Brief reference to the Principialist Conception of law and the life cycle of obligations

Prescription and expiration in family matters

Part I

Lic. Cristian Eduardo Palacios Martínez

Breve referencia a la Concepción Principialista del Derecho y al ciclo vital de las obligaciones. Prescripción y Caducidad en Materia de Familia
Parte I
Lic. Cristian Eduardo Palacios Martínez

Resumen
El Derecho es un organismo vivo, está en constante cambio, sujeto a colisiones entre sus componentes y transitando progresivamente en el tiempo. Sin duda alguna que la idea de Derecho invoca la idea de obligación, pues hablar de Derecho es hablar de la necesidad de ejercer o no una actividad, bajo la advertencia de sufrir la imposición y el cumplimiento de una sanción. El Derecho es un mundo obligacional, y una obligación es la fuerza que mantiene unidas a las instituciones jurídicas, adecuando la interacción entre ellas y posibilitando que el orden jurídico no se altere. Ahora bien, las obligaciones tienen su propia naturaleza y explicación, la forma de cómo se originan, expresan, desarrollan y extinguen; es decir, tienen su propio ciclo vital. Asimismo, el Derecho es un sistema de principios dotados de justicia, según lo predica la Concepción Principialista del Derecho. En esta concepción no se interpreta a los principios como partículas absolutas y sobrepuestas al todo, sino como compuestos inteligibles y entrelazados que responden a una forma coherente y estable de la labor jurídica, como parte del quehacer de la sociedad. La Concepción Principialista del Derecho permite entonces descubrir que la eficaz aplicación de un sistema normativo no depende de la codificación cerrada y extensiva del mismo, sino de la adecuada interpretación de los principios que guían su composición y estructura. Sin duda alguna que en esta concepción los principios tienen no solo un valor supletorio del Derecho, sino también un valor fundamentador e interpretativo del mismo.

PALABRAS CLAVE: CADUCIDAD – CONCEPCIÓN PRINCIPIALISTA DEL DERECHO – DERECHO DE FAMILIA – OBLIGACIONES JURÍDICAS – PRESCRIPCIÓN – PRINCIPIOS JURÍDICOS.

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Abstract
The law is an alive organism in constant change, subject to collisions between components and progressively traveling in time. Without a doubt, the concept of Law invokes the idea of obligation, as talking about Law is talking about the necessity of carrying out or not carrying out an activity, under the warning of facing imposition and the fulfillment of a sanction. The law is an obligational world and an obligation is a force that holds together the legal institutions, adapting the interaction between them and enabling the legal system to be not altered. However, the obligations have their nature and explanation, the way how they originate, express, develop and extinguish; meaning, it has their own life cycle. Also, the law is a system equipped with principles of justice, according to the Principal´s Conception preached by the law. It does not interpret in this conception of the principles as absolute and overlaid particles at all, but as intelligible and intertwined compounds that respond to the way stable and consistent with legal work, as part of the task of the society. The principalist conception of law allows the discovery the effective implementation of a regulatory system does not depend on the closed and extensive encoding of the same, but the proper interpretation of the principles that guide their composition and structure. Without a doubt, the principles have not only a substitute value of law in this conception, but also a foundational and interpretive value the same.

KEYWORDS: EXPIRY – PRINCIPIALIST CONCEPTION OF LAW – FAMILY LAW – LEGAL OBLIGATIONS – PRESCRIPTION – LEGAL PRINCIPLES.

Brief reference to the Principialist Conception of law and the life cycle of obligations
Prescription and expiry in family matters
Part I

Lic. Cristian Eduardo Palacios Martínez[1]

…incredible things are happening in the world (…)
Right there across the river there are all kinds of magical instruments
while we keep on living like donkeys…[2]

Introduction

The article describes some considerations on the prescription and expiry in family matters in the Salvadoran legal system that arise within forensic practice and certainly within the study of the theoretical currents about the doctrinaire acquis of Law scientists in which it is sustained and explained.

This study aims to make available to the public administration, the actors of the judicial system, and, of course, all those interested in Family Law, a theoretical approach to one of its appendices, which reflects the legal effects of time in the consolidation of legal relationships. This area we are referring to is that of family-related obligations.

For the systematization and exposition of information, this work has been divided into three parts, the first part is related to the exposition of the theoretical bases of the principialist conception of law and the life cycle of

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2 By José Arcadio Buendía in GARCIA MARQUEZ, Gabriel, *One Hundred Years of Solitude,* Bruguera, Barcelona, 1985, p. 13.

obligations. The second part shall be about the development of the prescription, and the third part about the exposition of the academic issues that correspond to the expiry and the contrast of both legal institutions. The two parts that complete the content of this work will be made available to the reader in the following publications of this journal.

This article aims to expand the field of Family Law in our legal culture and enrich a fertile area of study, such as the Law of Family Obligations. Undoubtedly, the theoretical enrichment does not begin with the presentation of the ideas contained in this article but with the criticism and improvement that can be made of them.

I. Study approach

In general terms, this study approach allows the reader to know what the interpreter's perception of the legal situation they are investigating (objective, subjective, current, positive, public, private, social law, for example), to facilitate the understanding of an investigation. Likewise, according to the research approach, the theoretical perspective used to discover, interpret and expose the data obtained in the research is established. These theoretical perspectives are the theoretical orientation of the natural law, legal positivism, legal realism as forms of legal reductionism, legal trialism, and argumentative theories. And with that, define the type of legal research: Legal-dogmatic formalist or legal-historical sociological.

There are different approaches as interpreters exist. Some have been classified on account of their more general characteristics with their own traits which go from traditional conceptions to more modern orientations, and based on precise methods (analytical, synthetic, deductive, inductive, analogical-comparative, systematic, historical, dialectical, intuitive) and with particular research techniques (surveys, interviews, case studies, comparative tables, among others).

The approach used in the research that gave rise to the present article was eminently regulatory with certain axiological[3] and factual characters which do not fit precisely with the legal reductionisms. Nevertheless, the core of the research was eminently legal-dogmatic formalist, reducing itself to analyze, synthesize, deduce, induce and compare the meaning of the norm, and to contrast its content with the values and principles that justify it.

Therefore, in the elaboration of this work the deductive method has been used, which starts from the most abstract (values and principles) and takes shape through the factual assumptions (casuistry). Thus, the link that joins the origin or source (law) with the destination (casuistry) is built, and the end or result is foreseen (Jurisprudence).

II. Previous notion

Similar to the phenomena of the physical world which occur within a larger order, that is, within a solar system which belongs to a galaxy, and this to the universe; legal institutions belong to a legal order, which is part of something greater, that is, a legal system,[4] which settles down in a social conglomerate, precisely, within society. Within that system orbit all legal institutions, including sources of law, around and in favor of people. In an ethical-abstract world, like

3 Every regulation of human action implies a choice of values; therefore, the normative is intimately linked to axiology, that is, to the world of values. *Vid.* MARTINEZ MARULANDA, Diego, *Ground for an introduction to law,* Erinia Collection, University of Antioquia, Medellín, 2007, p. 41. It has been said that values are basic and primary, norms are derived and secondary.) It is even said that the rules are instrumental for the realization of some values. *Vid. VON WRIGHT, Georg Henrik, An Essay in Deontic Logic and the General Theory of Action,* translated by Ernesto Garzón Valdés, Collection: Cuadernos, Cuaderno 33, Philosophical Research Institute, Mexico City, 1976, p. 12. The Law involves axiological aspects with different denominations National Autonomous University of Mexico, by the authors, as follows: moral correctness or claim to correctness, as a non-positivist concept of Law (Robert Alexy) or objective morality (Moreso). *Vid.* FERRAJOLI, Luigi, *"Constitucionalismo principialista y constitucionalismo garantista",* Digital Edition, in **AA.VV**., Doxa (periodicals): Notebooks of Philosophy of Law, electronic magazine, number 34, 2011, Virtual Library Miguel de Cervantes, p. 29. Also available in http://bib.cervantesvirtual.com/FichaObra.html?Ref=053980) [Accessed May 14, 2014].

4 The idea of a *legal system* in this article is broader than that of a legal order. Therefore, the concept of a legal system does not correspond exactly with the idea of *constitutionalism,* which itself involves the idea of a normative system.

the phenomena of the physical world, legal institutions have raison d'être; they live interacting in an order that, to a greater or lesser extent, is harmonious and intelligible, thereby expressing their own cosmos. This is a structural vision of law,[5] with which the idea of is not exhausted either.

Law is inserted in a *social galaxy*. Law is an *obligatory world,* and in the way of conceiving it in this article, an obligation is a force that holds *legal atoms* together, that is legal institutions,[6] adapting the interaction between them[7] and enabling the legal order not to be altered. Legal obligations enable and strengthen the continuity of legal relations, and from this perspective, they allow the progressive continuity of law and, in turn, the balance of human relations. Obligations have their own nature and explanation, the way how they are constituted, expressed, developed, and extinguished. Obligations have their own *legal cosmology.*

Despite the similarities that are noticed when making an analogy between the physical world and the legal world, the laws that govern each of them are completely different. In the first, they are firm and unalterable, whereas in the second, they are totally opposite. In the physical world, for example, the forces that maintain the existence of things are not established by the human

5 From a realistic or sociological approach, the Law is not simply language and normativity, but also, human behavior, and in particular, judicial behavior. Likewise, the Law is argument, a technique for solving practical problems. As an argument, Law is an instrument that humanizes principles and values. It is the field of factual conjectures and legal refutations. *Vid.* ATIENZA, Manuel, " Law as argumentation" in AA.VV. Legal argument, Electronic Magazine Isegoria, number 21, 1999, p. 37-38. Available in http://isegoria.revistas.csic.es/index.php/isegoria/issue/view/4. [Accessed May 15, 2014].

6 These can be understood as living elements of Law, as elemental entities that form the most logical and stable structure of the legal system, gaining vitality because they constitute true requirements and thus deserve a more or less detailed normative regulation. They can also serve as the backbone of the legal order. For example, the ideas of person, state, property, tenancy, prescription, expiration, public order, life, and legal security are all legal institutions because the legal system is based on them. For this reason, they are often subject to specific regulations within legal frameworks. Additionally, Law relies on these institutions to update and legitimize itself, sometimes even without prior codification.

7 The configuration that the legal norm makes of basic social facts, always taking into account values and possibilities, is what is called legal institutions. These institutions are proposed to the subjects of Law, who participate with them through *legal relations. Vid.* MORAN MARTIN, Remedios, *Materials for a law history course,* National University of Distance Education, Madrid, 2010, p. 65.

being. On the other hand, in the legal world, the forces (obligations) that carry out the legal order are established by humans. However, these latter are not based on individual will but on *values* that embody the generally accepted will of a human group in a specific period.

Even under the light of reason, that reveals the similarities between the physical world and the legal world, the laws that govern them cannot be explained in the same way, but they require different methods and techniques that fit with the objects of study that one world or the other presents. Understanding this is essential for the *legal cosmology* that seeks to explain the origin, evolution, expression, structure, and purpose of Law, and of course, to explain the *life cycle of obligations*[8] and the incidents that manifest within it. Indeed, we must understand that the legal obligation is affected by prescription and expiration,[9] but in an incidental way, because these institutions may or may not manifest themselves in the forces that give stability to the legal order.

However, the physical world and legal world do not obey the same laws, this is not an obstacle indicating that the laws of both are revealed to the human being and it is he who discovers, interprets, understands, and explains them. At the end, at a later stage of knowledge, human beings can predict the phenomena that will happen in both. Of course, in whole or in part the human being is revealed by the curiosity that characterizes human thinking, affected by the germ of the continuity of knowledge.

Before understanding the effects of time on the consolidation of legal relations, through the institutions of prescription and expiration, it is necessary to know more closely what the forces that maintain the order established in the legal world are, the links seeking stability and security for such a changing

8 The idea of the *life cycle of obligations* has been taken from JULIAN, Emil Jalil, "The normative system of the General Theory of Obligations in the projected Civil Code", in AA.VV., *Derecho Privado. Reforma del Código Civil. Obligaciones y Responsabilidad,* Directors Gustavo Caramelo and Sebastián Picasso,Ministry of Justice and Human Rights of the Nation Editorial, Buenos Aires, Year I, Number 3, December 2012, p.4.

