limits and methods of legitimate exercise of public power, including governmental interference in the relationship between private individuals. As early as 1810, the federal Supreme Court struck down a Georgia statute on ground that it violated "general principles which are common to our free institutions"[43], in this case, the principle of vested rights which is to be found nowhere in the constitutional text. Utterances that "behind the words of constitutional provisions are postulates which limit and control"[44] are abundant in the Supreme Court case law. The two major sources of constitutional adjudication - due process and equal protection clauses have also been the main vehicles for construction of substantive principles of constitutional law. Such a conversion of the Constitution into a value conscious document, especially if the value choice is a

[36] Benjamin N. Cardozo, *The Nature of the Judicial Process,* New Haven/London, 1921; Eisenbcrg, 77; Atiyah and Summers, 93-95.
[37] 115N.Y. 506, 22 N.E. 188 (1889).
[38] Eisenberg, 77; Sunstein, 31
[39] Dworkin, 1978,22-28.
[40] Ronald Dworkin, 1967, 22-32; Eisenberg, 77; Atiyah and Summers, 94. "Sunstein, 31.
[41] Anything beyond cognitive function of ascertaining the meaning of the express words of the statute. Summers, 411. Still, "cognitive" itself is a rather open-ended concept.
[42] It has even been argued that the American common law contains more principles than continental systems, such as France. Andre Tune el Suzanne Tune. *Le droit des Etats-Unis d'Amerique: Sources et techniques,* Paris, 1955, 210.
[43] Fletcher v. Peck, 10 U.S. (6 Crunch) 87 (1810).
[44] Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

judicial one under the guise of interpretation, has encountered a vehement criticism.[45]

From all the richness of academic discourse on general principles of law we would select several points of interest. General principles do convey an idea or a value that should be promoted by law rather than commanding a determined legal result. The indispensability of normative concretisation opens up the search for the real actors and the methods by whom this is usually undertaken. The growing awareness of the long lasting judicial input into this matter is a positive development and it does not, in itself, pre-empt the necessary further discussion on the desirability of such role of the courts. The constitutional nature of general principles or at least of some of them is evidently the most ambigous issue concerning their status in a particular legal system. On various classifications, the list containing a few continously repeated and rearranged dichotomies could be refreshed by the one on established/emerging principles. As to the atribute general, it seems that all the possible meanings are acceptable in a given context, while generality as a trend towards universality is undoubtedly the meaning the most frequently referred to.

While sharing a significant quantum of substantive content, each of the five systems discussed above has its own distinctive concept of general principles of law. In Germany, it is primarily a constitutional law category. For France, general principles of law have for long been seen as components of legality of administrative acts and a *domaine reserve* of the *Conseil d'Etat.* For the British lawyer, principles are one of the facets of the common law methodology. European law, especially the EU law is exerting some pressure on these systems in the direction of a greater mutual acquaintance.

[45] From various standpoints and with countless arguments. For a relatively recent and extremely powerful one, *see,* Kennedy, 1997.

BIBLIOGRAPHY

Akehurst,M., The Applcation of the general Principles of Law by the Court of Justice of the European communities, BYIL, (1981);

Atiyah, P.S. and Summers,R.S., Form and Substance in Anlo-American Law, Oxford, 1987;

Bieber, R. and Salome, I., Hierarchy of Norms in European Law, 33 Common Market Law Review, (1996);

Berman et al., European Community Law: Cases and Materials, St.Paul, Minn., 1993;

Boulois,J., Droit institutionel de lUnion europeenne, 5e ed., paris, 1995;

Brown,N.L., General Principles of Law and the English Legal System in Mauro Cappelletti (ed), New Perspectives for a Common Law in Europea, Leyden/London/Boston, 1978;

Dworkin,R., Taking Rights Seriously, London, 1978;

Eisenberg, M., The nature of the Common Law, Oxford, 1994;

Jowell and Lester, Beyond *Wednesbury*: Substantive Principles of Administrative Law (1987) Public Law;

Isaac,G., Droit communautaire general, 3e ed., Paris, 1992;

Kennedy,D., A Critique of Adjudication, Cambridge, Mass/London, 1997;

Kutscher, H. (joint ed.), der Grundsatz der Verhaltnismassigkeit in europaischen Rechtsordnungen, heidelberg, 1985;

Lefas, A., Essai de comparaison entre le concept de natural justice en droit administratif anglo-saxon et les principes generaux du droit ainsi que les regles general de procedure correspondants en droit adminsitratif francais, (1978) RIDC 3;

Lord Woolf, Droit Public English Style, ERPL/REDP, 7/2 (1995)

Papadopoulou,R-E, Principes generaux du droit et droit communautaire, Bruxelles/Athens, 1996;

Schwartze,European Administrative law, London, 1992;

Sunstein,R.C., Legal Reasonning and Political Conflict, New York/Oxford, 1996;

Usher, R., General principles of the EC law, London, 1998.