9 Expiration - extra procedural -, as will be explained below, indirectly affects rights. Therefore, if the obligations are the correlative of the rights, the expiration indirectly affects the obligations as well.

and complex world. In fact, it is essential to know the *life cycle of legal obligations* based on their constitution or birth, development or life, and extinction or death thereof.

III. Law

Law is a living organism, just like the planet; it is constantly changing, subject to collisions between its components and progressively passing through time. Law is the *Dasein of the ought-to-be.*. The law reproduces itself does not require closed and finished concepts that declare it. It is enough to interpret human thinking. The law is reproduced and renewed every day in the courts and tribunals, in public administration institutions, and even in the simplest human relations. Hence for *Legal Realism,*[10] law is created and reproduced with forensic practice.

The legal world, like the physical world, is not created or destroyed but transformed. Consequently, the new elements of it are only *discovered.* The law, when applied, is revealed as something new and finished, although it is constantly changing, subject to social laws, interest shocks and value weighing. Therefore, the law, in the conception that has been described following the stimulus that the facts produce, only discovers itself. Then, the error of law is not in the law itself, but in the thought of whoever discovers, interprets and exposes it.

Now, in this article, we will focus our interest on the pragmatic idea of law, that is, we will start from the notion of law as a bond, necessity, burden, commitment, or more precisely, as an *obligation.* The very essence of law is "being an obligation." (*Dasein of the legal ought-to-be*[11]).

10 It is a distinctive note of *American Legal or Behavioral Realism,* the judicial creation of Law. *Vid.* MORALES, José Humberto, *Notes on Philosophy of Law*, University Editorial, University of El Salvador, San Salvador, 2011, p.78.

11 The Law is there; it has its own existence. It has a time and a place where it manifests. It is not in consciousness, it is an external entity that naturally overcomes human behavior, since it has enough real force to bend it.

3.1. Law as an obligation

The legal conception of human relations is adorned with the element of obligation, the helmet of afflictive necessity. The idea of law invokes the idea of obligation. Speaking of law means speaking of the necessity to perform or refrain from an activity, under the *warning* of suffering the imposition and fulfillment of a positive or negative sanction.

Law is the prelude to a series of warnings, positive or negative, for its recipients. At the same time, it is the concretization of these warnings. For this reason, law is the source and the means that are discharged in an end, being this end the human being, to whom it is revealed and to whom the law is allowed to be the way it is known. However, this way of discharging is not as simple as described but rather it is due to the internal and logical mechanics of social organization more or less complex.

Law as it is known today is an imposition which commands, permits or prohibits. It is a source of commands and rules, and the means by which those commands and rules are channeled and fulfilled. In order for the law to be discharged, observed or updated in the legal subjects, it is required that they accept it as legitimate or valid. The process of acceptance of the law is silent, because the legal subjects from their birth or constitution are incorporated into a pre-established order. Although they recognize the law under the condition of their own personal, patrimonial and legal security, a real and express will does not intervene, but rather, a presumption[12] of acceptance. In addition the legal subjects, as recipients of the norms, sacrifice a portion of their state of freedom and, in return, they become conditionally free.

12 Therefore, it is not surprising that in the rationalist creation of the Constitutional State of Law, it is presumed that all norms are constitutional, and therefore mandatory, and that to establish otherwise, they must be declared as unconstitutional by the competent authority and under the legally established means.

3.2. Enforceability of law

That Law is obligatory means that it becomes coercible. *Coercibility* is the inherent characteristic of Law that enhances the effectiveness of its *legal propositions.*

Coercibility is the characteristic of law, precisely of legal norms,[13] that enables them to be enforced by their recipients through the afflictive, threatening, or restrictive intervention of a third party, particularly, the State. Coercibility accomplishes and materializes the hetero-composition of human conflicts. In private justice and self-composition,[14] there is no coercibility, notwithstanding the coercive support provided by the State in this latter form of conflict resolution.

The law is coercible because it is naturally infringed. It legitimizes and validates its existence in its own disobedience. For this reason, it requires being coercible to overcome what law itself has foreseen. Laws exist because social evolution has demanded them to exist because if life in society were interest free, laws would not be necessary. In other words, the coercibility of law is based on the fact that it will naturally be infringed or disobeyed.

Even when discussing the legal nature of international law norms due to their apparent lack of enforceability, their legal nature will not be diminished because the law itself obtains the coercible nature of the general principles of law (prevailing values of the time), precisely of the idea of justice.[15] The law

13 It has been well said that *enforceability* is a characteristic of the legal norm, together with rationality, generality, imperative nature, statehood, formal unity, unilateralism, permanence and propositional character.

14 It can be defined as that peaceful and direct form of dispute resolution that consists in the reciprocal or unilateral subordination of the interest of each party or one of the parties to the dispute, to that of the other in dispute. *Vid.* ALDEA MOSCOSO, Rodolfo Alejandro, Legal Editorial of Chile, Santiago de Chile, 1989, p. 86. *Of self-composition. A contribution to the study of the solution of legal conflicts.*

15 The study of the sources of law can be adopted from a legal-positive perspective or from a philosophical and legal perspective. *Vid.* GARCIA CUADRADO, Antonio M., The constitutional order. A historical and formal approach of the theory of the Constitution and the sources of Law, Editorial Club Universitario, Alicante, 2002, p. 196.

serves an ultimate goal: Justice[16] in the person. This purpose determines what behavior must be observed. Something is required because it is considered or should be considered as necessary to achieve justice. If the obligation does not serve that end, it is naturally illegitimate and therefore should be disobeyed.

Law as a historical product is an expression of a certain history, that is, of the prevailing values of the era that is lived. The forms or ways of the law to assert itself will precisely vary according to the organization of societies in the course of time.[17] Therefore, the international law, that has been said to be more a Law of moral content[18] than legal content, has its own self-executing way according to its historical evolution to the present day. It would not be strange if in the future really pressing means will be recognized to force states to fulfill their obligations. Furthermore, the discussion of the legal content of international law has to do with the absence of a world state,[19] but this is no reason to denature it as a moral right.

3.3. General principles of law (Principialist Conception)

That the law is an obligation does not merely rely on its words being printed on paper, or that it has been positivized, although the latter is an apparent and necessary closing clause of law. *The principalist conception of law* makes it possible to discover that the effective application of a normative system does not depend on its closed and extensive codification. The application of

16 Hence the concept of what is called Dikelogia which is the science of justice. *Vid*. ALDEA MOSCOSO, Rodolfo Alejandro, *De la autocomposición…*, *op. cit*., p. 86.

17 It is not surprising that at present people who sell products by electronic means ("virtual people") are supposed to pay taxes just like natural persons. They are demands requested by society according to its historical evolution.

18 This distinctive note is important because it has been considered that the law is coercible and moral is not. *Vid.* OLASO, Luis María, *Introduction to Law Course. Philosophical Introduction to the Study of Law,* Tomo I, 3rd edition, Andres Bello Catholic University, Caracas, 1998, p. 120.

19 *Vid*. ATIENZA RODRIGUEZ, Manuel, *Three Lessons in Theory of Law,* Universitary Club Editorial, Alicante, España, 2000, p. 34.

this system depends on the proper interpretation of the threads (principles) that guide its composition and legal structure. In the p*rincipialist conception of law*, principles not only have a supplementary value to the law but also a foundational and informative or interpretative value of it.[20]

The general principles of law do not come from legal norms, they are not a product of them, but quite the opposite; even though some legislations have recognized the general principles of law in their normative texts as sources of the law.[21] That is to say, contemporaneously, from a rationalist vision, the "principialist codification" takes place, and this phenomenon is not foreign to our legal-political culture, nor to our legislative technique.[22] That is to say that *protectionist constitutionalism* considers that ethical-political principles are old expressions of natural law that they have been positivized, converted into binding legal principles for all holders of normative functions.[23]

From a *philosophical-legal* conception, the core of the law is in the force of the innate principles of the law itself and not in the positivization of legal norms. These innate principles are the threads that discover the existence of a supreme normative order to the written one, the one that goes ahead of the normative texts. This normative order counts on the existence of norms so that the legal subjects get to know them. It is appropriate to state that the legislator is mechanical and limited, and consequently, at times unconscious and insensitive. On the other hand, the principles of law are flexible and full of content, available

20 *Vid.* JORDANO BAREA, Juan B., "The primary source of Law (Gloss to an old dispute between Castro and D'Ors)", in AA.VV., *Book tribute to Professor Manuel Albaladejo García,* coordinators J.M. González Porras and F.R. Méndez González, Volume I, National College of Property and Mercantile Registrars of Spain, Editum, University of Murcia, España, 2004, p. 2,548.

21 This happens with Spanish legislation which in Article 1 of the Civil Code has established that the sources of the Spanish legal system are law, custom and general principles of Law. (The new edition of the Royal Decree of Spain of July 24th 1889)

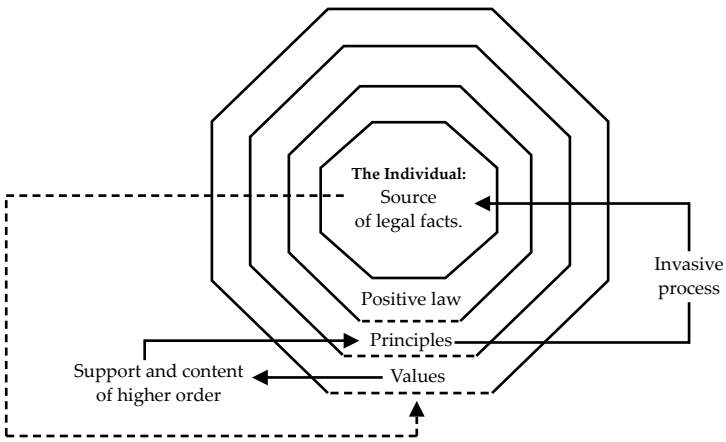
22 The Code of Civil and Commercial Procedure (2010) is the clearest example of this phenomenon in El Salvador whose general content recognizes some of the principles of Procedural Law which are, in turn, part of the wide range of principles of law.

23 *Vid.* FERRAJOLI, Luigi, *"Constitucionalism…", op. cit.,* p. 27. It is about the *neo-constitutionalism, principialist constitutionalism or ius-constitutionalism,* which the aforementioned author nominates.

to all those responsible, not just to a few legislators, who based on the idea of popular representation, decide that it will be (positive) law for this historical era.

In the *principialist conception of law*, principles are not interpreted as absolute and superimposed on the whole particles, but as intelligible and intertwined compounds that respond to a coherent and stable form of legal work as part of the society's activity. Indeed, *the law is a system of principles endowed with justice* that does not respond to particular interests, but to values of a human conglomerate. Once this information has been cleared up, it is concluded that the principles do not apply absolutely, if so, the principles the law would be emptied, and this law would lose its content and every idea of legal certainty. Furthermore, any idea of Constitutional, Social, or Environmental State of Law would be unknown. This is the raison d'être of the principle of legality by investment (Art. 8 CN) as a closing clause of the positive law, but not as a closing clause of the law itself.

The general principles of law have the particularity of being invasive because, despite being above the legislative text and seemingly "in an abstract sphere," they infiltrate the legal sphere, reaching the point of being the foundation of jurisprudence. In other words, they descend perpendicularly from the abstract to the concrete based on prevailing values.



The previous figure shows that when a fact breaks the law (positive law), either by *anomie or antinomy,* for example, the membrane that divides the law into the principles is broken in the same way, and therefore, this membrane invades the facts based on the prevailing values[24] which arise from the same people. Even though they are not considered as individuals, as the people that break the law, but as a whole of society.

Truly, it is a kind of *legal apeiron,* as everything returns to its origins and renews itself infinitely. The law is renewed, and at the same time, it is discovered by its recipients.

Then, the law is not only positive law, although this is the one that is most easily revealed to its recipients. The support of the Law as it is known is the principles of the law, and consequently, the pillars of the legal world are in a higher order. This support is revealed to the legal subjects in a renewed manner in each historical period with greater or lesser degree of stability as required by the interests that society intends to protect.

IV. Obligations

4.1. Importance of the general theory of obligations

The different areas of legal reality are referred to as *legal platforms.*[25] These legal platforms are built, intertwined and transformed from obligations. No *legal proposition* is effective in reality if it is not based on a *legal warning,* that is, a *legal consequence.* The recipients of the norms obey them with the understanding that their non-compliance entails the realization of what is

24 These values will vary according to the culture of the group. For example, when doing a study of the sources of Islamic Law, in the countries that practice this religion, it is noticed that the Islamic Religion was before the State. Unlike Christianity, that the State came first and this later legitimizes the Christian Religion. *Vid.* LOSANO, Mario, "The sources of Islamic Law", in **AA.VV.,** *Current perspectives of the sources of Law,* Coordinators María del Carmen Barranco Avilés, Óscar Celador Angón y Félix Vacas Fernández, Dykinson, Madrid, 2011, pp. 155-157.

25 A *legal platform* is any economic, social, cultural, political field, whose structure is shaped and governed by legal norms.

warned by those same norms. Even in the Rousseauian conception, which offers a conjecture on the cause of life in society under the rule of authority, the idea of a social contract implies the warning of constraining the "contracting parties" under the mechanisms stipulated for their fulfillment.

It is human behavior, its resistance and fallibility, that justifies the need for obligations. Obligations support the possibility of the execution of the uncertainty. Therefore, knowing the forces that join the pieces of the whole and allow legal platforms to function in the best possible way is as important as knowing the whole. The unit is not explained until each of its components is divided. It is understood that from the social, economic, political and cultural point of view, in a multiform and dynamic society such as today, the law of obligations and the general theory that explains those obligations acquire a relevant importance because through obligations the vast majority of legal relationships are developed. Through these legal relationships each individual develops in the life of their community.[26]

There is no doubt about the prominence of the general theory of obligations for legal sciences because when speaking about them in a generic sense, sub-species are presented according to the nature of the legal platforms on which they operate. Thus, the general theory of obligations has an approach to civil and commercial obligations, which regulate legal transactions between private or public individuals, whether for profit or not. At the same time, this theory approximates the obligations that regulate the interests of fully consolidated social groups at a given time and place such as the obligations of employers and workers, suppliers and consumers, among others; and of course, it approximates those of family order which this article is about.

26 In DIAZ PAIRO, A., *General theory of obligations,* Vol. I, 2nd edition, Havana, 1945, p.1, cited by ACEDO PENCO, Ángel, *General theory of obligations,* Dykinson, Madrid, 2010, p. 19.

4.2. Concept of Obligation

To avoid engaging in wearisome distinctions, despite their differences,[27] the concepts of obligation and duty are considered equivalent. The concept of obligation, regardless of the cause, denotes the need to comply with a particular activity or to stop doing one in particular, in order to seek, prevent, or concretize a warning, which translates into approving or acquiring a benefit or avoiding a reproach.

However, the concept described above is too generic, since it is applicable to any kind of obligation, which is why it is not possible to distinguish the dividing line between legal obligations and those that are not; In that sense, it will be defined what is a legal obligation, but not before indicating what are the kinds of obligations and standards.

4.3. Quadruple root of the origin of obligations

Obligations are bounded to normative statements which imply a regulation of human activity.[28] Therefore, obligations are formal derivations of the content of the standard. Meanwhile, the standard has been defined as a rule of behavior. This way, traditionally, four kinds of standards have been classified, namely moral, religious, social and legal. In turn, obligations include four kinds too moral, religious, social (social uses) and legal. This is the *quadruple root* of the origin of obligations or of ought to be.

27 It has been considered that duty indicates something more compelling for the conscience; on the other hand, the obligation indicates something more absolute for practice. *Vid.* BARCIA, Roque, *Castilian Synonyms,* University of Rosario, Classics of Knowledge Collection, Bogotá, 2010, p.105. Thus, it has been said that the obligation is imposed by law whereas duty comes from conscience. The moral and religious man has duties, and the associated man has obligations. Nevertheless, the terms duty and obligation are legally equivalent because they have no substantial divergences. Therefore, the position of those who prefer to use the terms legal duty and legal obligation seems more reasonable (H. Kelsen, H. Nawiasky, H. Hart ...). *Vid.* MONTORO BALLESTEROS, Alberto, The legal duty, Notebooks of Fundamental Theory of Law, number 14, University of Murcia, 1993, p. 9.)

28 *Vid.* MARTINEZ MARULANDA, Diego, *Fundament*…, *op. cit.,* p. 41.)

The *quadruple root* of the origin of obligations or *the ought-to-be* finds its foundation and expression, as indicated in the moral, religious, social, and legal norms[29] which must be differentiated in order to estimate the legal nature a the conduct, and its possible legal sanction.

This article is specifically about legal norms, usually characterized by being *external, bilateral, heteronomous and enforceable*.[30]

At the same time, doctrines accept a trend of reformulation, considering that a rule is legal not because it is necessarily external, bilateral, heteronomous, and enforceable, but because it belongs to a legal system that is so. For example, the standard that establishes the age of majority in different countries is not an enforceable rule, while it is not intended to regulate human behavior through the use of force. However, this provision can be considered a legal rule because it belongs to a system of rules called the legal system,[31] which is enforceable. Thus, it is correct that the legal nature of a rule, and consequently the link that it produces for its recipients - legal obligation -, is appreciated not depending on the rule in isolation, but as belonging to the whole, that is, to the legal system that it integrates. This vision is compatible with the principialist conception of law, and also, more complete, because it does not exclude the legality of the norms based on the individual operability of each one of these norms, but quite the opposite.

29 For the study of the different characters of religious, moral, social (social uses) and legal norms. See HOFFMAN ELIZALDE, Roberto, *Introduction to the study of law,* 2nd edition, Iberoamerican University, México D.F., 1998, pp. 15-26.

30 *Vid.* MARTINEZ MARULANDA, Diego, *Fundament…, op. cit.,* pp. 50-54. Even the norm - legal - has been defined as a model of human behavior, external, bilateral, imperative and enforceable that regulates the actions of men in order to establish a fair and organized order of human coexistence. *Vid.* PACHECO, Máximo, *Introduction to the study of law,* Santiago, Editorial Jurídica de Chile, 1976, p. 50, cited by SOTO GAMBOA, María de los Ángeles, *Basic notions of Law,* 2nd edition, State Distance University Editorial, San José, Costa Rica, 2005, p. 17.

31 It has been debated whether the norms of international law are a type of sui-generis rule, because it involves a system of rules whose structure does not fit completely with the legal norms. However, such an approach does not take place when one thinks more of the coherence and content of the standard in relation to the system of norms it integrates than of the coherence and content of the standard seen in isolation. Thus, it will be sufficient for the regulatory system to contain enforceable rules for that system to be considered legal. *Vid.* MARTINEZ MARULANDA, Diego, *Fundamento…, op. cit.,* pp. 54-56.

It is important to highlight what has been mentioned because of its high academic value, to the extent that some branches of knowledge such as the philosophy of law have been concerned with differentiating legal obligations from those that are not. Moreover, as legal obligations have not always existed but have rather emerged, and modified with the organization of societies in the course of history. Similarly, they have served to project the future of human relations, according to the worldview of the one who interprets reality. Thus, in the marxist view, legal obligations would tend to disappear along with the law and the State since they would lose their foundation by the coexistence of people in the community.

Indeed, it is useful to understand the subjection of human beings to higher authorities, such as the fact that religious norms precede legal norms. In this regard, *legal anthropology*[32] shows us that in primitive society, every norm of conduct is presented in the form of customary practice, and thus, custom transitions from something that has been and is, to something that "ought-to-be".[33] Precisely, the obligatory nature of an activity arises from its repetitiveness and convenience until the community accepts that this activity must be regarded as a duty. It is clear, then, that a behavior is binding, or in other words, obligatory, based on its necessity, which means that through its repetitiveness and approval, it is endowed with stability, permanence, and continuity within the social group. But even so, that conduct does not obtain legal character merely through generic acceptance. It becomes legally binding only when the community recognizes a higher objective order and achieves compliance with a conduct through means that are consensually established by the community itself. From now on, we will refer to legal obligations when speaking about obligations in general.

32 *Vid.*KROTZ, Esteban, *Legal Anthropology: Sociocultural Perspectives in the Study of Law,* Anthropology Collection Authors, Topics and Texts, Edition of ESTEBAN KROTZ, Editorial Anthropos, Autonomous Metropolitan University, Iztapalapa, 2002.

33 *Vid.* HOFFMAN ELIZALDE, Roberto, *Introduction…, op. cit.*, pp. 15-16.

4.4. Etymology and definition of legal obligation

It has been accepted by doctrine that the term obligation, during the gestation of Roman Law derives from the ancient verb *obligare,* which comes from the expressions *ob* (around) and *ligare* (to bind), something like "to bind around". Later, the noun *obligatio*, would mean "binding or restraint", both physical and moral.[34]

Defining the different legal concepts academically is as delicate and challenging as defining what law is, because the evolution of society is progressive and hasty, and consequently, the evolution of law is similarly so, leaving a restricted margin of stability for the interpreters of legal reality. And the fact is, if legal concepts are not fully developed, their definitions are not either. However, for didactic purposes, it is necessary to resort to definitions.

First and foremost, we must consider that a legal obligation goes beyond expressing the necessity of fulfilling a particular activity or refraining from doing one, in order to pursue or prevent the realization of a warning, which results in approval or the acquisition of a benefit, or in the way of avoiding a reproach. The legal obligation has a special component which is due to the adjective that accompanies it.

The notion of obligation is what Justinian's works gave when they said: *"Juris vinculum quo necessitae adstrigimur alicuius solvendae rei secundum nostrae civitatis iura"*. It is a legal bond whereby a person, known as the debtor, is obligated to another person, known as the creditor, to give, do, or refrain from doing something.[35] However, it has been erroneously argued that an obligation consists of giving, doing, or refraining from something, as this description refers to the immediate content of the obligation, which is the performance. For this reason, it has been said that an obligation is a legal relationship (obligatory legal relationship), whereby a person, called the debtor, has the legal duty to

34 *Vid.* ACEDO PENCO, Ángel, *Theory…, op. cit.,* p. 20.

35 *Vid.* ROCHA ALVIRA, Antonio, *Lessons on Civil Law. Obligations of Antonio Rocha Alvira. Reviewed, updated and completed by Betty Mercedes Martínez Cárdenas,* Colección "Living Memory" Collection, Jurisprudence Faculty, University of Rosario, Bogotá, 2009, p. 17.

perform an obligation in favor of another person, called the creditor, who has the power to demand it.[36]

Without prejudice to the previous theoretical contributions, and in order to approximate the definition of legal obligation, it can simply be indicated that this *is a necessary requirementto fulfill in order to obtain an approval or to avoid a legally established reproach.* The elements of this statement are presented below:

a) Necessary requirement to obey (factual or legal assumption)

The necessary requirement to obey is the description that the legal order makes of the conduct that enables the shaping of the *legal warning*. It is what has been called the *factual assumption* of the legal norm. The use of the expression *necessary requirement to obey seems appropriate*, because legal norms, in principle, can be permissive (such as those that establish powers), descriptive (such as those that delimit concepts), and imperative (such as those that impose obligations or prohibitions). The necessary requirement to obey is imperative.

The requirement then falls on the "must" and "must not," which are deontic or normative operators, along with the "can," which correspond to the notions of obligation, prohibition, and permission, respectively.[37] Thus, the factual assumptions of the norms that impose obligations, before they are simply stated, they are, in particular, requirements to obtain or avoid what is expected.

b) Obtaining an approval or avoiding a reproach (Legal warning)

The approval or the reproach is the prize for the accomplishment or the nonperformance of the necessary requirement to obey. In this article, the use of the concept of legal warning is preferable over that of legal

36 *Vid.* LOPEZ DIAZ, Elvira, *Initiation to Law,* Delta publications, Madrid, 2006, p. 168. Any legal bond by virtue of which a person must perform a service in favour of another person is called an obligation. *Vid.* CAMACHO CUBIDES, Jorge, *Obligaciones,* 5th edition completed and updated with the collaboration of Juanita Cubides Delgado, Professors Collection, Pontifical Javeriana University, Bogotá, 2005, p. 33.

37 *Vid.* VON WRIGTH, Georg Henrik, *Un ensayo de lógica deóntica y la teoría general de la acción,* Translated by Ernesto Garzón Valdés, 2nd edition in Spanish, notebook 33, Philosophical Research Institute, National Autonomous University of México, México D.F., 1998, p. 9.

consequence, because in the way the information is presented, the idea of warning corresponds more closely to that of approval and reproach.

Despite how debatable this may be, in the mandatory order, although it is true that formally a legal consequence is a subsequent legal fact as a result of a previous legal fact; structurally, it is not possible to evidence a real consequence (in the sense of alteration), but rather, the concretization of a warning that the recipient of the norm should know. From an eminently normative dimension, a legal proposition is a deontic statement that allows, obliges or prohibits; and this legal proposition is the deposit of warnings, of course, of legal content. A legal proposition does not alter an established order, does not imply new results, nor brings effects that change the legal system, but it is limited to recognizing what has previously been established, that is, to consummate a pre-established warning. The factual assumptions do not surprise the legal system in which they manifest themselves because somehow they will always receive a legal qualification.

Furthermore, the *actual result* should not be confused with the legal consequence since in the configuration of the factual assumption (necessary requirement to obey) the *actual result* may not take place, while the legal consequence may happen. For example, the legal consequence of a punishable act is the punishability of the perpetrator, and not the actual execution of the sentence as long as the mandate "is valid",[38] which would be the actual result sought by the norm for the commission of the punishable act.

Notwithstanding the above, the ideas of factual assumption and legal consequence are generally accepted fundamental legal concepts which this article is not intended to refute, but quite the contrary. Finally, it should be noted that the factual assumption belongs to the state of being, whereas the legal consequence belongs to the state of ought to be. Harmonizing these two states is the job of law operators.

38 The legal consequences are produced *in concreto*, that is to say, it acquires validity because it has been coordinated *in abstracto* by the legal proposition. *Vid.* LARENZ, Karl, *Methodology of the Science of Law,* Ariel Editors, Barcelona, 1966, p. 166.

c) Legally established (recognized superior order)

Throughout time, human beings have recognized higher orders, among them, a divine order, a moral order, a social order and finally, a legal order. The latter is the result of social organization through norms that ensure a peaceful intersubjective coexistence. These norms are enforceable by the means established by that order. What is legally required are legal warnings, of course, provided that the necessary requirement to obey has been carried out. Thus, in order to *obtain an approval or to avoid a reproach*, the approval or reproach must exist (be established) in the legal order, as well as the means to demand it. That is, what is legal is what is required by a prior agreement between humans.

However, regardless of the foundation of the legal order, which is essentially validated and legitimized in positive law or natural law,[39]it will always be a superior order to which human behavior is subordinated. In both foundations, there is recognition of a higher authority to whom the realization of legal warnings can be demanded and whose ultimate goal is justice.[40] Legal warnings must be previously established by the legal order, because ultimately it is the validity of the principle of legality, as a closing clause of the legal order and as a guarantee of legal certainty. This is without prejudice to the renewal of the law, as stated in principle.

Only obligations of a legal nature, regardless of their origin, involve the coercive power of the State, in order to confirm the precise content of such obligations and, above all, to avoid leaving without compensation or indemnification for the damage caused to persons or property as a result of non-compliance.[41] The guarantor of the legal obligations is the State, which must create the necessary mechanisms to bring them to compliance, whether

39 The legal order becomes, for the positive law, the set of positive legal norms; and for the natural law, the set of innate norms to the human beings that regulate their own actions in society, without the need to be rationally set by the human beings.

40 Justice has been considered to be a distinctive note of the legal order, which separates it from the order of current morality and social conventions. *Vid.* LARENZ, Karl, *Methodology…*, *op. cit.*, p. 159.

41 *Vid.* ACEDO PENCO, Ángel, *Teoría…*, *op. cit.*, pp. 19-20.

or not that State is obliged to do so. Legal obligations give stability to human relations, avoiding a clash of cultures and conceptions of life.

4.5. Concept of Law of Obligations

The *Law of Obligations* is the specialized branch of legal sciences that studies legal obligations, taking into account their life cycle, structure, systematization and expression in legal reality. The law of obligations is a foundation for the other legal sciences because it provides a general theory about its object of study, and it is applicable to the different areas of law.[42] Then the practical importance of this branch of knowledge as an instructive discipline must be known by all legal operators.

Likewise, in a clear and simple way, it has been indicated that the Law of Obligations is the part of the Civil Law that deals with the relations of obligation.[43] It should be understood that a *relationship of obligation* is the communion between subjects of law that has been born linked to one of the sources of the obligations and that imposes the need to comply or refrain from performing conduct.

4.6. Classification of obligations

Legal categories can be classified according to the preference of whoever does it. On this occasion, it has been considered appropriate to take a foreign classification of obligations,[44] but appropriate for the purposes of this article, to

42 The law of obligations has been considered to be of a patrimonial nature, which is not debatable, provided that the patrimonial is not assimilated to the pecuniary because there are obligations such as those of family laws, that do not have an economic component, but that belong to a personal or extra-patrimonial order such as the duties of marriage, for example.

43 *Cfr*. LACRUZ BERDEJO, José Luis, SANCHO REBULLIDA, Francisco de Asís, DELGADO ECHEVERRIA, Jesús and Francisco RIVERO FERNANDEZ, *Elements of Civil Law II, Law of obligations,* First Vol., 2nd edition, Bosch Editorial, Barcelona, 1985, p. 15, cited by ACEDO PENCO, Ángel, *Theory…*, *op. cit.*, p. 20.)

44 This classification corresponds to JULIAN, Emil Jalil. See in this regard "*The system...*", *op. cit.*, pp. 3 - 32.

which the relevant contributions have been made. According to the CC, legal obligations can be classified as follows:

Depending on the object

By the nature of the service (Art. 1309 CC)

Obligations to give

To give money

To do

Not to do

By the nature of the link

Alternative obligations (Art. 1370 CC)

Optional obligations (Art. 1376 CC)

By the possibility of splitting the service

Divisible obligation (Art. 1395 CC)

Indivisible obligation (Art. 1395 CC)

By the relevance of the service

Main obligation (Arts. 1343, 1406, 1536, 209 CC, among others)

Accessory obligation (Arts. 2086, 2094 and 225 CC)

Depending on the individual

Single-person

Multi-personal

By the responsibility in the payment

Joint obligations (Art. 1382 subparagraph 1 CC)

Obligations of solidarity or *in solidum* (Art. 1382 subparagraph 2 CC)

Depending on its enforceability

By the possibility of being prosecuted in court

Civil obligations (Art. 1341 subparagraph 2 CC)

Purely natural obligations (Art. 1341 subparagraph 3 CC)

By the possibility of demanding its immediate compliance

Pure and simple obligation (Arts. 2090 CC)

Conditional obligation (Art. 1344-1369 and 2090 CC).

V. The life cycle of obligations

The law is reproduced and its appendices do the same. The accessory follows the fate of the principal. Obligations follow the fate of the law. The law is updated second by second, and its cells fall and renew themselves. Therefore, when their appendices die, it does not mean that the law also does so, but that as in biotic beings, their cells (obligations and rights) change so that others take their place more vigorously.

The law has its own system with which it circulates legal traffic, it reflects a systolic pressure with rights and a diastolic pressure with obligations. The rights are exercised and the obligations required, this is the heart rate with which the law expresses its vitality. Therefore, just as the biotic beings of nature have their existential origin that constitutes the beginning of their biological cycle, and an end that is consistent with natural death, obligations in general hold the same fate.[45] It is between these two moments that *the life cycle of obligations* is concretized. The vitality of obligations will then be examined.

5.1. The mandatory birth

In the material world, nothing arises from nothing, and in the legal world, no obligation arises from nothing. The creation of a legal obligation is subject to prior recognition by the legal order. For an obligation to exist and be legitimate, a title is required that describes its existence and through which it is legitimized. That title tells us what the *cause of the obligation* is, or if preferred, the *efficient cause that gives rise to it.*

5.1.1. Characteristics and elements of the obligation

The characteristic features of an obligation, in general, are relativity (they are required from specific individuals), the existence of a *legal bond* (legal relationship),

45 *Vid.* JULIAN, Emil Jalil, "*The System…*", *op. cit.*, p. 4.

temporality (they have a limited duration in time), and patrimoniality (the credit and debt are integrated into the assets of the creditor and debtor, respectively).[46] The obligation has an active aspect called credit, and a passive aspect called debit.[47] Legal obligations must be objective, rational, and necessary.

The essential elements of the obligation are those components that must inevitably be present in the obligatory bond at the time of its formation.[48] The obligation has a logical structure, it operates under necessary connections, it has a subjective element (assets and liability), objective (benefit), legal (link or power relationship) and causal (reason for the legal relationship).

As for the causal element, it must be clear that it is not about the cause of the content of the obligation (the benefit), but about the cause of the obligation. The cause of the content of the obligation differs in its meaning from what we are now explaining; for example, it has been considered that in bilateral contracts, the object of one party's obligation is the cause of the other party's obligation. Therefore, we are not referring to the cause of the content of the obligation, but to the cause of the obligation itself. That is, we are not referring to the cause in the sense of "why," but "by virtue of what".

Thus, it is questioned where the maintenance obligation comes from, and not why the father has an obligation to assist his children with food. For the first case, the answer may be that the obligation comes from the law or the sentence, and in the second case, from the filial connection that the father has with the child and that is proven by the child's birth certificate.

5.1.2. The efficient cause of the obligation: mediate or immediate cause

In obedience to the principle of legality, there is no legal obligation without a cause, that is, a cause that makes it derive from some suitable fact to

46 *Vid.* ACEDO PENCO, Ángel, *Theory…*, *op. cit.,* pp. 23-24.

47 *Vid. U. BARBERO, Omar, Introduction to Private Law,* Juris, Rosario, 2004, p. 191.

48 *Ibidem,* p. 191.

produce it, as established by the legal system. Article 8 CN, which recognizes the so-called *principle of legality by investment*,[49] ignores the obligations born outside the law. The legal obligation will always have a cause, and to know what this cause is, a title is needed to reveal it. The cause is expressed by the title.

The cause of the obligation can be mediate or immediate. *The mediate cause* of the obligation is the law, that is, the legal norm. The *immediate cause* is a source of the obligations, such as a contract, a quasi-contract, a crime, a quasi-delict, a misdemeanor, an unjust enrichment, an abuse of the right,[50] among others. The legal obligation will always have its origin in the legal norms or in the sources of the obligations that these norms establish. Outside these, the obligation loses its legal character and becomes a moral, religious or public use obligation. The cause of the obligation is always the legal norm because it is the one that establishes the sources of the obligations; in fact, article 1308 CC indicates thatlaw itself is one of the causes of the obligation.

The classification between mediate and immediate cause of the obligation is for academic purposes of systematization and exposure of the information that is presented herein. However, the difference between the mediate and immediate cause of the obligation has practical effects because when the fact with legal incidence either does not fit or does not match the legal hypothesis or factual scenario, the legal consequence cannot be coordinated or

49 But this rule (closing clause of the positive law), in order to be formally valid and coherent in a system of norms, requires another rule that enables what is not prohibited or prohibits what is indefinitely allowed. This is because the system of norms has as a last support or filter the content of the general principles of law. From a positive dimension, it is not entirely true that the facts are always manifested within a full and coherent legal system, but rather, this is a presumption. Therefore, it is not strange that acts such as the change of sex of persons due to transsexualism and intersexualism, despite not being expressly prohibited, are also not considered to be expressly allowed or enabled. Instead, to resolve this type of case the jurisprudence resorts to general principles of law and other sources of law, such as international jurisprudence and doctrine, for example. However, what is provided in Article 8 CN is that, one cannot reproach for something not forbidden that was done, nor can one reward or acknowledge what is not allowed. This is the basis of criminal law, which does not prosecute a conduct that is not criminalized by the law.

50 Concerning an unjust enrichment and an abuse of law: *vid*. BONNECASE, Julien, *Elements of Civil Law,* Volume II, Volume XIV, translated by José M. Cajica Jr., Editorial José M. Cajica R., Puebla, Mexico, 1945, pp. 307-334.

configured. Therefore, the legal system must resort to *legal instances of assistance* or help. Indeed, when the obligation arises from a source other than the law, the first recourse is to the same law (legal norm); and when the obligation arises directly from the law, the legal sources are consulted, including the general principles of law. There is, therefore, a principialist assistance for obligations, which in turn becomes a cause of legal obligations.

5.1.3. Principialist cause of the legal obligation

The principialist cause of obligations is the genesis of the forces of the legal world. This cause prevails in the legal world to a centripetal force that can be described as follows: *Values / principles as sources of law / law / legal obligation.* It is as if in the physical world the causes of the forces that govern and explain it will be sought as if it were a question of knowing the origin of the world. Similarly, from this conception, the remains of a *legal Big Bang* are sought, not limited only to codified norms, but also looking into the antecedents of the forces that give effectiveness to human relations within the legal world, that is, into the most remote antecedents of obligations.

It was previously indicated that the cause of the obligation is the law or legal norm, which has been called the *mediate cause of the obligation*, but such statement does not reveal or *discover* anything new. However, what is historically disputable and still debatable today is that the law is not the origin of obligations in the first place, but that the true germ of obligation is found in the sources of law, particularly in the general principles of law. These principles translate (make comprehensible) the messages of the prevailing values of the historical era to the recipients of the objective order in which those principles exist. Hence, it is the general principles of law that *not only reveal, but also cause* the origin of legal obligations. The legislative activity itself is steeped in values.

It should not be forgotten that the general principles of law do not aim to empty the law; on the contrary, to prevent them from overflowing or

saturating the legal framework, they have established their own restraint or counterbalance through principles that support the realm of the positive. This is quite rightly so, because there are values that are a reinforcement of the same codified order, for example, that of legal certainty, which is forcefully expressed through the principle of legality in its different dimensions. It would not be logical for the application of general principles of law to render ineffective that which they themselves are based on. Therefore, it is insisted that the general principles are applied in a supplementary or auxiliary way to the positive law. This is the double function with which they operate, in principle, (1) as the founders of the legal order, and then, (2) in aid of the application of the law.

5.1.4. Principialism and sources of Law

The sources of obligations should not be confused with the sources of law. The sources of law have been conceptualized in various ways and have been named as sources of knowledge, creative forces, creative authorities, grounds of validity, and forms of manifestation of norms,[51] among others. However, without aiming to present a definitive concept and in accordance with the legal approach used in the elaboration of this article, we can say *that the sources of law are the ways in which law reveals or manifests itself.* As law, as explained, is only *discovered*, the sources of law are the means through which it *reveals* itself to its recipients.

In the sources of law, specifically in the values, lies the core of the legal world, or if preferred, they are the pillars or foundations on which it stands. It is vitally important to know the sources of law in order to understand the nature of human relations, and to differentiate those that have legal content from those that do not.

51 LEGAZ y LACAMBRA, *Philosophy of Law,* 5th edition, Bosch, Barcelona, 1979, p. 509 cited by AGUILÓ REGLA, Josep, *General theory of the sources of Law (and the legal order),* Ariel, Barcelona, 2000, p. 22

The sources of law have traditionally been treated by civilists, however, nowadays it must first be considered as a fundamental issue of public law,[52] and certainly of social law, which requires a general theory to discover and explain it.

The sources of law include (1) values,[53] and within these, legal values, (2) the general principles of the Law, and more precisely, the special principles of the different areas of law, (3) the jurisprudence or *juris prudence,* (4) customs, (5) the law, (6) legal acts and, of course, (7) the scientific doctrine. In regardless the sources mentioned above, it should be borne in mind that, among all the sources of law "discovered", the values occupy the first place in the *scale of legal abstraction*. These values are the founders of the legal order, and from these values, the legal assets protectable by the historical society that recognizes them and the facts legally reproachable are detached.

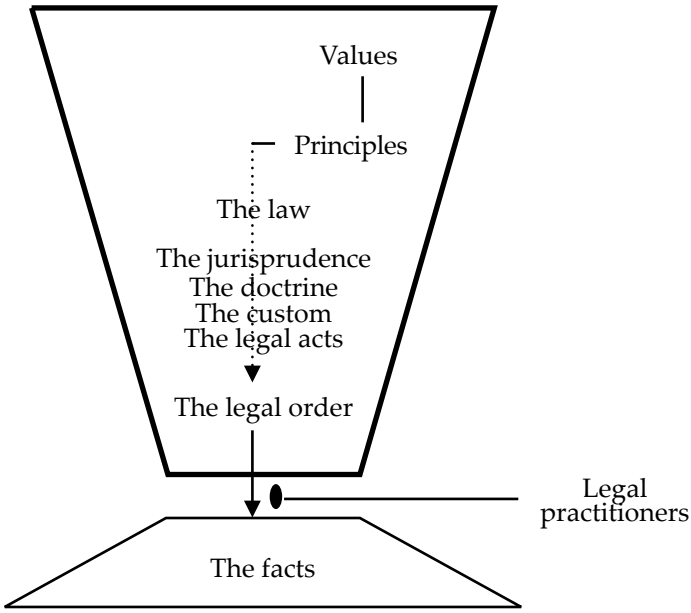
However, because of the high level of abstraction values require a link with human reality, and *those links are the general principles of law.* Thus the jurisprudence, the law, and even the legal acts, on the scale of abstraction are slightly below the values. For this reason, they are imbued with the essence, to a greater or lesser extent, of the same values,[54] and, of course, the specific cases they regulate are as well.

52 *Vid.* GARCIA CUADRADO, Antonio M., *El ordenamiento…, op. cit.*, p. 195.

53 The Law appears, hides and reincarnates in the values. This is the legal existentialism, the Dasein of the ought to be.

54 The norm is made up of social values that the community has decided to protect and regulate, regardless how they are presented. *Vid.* SOTO GAMBOA, María de los Ángeles, *Notions…, op. cit.,* p. 17.

The following "inverted" trapeze may indicate the ideas above.



It can be seen that it is preferable to use a trapeze rather than an inverted pyramid because the law is an infinite system which renews itself constantly and progressively without finding an ending point.

5.1.5. The legal norm

As explained in this article, there are two orders of realities: a physical order, with unalterable norms that are always inexorably fulfilled (laws of nature), and an ethical order, in which the norms can be broken, as they refer to the behavior of man, and he is free to comply or break the rules. The ethical order is therefore governed by a set of norms, among which can be classified, according to their nature and purpose, into moral, religious, legal norms and social uses.[55]

55 *Vid.* GARCIA CUADRADO, Antonio M., *The ordering…*, *op. cit.*, p. 196.

Legal norms are those rules that regulate free human behaviors that may be judicially enforceable.[56] Therefore, as indicated above, among the aspects that differentiate legal norms from those that are not, there is the possibility of resorting to the jurisdictional bodies to demand compliance, that is, their enforceability.

It should not be forgotten that the concept of norm invokes a broader idea than that of formal-law, because the formal-law, like custom and jurisprudential decisions, is a manifestation of the legal norm.[57] The legal norm in the law-formal dimension finds its offspring in the principle of legality. This principle substantiates the closure of a legal system by means of codified norms. The rationalists, precisely the positivists, considered it necessary to indicate through written precepts which human behaviors were juridical and, by exclusion, which were not, without prejudice to a post-legal evaluation. Indeed, the principle of legality, based on the value of legal certainty, seeks to provide legal stability; however, the law is not exhausted by what is positive, but it is a closing key for the most repetitive and legally relevant behaviors.

5.1.6. Principles and legal norms

Legal norms are a reflection of values and principles; they are values embodied in the material reality of a society. Unlike the principles, as previously stated, values are too abstract, they require a link with reality, and that link, that guide to the human world, are the general principles of the law. These principles are the ones that establish (translate) which norms must exist, which must be repealed and which must be understood to exist, even without their prior codification, that is, surpassing the same legislative activity, that is, overwhelming the principle of legality in a rational way. Therefore, it has been said that the principles fulfill a *founding or revealing* function of the Law.

56 *Ibidem,* p. 196.

57 *Vid.* SOTO GAMBOA, María de los Ángeles, *Notions…, op. cit.*, p. 17.

Furthermore, principles serve an *auxiliary function* in the application of law, which involves the odd aspect that, in addition to their *foundational function,* they also serve a suspensive function of law. This may seem particular because, without eliminating the rule of conduct they underpin, they only suspend it in a particular case. The complete suppression of a norm or rule of conduct must be carried out in compliance with the principle of legality, that is, under the *principialist order,* through legislative or jurisprudential activity, the latter being reserved for the Courts that issue judgments with *erga omnes* effects and binding on lower courts. Therefore, the general principles of Law, while revealing Law in the abstract, also reveal how it should be manifested in the concrete, regardless of whether this means the need to temporarily suspend the efficacy of a rule of conduct in a specific case.

The legal norms, and consequently, the legal obligations, have a *principialist cause*. This is reasonably correct; that's why it is not surprising that legal norms may be disregarded, even by courts, in favor of general principles of law, and of course, in the face of specific principles of different branches of law. It is entirely reasonable that a legal proposition loses its validity in a specific case when it collides with a principle of law. Therefore, a principle of law has enough strength to override the effectiveness of a legal norm in a particular case.

Illustrative Casuistry

An example is presented below in which a codified norm loses its force against the principles of the Law. For this purpose, the vote of the substitute magistrate that resolves the discord in the procedure of loss of parental neglect due to abandonment without justified cause, classified under reference 129-13-SA-F2, of the Family Chamber of the Western Section, known on appeal, will be cited and commented on. The recitals of the said vote are the following:

Article 206 of the Family Code stipulates that: Parental authority is the set of faculties and duties which are granted and imposed by the law on the father and mother over their children who are minors or declared incapable, so that they are to be protected, educated, attended and prepared for life, and they are represented by their parents. Their assets are also to be managed by their parents.

It is understood that, parental authority involves a host of faculties-duties, a series of reciprocal relationships between parents and children. The duties of the parents become faculties for the children, and what is expressed as faculties for the father becomes a duty for the child, and more especially, in front of the other parent who must respect those prerogatives, and even demand them when they are not fulfilled. From this perspective, it should be understood that the exercise of parental authority is not always observable, nor is it always fulfilled, either due to intentional and attributable acts by one or both parents, or due to acts not attributable to them, for some justifiable reason.

In the first case, when the parents consciously and intentionally fail to comply with their parent-child duties, the law provides, for the causes determined in article 240 CF, the loss of parental authority, as a legal sanction of a family nature, which results in the elements of parental authority (1) Personal care, (2) Legal representation and (3) Administration of assets of the son or daughter, not being exercised by the parent who has been sanctioned with loss of parental authority. In the second case, when configuring the assumption of fact that concretizes the legal consequence (legal warning), it cannot be attributed to the father or mother who is intended to be sanctioned with the loss of parental authority due to circumstances beyond his or her control which mitigate or exclude their responsibility. In the first case, however, when the cause of loss of parental authority has been proven, and that therefore, the precept established in Article 240 subsection 1 CF must be obeyed which states:

*The father, mother or both will lose parental authority over **all** their children, for any of the following causes:*

1ª) When they corrupt any of them or promote or facilitate their corruption;

2ª) When they abandon any of them without a justified cause;

3ª) When they incur in any of the conducts indicated in article 164; and

4ª) When they are convicted as perpetrators or accomplices of any intentional crime committed against any of their children.

*The legal proposition clearly states that the father, mother or both will lose parental authority over **all their children (...).** In this regard, it cannot be denied that it has been a practice of the Salvadoran judicial activity to interpret the legal norm textually (historical-exegetical interpretation) leaving aside any interpretation in accordance with the Constitution, the coherent system of the legal system and with a human rights approach under a principialist conception of law.*

Therefore, under a literal interpretation, it is easily noticeable that, regardless of the number of children sired by the parent sanctioned with the loss of parental authority, the effects of the sentence of loss of parental authority extend to all of them. In other words, it is a sentence with pluripersonal effects, regardless of whether they are guaranteed a prior hearing in which all the children are heard.

Consequently, regardless of whether they are traditional siblings (when they come from the same parents), or half siblings (when they come from the same ancestry in the first degree, differing in the other parent), the effects of the sentence are extended to these siblings.

According to a Human Rights approach and an interpretation in line with the Constitution, in those processes where the cause of loss of parental authority reaches a gravity that requires the child to be removed from the parental relationship, due to its imminent preventive protection, to safeguard certain legal goods or fundamental rights, the sentence should indeed have pluripersonal effects. Such a sentence must be extended to all the children of the parent sanctioned with loss of parental authority, given the claim of loss of parental authority is based on the

fourth ground of Article 240 CF. Otherwise, the effects of the sentence should only reach the children for whom the corresponding process has been promoted, and those who have participated in the process; on the contrary, the child's right to express an opinion would be violated. In addition, the right of defense of the defendant and the children who did not participate in the process would be affected, because those effects affect fundamental rights concerning people with whom they maintain family relationships, whether they are effective or not. In that regard, when the loss of parental authority is promoted by abandonment without just cause, it would not be fair if the effects of the sentence extend to all the children of the parent who incurred a sanction because of the assumption of article 240 causal 2 CF; otherwise, the sentence would be excessive for reaching the interests of the children who did not participate in the corresponding process.

It is then noted that the interpretation made in the related judicial ruling obeys a *principialist conception of law,* because the judge is not limited to being the mouth of the law, but refers to exploring and understanding the genesis of law, to explain it and apply it. The judge, in the commented vote, valued the defendant's right to defense and hearing, his right to a fair trial or prior trial. The judge also valued the right of the child to be heard and to have effective filial relationships to unity, integration, and family solidarity, and of course, their best interests, under equity and justice. This set of values and principles subtracted (*suspended*) the vigor of the norm codified in the specific case, which established that the sentence of loss of parental authority should be extended to all the children of the sanctioned parent. Then, it can be strongly said that the principles may overthrow (*suspend*) the legal norm *in concreto* cases. Hence the judge must apply the legal norm (Art. 86 subsection 3, 172 and 235 CN), but in coherence to a logical and fair law system, not a mechanical and irrational law.

So far, this article has referred to the cause of the obligation, but it remains to refer to the title that expresses that cause.

5.1.7. The title expressing the cause of the obligation

The title does not refer directly to the cause of the obligation, but to the instrument that proves its existence and the way in which it was generated. The title of the mediate cause is the legal text, the legal norm itself; the title of the immediate cause is the instrumentalized fact or legal act that generates *the necessary requirement to obey to obtain approval or to avoid a legally established reproach.* The mediate cause has a title *in general*, while the immediate cause, a title *in particular*. In that order of ideas, the sentence is the title that expresses the cause of the crime, for example, homicide, theft, kidnapping, which generated the criminal responsibility borne by the perpetrator. The contract or written agreement is the title of the contract of sale, exchange, and of course, of other conventions that generate obligations, such as the divorce agreement, of maintenance, of marriage contracts, and even the marriage itself, for example.

Thus, the obligation of the father to provide maintenance for the child has its source in the law, particularly in articles 33 CN and 247 and 248 CF. However, when the father is forced to provide maintenance for the child, through a maintenance agreement signed before the Attorney General of the Republic (art. 263 CF) or by means of an enforceable sentence in maintenance or divorce proceedings (arts. 247 and 111 subparagraph 1 CF), the law is still the *mediate cause* of the obligation, in this type of cases, the title that expresses the immediate cause of the obligation is the agreement or the respective sentence though. Then, it is no longer a generic source, as though the law, but a particular title is present, and therefore, it has the same effects. The same applies to the obligations of visiting arrangements, personal care and those derived from the marriage union (the title of these obligations is the instrument in which the marriage act was formalized).

However, there are enforceable obligations that only become for a particular title, that is, through an *immediate cause,* such as the obligation of the guardian to take care of the ward and to administer their goods, except for the

obligation of the relatives who are called to exercise the legitimate guardianship of the ward (Art. 291 CF), in respect to the principle of *family solidarity;* but in any case, the corresponding sentence is required to require the relatives to fulfill their obligations as guardians. Therefore, it is this point that should not be lost sight of, because the fulfillment of non-enforceable generic obligations cannot be claimed, that is, obligations arising from a previous judicial declaration, such as the obligations derived from the judicial declaration of non-marital union or those that arise as a result of the divorce decree, such as the payment of compensatory pension, for example.

The title has practical effects. While the positive-current norm (title of the mediate cause) imposes on the parents the obligation of providing nourishment, this obligation is generic, since there is no time limit to establish its expiration and, consequently, to execute its collection. On the other hand, the sentence (title of the immediate cause) imposes payment dates and the amount of maintenance to be paid, allowing for the calculation of a specific amount and a collection period. Therefore, on one hand, it enables the execution of the title through the collection action in favor of the child, and on the other hand, the prescription action in favor of the maintainer, which are the issues worth to be pointed out in this article.

It is debated though whether the title of the obligation is autonomous to the motivating underlying relationship as in commercial matters concerning securities. For example, ccan a child support judgment be executed when the paternity or maternity of the maintainer has been challenged concerning the recipient of support? Or can a divorce judgment - considering that it was issued on the basis that the defendant was of unknown whereabouts - be enforced regarding the payment of spousal support when the marriage for which it was imposed has been declared null? In the first question, it has been considered that a sentence is an act of authority that must be obeyed for legal certainty. Therefore, although it is true that such an obligation had no foundation from

the moment the filial bond was challenged. It is true that such a judgment produces effects as long as they do not cease through legal mechanisms.[58] In family matters it has been estimated that despite being personal relationships, the title is autonomous to the motivating underlying relationship, since it is valid as long as the contrary is not declared consequently producing full effects.

5.2. The Obligatory Life

After exposing the origin of a legal obligation, it should be noted that after its birth, it will go through a regular process that will end or be renewed with the fulfillment of the legal obligation depending on whether the obligation is periodic or not. The obligation has its own life, and thus, it will undergo a legal development, going through a series of stages according to its nature, as determined by the law, and above all, the will of its holder. However, like any process that can be diverted from its normal course, the legal obligation may follow an irregular process which will cause it to be extinguished in a way that was not originally foreseen.

The birth of an obligation is subject to conditions, under penalty of being discarded by the legal order under a kind of *natural selection* because the obligations that contravene the legal order are unknown under the established mechanisms as is the case with acts that generate obligations that are null and void. So the birth of an obligation is not as simple as one might think, but quite the opposite, and it is of the utmost importance because it marks the life expectancy that the obligation will have. The life of an obligation can be charged with as many events as the owner of the obligation allows.

58 It is difficult to resolve such a situation because the process of cessation of maintenance obligations does not foresee this ground (Art. 270 CF) and, due to the *principle of objective challenge*, the appeal for review of sentences is not simply configured, although it should be appropriate. On the other hand, because of justice, the illegitimate obligation should be disobeyed, and if the obligor is sentenced for such behavior, he should be assisted by the corresponding constitutional remedy.

During its life, the obligation can undergo changes in its structure or elements (subject, object, legal link, and cause), and at the same time it may face situations typical of the mandatory life such as partial payment, default, and legal interest. However, these situations are not essential or typical to their life course because they are contingent or incidental circumstances. For example, regarding the change in the obligation structure, it may mutate into a natural obligation (the legal bond loses force); it may be subrogated, legally or conventionally (the subjective element changes), and it may even be suspended (by fortuitous event or force majeure), among other aspects, regardless the death or extinction of the obligation for an effective compliance.

Regarding the contingent circumstances with which the obligation can be accompanied, we can mention that the obligation can be secured through real or personal guarantees, or in turn, be assisted by penalty clauses, earnest money, or the payment of conventional interests. We are truly talking about a form of obligational reproduction because the cause of the guarantee is found in the main obligation for which it is constituted, meaning that the accessory obligation derives from the main one. Let us refer to some aspects of the obligational life that are of interest to be explained in this article.

5.2.1. Natural, moral or conscientious obligation

Concerning the relations between the members of a society in which someone provides another with an advantage or satisfies a need or a benefit, only some of these, legal obligations come to be directly supported by the legal-political organization of the society. This organization confers full efficacy and validity to the legitimate action of the subject, putting its power at the service of the creditor[59] in order to obtain the satisfaction of their interests.[60] It must

59 Little use has been made of the term *creditor* as it is a concept of Private Law, far from Family Law, although in reality the creditor is both in Public Law and in Social Law, despite the fact that the basis of credit is totally different.

60 *Vid.* MEDINA PABON, Juan Enrique, *Civil Law: Approach to Law. Rights of Persons.* 2nd edition, Jurisprudence Lessons Collection, University of Rosario Editorial, Colombia, 2010, p. 333.

be remembered, then, that legal obligations, according to their possibility of being prosecuted in court, are classified into civil and merely natural or simply natural obligations.

Pursuant to article 1341 CC, *the obligations are civil or merely natural. Civil obligations are those which give the right to demand compliance. Natural obligations are those which do not confer the right to demand compliance, but once obeyed, authorize to retain what has been given or paid by reason of such obligations.*

In principle, all obligations are presumed to be civil, except those not established by the law. The civil obligation allows its execution in case of its eventual breach, and it must be demanded before the public authority. This public authority is to be under the obligation to activate the legal mechanisms to comply with it or to compensate for its breach. On the other hand, obligations that are merely natural or simply natural, although they can be demanded in court through the right of access to justice and petition, the law does not authorize the assistance of the State in favor of the petitioner; that is, the State must not activate its apparatus to achieve compliance with the disobeyed obligation or to compensate for its breach. In this case, the action would be illegal and the resolution would be challenged. Therefore, a natural obligation does not enable any action to demand compliance, that is, it does not entail execution. In effect, the compliance of a natural obligation depends on the will of the debtor, but once fulfilled by the latter, the return cannot be demanded (to repeat is the technical word) and the creditor is entitled to retain the satisfied interest.[61] Hence, they are called natural, moral[62] or conscientious obligations because their fulfillment is at the discretion of the debtor or obligor.[63]

61 *Ibidem,* p. 333.

62 Natural obligations come to be an intermediate type between moral duty and legal obligation. *Ibidem,* p.334.

63 The obligation may have a moral or conscientious nature, the main effect of which lies in the fact that what has been handed over in compliance of the said duty is unrepeatable. *Vid.* JULIAN, Emil Jalil, "*El sistema…*", *op. cit.*, p. 7.

The natural obligations that Salvadoran legislation recognizes, according to article 1341 CC, are the following.

1º. *Those contracted by people who, having sufficient judgment and discernment, are, however, unable to bind themselves according to the law such as unauthorized adult minors;*

2º. *The civil obligations extinguished by the prescription;*

3º. *Those that come from acts that lack the solemnities required by the law so that they produce civil effects such as paying a legacy imposed by a will that has not been duly granted;*

4º. *Those that have not been recognized in court for the lack of evidence.*

The list included in the above-mentioned article is appraised, limited or closed. The natural obligations are so by (1) innate causes to its birth or by (2) supervening causes. Thus the natural obligations related in the 1st and 3rd ordinals of article 1341 CC, are for innate causes to them, because they were born with a vice that did not allow them to be constituted according to the established legal order. It is as if there is a kind of *natural selection in the legal world* that discards those imperfect legal creations. On the other hand, the natural obligations mentioned in 2nd and 4th ordinals were born perfectly, but in their legal development, in their obligatory life, they were affected by a vice that removed their vigor to be prosecuted in court. This is why they have been called *aborted obligations,* because being civils, they lost the possibility of being claimed in court, mutating into natural obligations.

Natural obligations, compared to civil ones, have their distinctive notes:

a. *They do not enable legal action: The main characteristic of natural obligations is that they do not enable legal action against the debtor, neither to claim compliance with the obligation, nor to demand compensation for its breach. Based on the right of access to justice, of petition and response, the creditor has the right to formulate the petition to the jurisdictional entity, but the latter must not accede to it without the rejection of the attempted action extinguishing it, based on the natural obligation, as stated in article 1342 CC.*

b. *They admit guarantee: Although the force of the legal bond has been unknown to the State, the law allows natural obligations to be secured by real or personal guarantees, provided that the one who constitutes the surety is, at the time of establishing it, aware of the circumstances that turn the obligation that ensures into a natural obligation, as provided in article 1343 CC. The law respects the autonomy of the will of individuals and allows their relationships to be based on the fluidity of the legal traffic. However, it is debated whether the legal action can be tried against the guarantor, the pledge or mortgage debtor, of a natural obligation, who were constituted as such having knowledge that they were assuring a natural obligation. At first, it is considered that it is not, because the accessory obligations follow the fate of the principal one, and because the third party should not answer for what the principal debtor was not obliged to do. At another time it is considered to be so, because the law enables it, based on the consent of the guarantor, that is, that its own will overcomes the natural obligation, otherwise it would not make sense to ensure compliance with an obligation that they do not recognize. In other words, the guarantor, the pledge or mortgage debtor, recognize the civil vigor of an obligation that is natural. This thesis seems correct, on the basis that the natural debtor also consents to it for subrogation purposes. Indeed, the guarantee of natural obligations is validated based on the consent of the guarantor and the debtor.*

c. *They allow retaining what was paid when the payment was done voluntarily: A second essential characteristic of natural obligations is that what is paid for them cannot be repeated. The natural debtor cannot claim the payment of what is not due, when he has already made the payment voluntarily. The natural creditor has the right to keep in its assets and dispose of what has been paid as a natural obligation, including with the support of the public authority. As it is understood, the execution of the natural obligations is validated based on the consent of the debt holder.*

d. *Indirectly operates as an exception (It is a procedural consequence): Procedurally, natural obligations indirectly dismiss the claim brought against the debtor because if the facts are proven that turn a civil obligation into a natural obligation, the claim based on them must be rejected, notwithstanding the debtor's*

acknowledgment. Obligations become natural due to the cause that gives them such a status, without the need for a prior judicial declaration to consider them as such. Therefore, in the same proceeding in which the claim for payment is litigated, the reason for the civil obligation becoming a natural one can be proven. In other words, the fact that an obligation becomes natural is the effect, and the exception is the cause that produces that effect. For example, the exception is prescription, and the effect of proving this exception is that it results in a natural obligation, which dismisses, therefore, the claim.

The judge will be obliged to recognize the existence of a natural obligation ex officio when the cause for it does not prevent it. However, the causes that give rise to natural obligations, which are relevant in this article, must be alleged at the request of a party. Thus, the third cause stated in Article 1341 of the Civil Code must be alleged and proven by the debtor, preventing the judge from recognizing it ex officio. The same applies to the first cause mentioned in the same article. Both causes refer to prescription and relative nullity, respectively, which are applicable at the request of a party. On the contrary, the second cause of the same article operates differently because the lack of formalities is a cause of absolute nullity, which, according to Articles 1552 and 1553 of the Civil Code, the judge must declare ex officio.

5.2.2. The contractual sanction or guarantee: The penalty clause

The contract is one of the sources of the obligations. The contract is an agreement between subjects of law by means of which the fulfillment of unilateral or reciprocal obligations between them is imposed. In contracts, the autonomy of the will of individuals prevails, provided they do not contravene the established legal order. Therefore, the limits of the obligations acquired by the contracting parties are as flexible as their will, provided that such flexibility does not exceed the legal framework on which it is agreed.

Based on the flexibility above, it is debated whether individuals, considering that in their private relations the autonomy of the will prevails, can stipulate sanctions among themselves for the breach of the acquired obligations. In this regard, a sector of the Doctrine argued that it is not possible for individuals to agree on sanctions among themselves, but only to mechanisms to guarantee the assets committed in their contractual relationships.[64] Another side of the Doctrine considers that, in the case of private relationships, they can agree on sanctions, as long as the law does not prohibit such a situation, because the sanctioning activity that is characteristic of the public authority, is by omission guaranteed in favor of individuals. However, in the positive order and for legal certainty, for a conduct to be supported by the public authority, a norm is required so it enables this conduct (articles 86 subsection 3 and 235 CN). The absence of a norm that prohibits conduct is not enough for such conduct to be endorsed by a public authority (article 8 CN). Therefore, in principle, it is not admissible for individuals to agree to the imposition of sanctions among themselves.

On this point, it has been discussed whether it is possible for a civil law institution, such as the penalty clause, to be incorporated into institutions proper to family law. This means that legal figures born under the philosophy of protecting and compensating a credit right (in which the particular interest prevails, for profit or not) take place in legal relationships of social interest and be far from seeking to obtain a lucrative interest. Since they seek to guarantee the continuity of the family group and the integral and progressive (bio-psycho-social) development of its members.

Therefore, a brief comment will be made on what the *penalty clause* is in contractual relationships, in order to assess its legality when included in instruments (immediate cause of the obligation) that establish the payment of alimony, special alimentary quota, or compensatory pension.

64 It is even prohibited in some legislations, as it happens in the Belgian Code. Behind this reality seems to lie the idea that it is inappropriate for individuals to agree to a fine or sanction other than pure compensation for damages. *Vid.* DIAZ ALABART, Silvia, *The penal clause,* Reus Editorial, Madrid, 2011, p. 40.

Generalities: Concept, classes and legal nature

According to Art. 1406 CC, *the penalty clause is that in which a person, in order to ensure compliance with an obligation is subject to a penalty consisting of giving or doing something in case of not executing the main obligation or in case of delaying its execution.*

The object of the penalty clause is the payment of a sum of money, or any other benefit in kind that may be the object of a legal obligation, either for the benefit of the creditor or a third party[65] as agreed by the contracting parties.

The Civil Code of El Salvador recognizes the existence of two types of penalty clauses: (1) compensatory and (2) moratory, depending on whether they are applied for the non-performance of the obligation or for the delay in its fulfillment. Therefore, these penalty clauses serve both a repressive and preventive purpose. In reality, apart from their approval, they have a preventive and repressive or punitive function, but not a guaranteeing one, as will be explained later. When there is non-compliance or delay in fulfilling the obligation, the legal warning takes place. This means that the possibility of demanding the second obligation is activated, which is not intended to directly satisfy the main obligation but rather to repress and compensate for the non-compliance or delay.

The penalty clause is of a contractual origin; therefore, it is governed by those rules. The penalty clause is an accessory element of contracts, and it may or may not be present in them. For this reason, the penalty clause must be expressly agreed upon. This clause is always accessory; it follows the fate of the main obligation. For one sector of the Doctrine, its legal nature is that of a *surety* and not a guarantee[66] as it is a *duplicate obligation* on the part of the debtor, who has no greater possibility of ensuring the satisfaction of the creditor than

65 The penalty clause is intended to benefit the creditor, although it may be in favor of a third party. See more characteristics in ibid., pp. 40-41.

66 It has been indicated that between surety and guarantee there is a gender to species relationship.

the one with the main obligation.[67] Another part of the Doctrine considers the penalty clause as a *guarantee* in itself because it constrains the debtor, under the threat of patrimonial content charges to fulfill the acquired obligation. However, the penalty clause is similar in nature to the *personal recognizance* (which is not strictly a guarantee) because the same obligor cannot also be guaranteed, taking into account that they are, as a general rule, the sole owners of an estate.

A different situation arises when a penalty clause is imposed on a third party, a new patrimony comes into play, and therefore, a true guarantee is established. It differs from a surety, as the party obligated to pay the penalty (fulfill the penalty clause) does not assume the entire obligation of the debtor, but only the obligation to pay the stipulated penalty, whether for non-compliance (compensatory) or for delay (moratory). The penalty clause in charge of a third party is configured as a guarantee of a personal nature as opposed to the *down payment,* typified as a real guarantee.[68] In any case, it is not a guarantee of the entire debt, unless the penalty clause covers the full amount of the debt.

Doctrinally there is much to comment on, but it is not the object of the present work, since it is not intended to exhaust the subject, but to illustrate the necessary points to be treated in this article. What it does need to be considered is whether the penalty clause, which operates on credit relationships, is compatible or not with family assistance relationships, taking into account the differences between these two relationships.

67 *Vid. Ibidem,* p. 59.

68 MELICH-ORSINI, José, *General contract theory,* 4th edition, Academy of Political and Social Sciences, Caracas 1997, p. 561 to 585 cited by MORALES HERNANDEZ, Alfredo, *Garantías mercantiles,* Editorial Texto C.A., Andrés Bello Catholic University, Caracas, 2007, p. 74.

Credit relationships	Family Assistance Relationships
They operate outside the relationship	They seek family unity and stability of the social group
The purpose is of a patrimonial nature	Its purpose is the continuity of the family group (extra-patrimonial)
The objective is particular	The objective is family-collective
There is a selfish protection of assets	There is solidarity protection for the family group
The legislator does not intervene actively	The legislator intervenes actively
They enable criminal sanctions	They enable criminal sanctions

There is no normative provision establishing the *penalty clause* is an institution reserved for civil or commercial contracts. However, based on the family legal order, in principle, it does not seem acceptable to seek a lucrative activity against the debtor, by the holder of the credit right. For example, it would seem debatable the imposition of a penalty clause on the father who fails to comply with his periodic maintenance obligations, or in the payment of special alimony, even though that these are situations that are not far from reality. Thus, in a divorce agreement, the applicants established, together with the payment of the maintenance fee and the annual update basis of the same (article 108 clause 2 CF), that the obligor had to pay ten percent of the child support for not making the corresponding payment on the agreed date, plus the corresponding maintenance fee. Such a moratorium sanction had been inserted in the form of a penalty clause. However, this clause was not approved in the Divorce proceedings by mutual consent, as it was considered excessive at the expense of the provider. In addition, that clause had no correspondence with the purpose permeating the principles of Family Law.

The same happens with the *legal interests* claimed for the non-payment of the maintenance fee, which would not proceed because they do not obey the purpose of family assistance that the maintenance is intended to provide. Notwithstanding the above, it cannot be denied that the admission of this type

of stipulation in agreements that have family obligations is not prohibited; However, based on the nature of credit relationships and family assistance, the penalty clause would be admissible in those obligations that are predominantly credit-based, such as the settlement of marital property or the payment of compensatory alimony, and not in family assistance relationships, such as child support and special alimony payments. Otherwise, the purpose of family assistance relationships would be distorted, and their *mercantilism* would be given. It should not be forgotten that legal obligations must be rational, objective and necessary; and that they are a function of historical values and, specifically, of the principles reproduced in a human conglomerate. These principles, regarding family assistance, are not coordinated with the idea of credit with which the penalty clause is impregnated.

5.3. Compulsory decease

Nature can grant long periods of time, but not indefinite time. The legal world operates under the same logic, hence the foundation of prescription and expiry, as it will be seen later. It has been said that the Law as a living organism changes its cells, changes its elements and is updated in time, and people *discover* it, as its progressive changes are revealed. From this perspective, the legal obligation is born with the fate or fortune of death. The obligation is extinguished as part of a whole that lives on even after it.

Nothing is eternal in the physical world, everything is constantly changing and subject to an end. In the same way, in the legal world, legal institutions suffer alterations, and above all, they are extinguished, either by the intervention of the subjects of law (legal acts) or by the action of natural phenomena (legal facts). This is the effect of the passing of time. This fate follows the legal obligation that since its birth has been condemned to death. However, the death of an obligation is more precise than its birth because, regarding its birth, the law is very broad, pointing out various ways of how an obligation can

be conceived. The death of obligations is not the same because the law has been more rigorous, carefully indicating the ways in which they are extinguished.

Ways to extinguish obligations

The Salvadoran Civil Code regulates the extinction of the obligations in Title XIV of Book IV, specifically in article 1438.

The existence of the obligation must be recorded from its birth to its death. This follows *the principle of the instrumentality of the act*. The death of the obligation will be determined by the reason and conditions of its death, that is, by the mode of extinguishing the obligation that operated on it. The modes of extinguishing obligations are the facts or acts to which the law attributes the value of ceasing the effects of the obligation.[69] It is said that an obligation has been extinguished when, by virtue of a specific action, it has been definitively canceled.[70]

Obligations can be extinguished in whole or in part. They are completely extinguished when the object of the obligation was fully satisfied, disqualifying the creditors to demand the collection of what was owed to them. They are partially extinguished when the creditors were partially satisfied with respect to the credit in their favor, the collection action of the remainder or residual owed being safe.

Obligations can be extinguished directly or indirectly.[71] In the first case, the obligation is flatly satisfied or canceled. In the second case, the obligation disappears due to the expiration of the force of the instrument (title) that gives life to the obligation, as when the contract is declared void. In this case, the obligation is not understood to be satisfied, either real or fictitious. The forms of direct extinction are payment, the novation-delegation, debt remission, compensation, confusion, and prescription.

69 *Vid.* RAMOS PAZOS, Rene, *Of the obligations*, Legal Manuals Collection, Editorial Jurídica de Chile, Santiago de Chile, 1999, p. 319.

70 *Vid.* ESPINOSA, José María y Enrique GOMEZ, *Lessons of Roman Law*, coordinators Lucia Bernard and Gabriel Buigues, European Higher Education Area, Universitat of Valencia, 2011, p. 146.

71 *Vid.* BONNECASE, Julien, *Elements…, op. cit.*, p. 451.

Without wishing to explain each of the ways of extinguishing the obligations recognized in article 1438 CC, a brief reference will be made to some of them in order to make some considerations about family obligations.

5.3.1. Rescission

Rescission or mutual agreement is the act by which the contracting parties, by mutual agreement, decide to consider the stipulated obligation as fulfilled. Rescission can be seen as the contractual agreement by which the generated obligation is rendered void, as it is considered to have been satisfied, even if it has not been actually executed.

Subparagraph 1 of article 1438 CC, provides that:

All obligations can be extinguished by a convention in which the interested parties, being able to freely dispose of their own, agree to consider said obligation fulfilled.

The legal proposal quoted is the legal basis of the mutual agreement. In this proposal there is the germ of the idea that *the contracts as they are made are undone.* This is correct because the facts are done; instead, the Law is updated and discovered. The autonomy of the will, just as it disposes to create, it disposes to rescind what is created. TRescission operates under a legal fiction, as it deems something fulfilled even when it was not actually complied with. Rescission is, in itself, a way of *self-composing* future disputes and, indeed, it is a form of private justice.[72]

Only what is one's own, that to which one is the holder or author, can be disposed of, not that which becomes imposed. Therefore, we must state that, particularly in Family Law, there are obligations imposed by the law that have the characteristic of being non-disposable by individuals. As a result, they cannot be terminated by mutual agreement. Thus, rights that do not fall within the realm of autonomy of the will are exempt from the free will of legal subjects;

72 "Private" because the defendants at their own request agree to resolve a situation that could later become the subject of prosecution.

they are non-disposable rights and obligations. Therefore, rescission does not apply to them. Obligations are inherently non-disposable, but in family matters, they are even non-disposable by the holders of the claims.

This is important because there are obligations that arise not from the autonomy of the will, but from the will of the constituent, from a second constituent power, and in many occasions, from mandates of public authority. From this perspective, no individual will exceed the sovereign will of the law (Art. 1 CC), leaving without effect by mutual agreement the duties that it institutes. For example, the duty to provide food, imposed by maintenance agreement or by final judgment, cannot be annulled by mutual agreement between the maintenance provider and the child, but it requires the authorization of the State. For this reason, in order to modify or rescind the sentence issued in a maintenance trial, it is necessary to conduct the sentence modification process (Art. 83 LPRFM) or cessation of maintenance obligations (Art. 270 CF).

5.3.2. The payment

The solution or effective payment is the normal form of extinction of the obligations by compliance with them. Hence, Title XIV of the Civil Code is called "On the ways to extinguish the obligations and *first of all the solution or effective payment.*" The Romans called this form of fulfillment "solutio",[73] thence the origin of its name. Payment entails the release of the debtor from the obligatory bond, extinguishing their responsibility and that of their guarantors, if any.

The payment is the satisfaction of any kind of benefit, not just the delivery of money, as it is commonly understood. Therefore, both shall pay the person who delivers a thing and the one who performs or abstains from a fact.[74] It has therefore been simply and clearly stated that the payment, in the technical sense of the term, is the compliance of the benefit, subject of obligation.[75] Paying

73 *Vid.* ESPINOSA, José María y Enrique GOMEZ, *Lessons…, op. cit.,* pp. 146-147.)

74 *Vid.* U. BARBERO, Omar, *Introduction…, op. cit.,* p. 247.

75 To the respect in *BONNECASE, Julien, Elements…, op. cit.,* p. 452.

is paying exactly what is owed. The payment corresponds to a need, generally of patrimonial content, and this need is satisfied by the purpose of the payment.

Discussing the importance of this legal figure is essential for family law because it is one of the ways to extinguish obligations more frequently in family relationships. In forensic practice, especially in the compliance of maintenance obligations, the phenomenon of payment in kind arises, even though the title of the obligation imposes payment in money by the maintenance provider. This leads to a situation where, during the liquidation phase of the forced execution procedure (Art. 170 LPRFM) or in the proceedings for adjusting modalities (Art. 175 LPRFM), there is a debate about whether in-kind payment can be deducted from the amount owed by the debtor, especially when the obligation's title specifies payment in a particular item, typically money. In this regard, the Courts rightfully do not allow it because the title expressing the cause of the obligation describes how the obligation was created and, consequently, how it must be fulfilled in its legal development (indicating the place, manner, time, among other aspects, of how the payment will be made).

Notwithstanding the above, it has been argued that the only way to introduce in-kind payment in the liquidation is if the beneficiary or their legal representative agree to it. This is when the "dación en pago" (payment in kind) comes into play. However, this is applicable only to enforceable obligations, that is, those for which the deadline for compliance has passed without the obligor having fulfilled them. It does not apply to obligations that are yet to be fulfilled because, as previously indicated, the title (of the non-disposable rights-obligations) cannot be modified by the autonomy of the will. This is so because the legislator is significantly protectionist in matters of childhood and adolescence.

Another aspect to be considered is that the payment can be made, independently of the debtor, by all interested persons, such as co-debtors and guarantors, and also by any other person (article 1443 CC), unless the obligation has been generated in consideration of the quality of the obligor. Therefore, it is

worth indicating that "payment", like any legal act, expresses an *intention* and a *fact,* the intention reflects, or presumes the positive disposition of the debtor to comply with the obligation; and the fact is the materialization of the intention that causes the satisfaction of the creditor. However, the purpose permeating the principles of family law goes beyond causing material satisfaction to the creditor, because family unity and continuity require the satisfaction of non-patrimonial interests, which are only satisfied for the purpose of complying with the obligation (a feeling of family assistance). For this reason, obligations are being perfected exclusively by certain subjects, without the obligation arising in consideration of subjects' quality; and although the obligation is fulfilled by a third party, it does not completely release the debtor from his responsibility. A series of cases can be mentioned in which the obligated party seeks to shield themselves by claiming that a third party made the payment on behalf of the creditor and in the absence of the obligated party, but this does not absolve the latter from their affective responsibilit (spirit), such as when the food payment is carried out by the paternal grandparents, the father wanting to justify his actions in such a situation. This type of case occurs with some frequency in the trials of loss of parental authority due to abandonment without just cause, when the father alleges, in defense of the plaintiff's claim that his child has never been abandoned because his father or mother (grandparents) has covered the needs of his child (grandchild).

5.3.3. The compensation and the confusion

Another way to extinguish obligations is *compensation*. This compensation takes place when two persons, in their own right, meet the quality of creditor and debtor reciprocally, whatever the causes of one or the other debt.[76] Therefore, being one of the other debtors, the two debts, up to the amount of the lesser, are extinguished with a force of payment, leaving the remainder of the larger debt outstanding in favor of the credit holder of the

76 *Vid.* JULIAN, Emil Jalil, "*The System…*, *op. cit.,* p. 10.

same. The compensation may result from the law itself which supposes the existence of two debts from different origins in which the creditor of one is the debtor of the other, and vice versa. These debts must be enforceable, liquid, homogeneous, fungible and *available*.[77]

The compensation can be opposed as an *exception* in court, as a way to cancel, totally or partially, the debt that is claimed provided that the object of the obligation allows it. It is on this opposition that the unavailable nature of family rights and obligations must be reconsidered on the grounds that invaluable obligations cannot be compensated because their equivalence would not be estimated. This is the reason why the obligations that admit compensation must be enforceable, liquid, homogeneous, fungible, and of course, available.

However, there are situations that the law takes as equivalent, without being in the presence of compensation, such as when a spouse does not work but takes care of the children, such activity is considered a contribution equivalent to the economic proportion with which another spouse contributes to the family expenses (Art. 37 CF). Likewise, for compensation to take place, it must be made only by the credit holders. For example, the mother (ex-spouse) cannot offset the credit produced by the non-payment of maintenance in favor of the child with the debit of compensatory pension that she has to pay in favor of the father (ex-spouse), because the holders of the right to maintenance (child) and compensatory pension (ex-spouse), are different people.

Finally, it will be indicated that the legal obligation is extinguished by the *confusion* which takes place when the qualities of the creditor and debtor are brought together in the same person and the same patrimony, leaving the obligation extinguished totally or partially in proportion to the part of the debt in which the confusion occurs.[78] The confusion is a legal fact that extinguishes the obligation which is settled by meeting the same person as the creditor and debtor.

77 *Vid.* BARBERO, Omar, *Introduction…*, *op. cit.*, pp. 256-257.

78 *Vid.* JULIAN, Emil Jalil, "*The System…*, *op. cit.*, p. 10.

This is because no one can owe something to themselves, or more precisely, the same patrimony cannot be committed to itself because it would be a contradiction.

The confusion can be operated by succession to a universal level (inheritance), or to a singular level, generally due to death. In the first case, because the creditor is the heir of the debtor, or because the debtor will inherit the creditor or, because upon the death of the creditor and the debtor, a third party receives the inheritance from both of them. In any case, if the inheritance is accepted with the inventory benefit, the confusion does not operate because the estates preserve their individuality.[79] A very practical case occurs when the father owes alimony to his child, and upon the father's death, the child accepts his father's inheritance. As a result of this, the credit and debt regarding the owed alimony become confused in the child, regarding the owed alimony.

Conclusion

A brief reference has been made to the principialist conception of Law and the life cycle of obligations in order to establish a doctrinal position in this regard. In conclusion, the following principles can be stated:

Law is not only positive law. Law is the axio-normative order that governs human behavior. Therefore, law is a set of principles endowed with justice, which translate the prevailing values of a specific time and community to legal subjects. That is why written law is interpreted according to the principialist order.

79 *Vid.* BARBERO, Omar, *Introducción…*, *op. cit.*, pp. 257-258. A similar situation occurs with the Individual Company of Limited Responsibility (EIRL) in commercial matters (Articles 600 and following CCOM.). It can be seen about the EIRL in DÍAZ MARTÍNEZ, Rutílio Antonio, "Individual Company of Limited Responsibility and Unipersonal Society" en **AA.VV.,** *Legal Window,* N°. 6, Año III, Vol. 2, Julio-Diciembre, 2005, Consejo Nacional de la Judicatura, San Salvador, El Salvador, pp. 113-127.

The general principles of Law are the guides that interconnect the ethical-ideal order with the real order. These principles seek to adapt the world of ought to be to the world of being. The principles of Law are the understandable language of values that justify the repetitiveness of behavior in a historically established society.

The principles of law fulfill a creative function and a suspensive function. The creative function is referred to the foundation of legal norms (justifying the laws) and to the foundation of legal solutions (judicial decisions). With the suspensive function, the principles of law have sufficient force to render the legal norm ineffective (*suspend)* in *specific* cases when the norm is not coordinated with the general sense of the principialist order.

In the principialist conception of Law, the principle of legal security is the support of positive Law which requires that the principles of Law be applied in a subsidiary, supplementary or alternative way to the legal norm (formal law); otherwise, by arbitrary and excessive application of them, the law would be emptied. Consequently, compliance with legal obligations is verified under the requirements of the general principles of Law which indicate that a legal obligation is legitimate as long as it is coordinated with the current value system.