ORDER OF LAW AND LEGALITY - GUARANTEES OF CONSTITUTIONAL DEMOCRACY

Emilian CIONGARU[*]

Abstract

The principle of legality is a principle of social and State life consisting in the compliance with the legal norms by all participants in social relations. In any rule of law, enforcement of legality requires the duty of every citizen to follow the general provisions of the law. The principle of legality is a universal principle that requires all subjects of legal relations to comply with the law in their work. Due to the fundamental importance of laws, and mainly of the Constitution, legality is considered a principle of constitutional democracy. The order of law is another legal category close as concept to legality. It is an essential element in society's life. The order of law is obtained when the principle of legality prevails, that is, when all people comply with the law. The order of law is a status of social relations governed by legal rules that correspond to the requirements of laws and other normative acts. The concepts of legality and order of law are close and interdependent. The order of law can not exist without legality, and legality weakens if there are flaws in the order of law.

Keywords: *order of law, legality, constitutional democracy, normative acts.*

1. Introduction

The classic notion of the Constitution is rooted in the doctrine of social contract or social pact supported and assisted by new social class - the bourgeoisie, since the sixteenth century, at first timidly and replete with military failures and ending as the dominant political theory of the eighteenth century – *Age of Enlightenment*. The Constitution is, from a legal point of view, a law superior to all other laws. Both the organic and ordinary laws must correspond to the letter and spirit of the Constitution. The obligation to observe it belongs to all, including the power bodies.

Constitutions embody the fundamental principles of economic, political, social, moral and legal life of a State, a society.

The fundamental principles laid down in constitutions are generally consistent with the fundamental values that the State, the society, promotes and defends.

The German philosopher Hegel in his famous work *Principles of the Philosophy of Law* says that people should have for their constitution the feeling of their right and the state of affairs at the present time passing through. He believes that every people have their own constitution which suits them and that they deserve. [1]

To establish the concept, the notion of constitution, there are required some clarification, namely:

firstly, that the constitution and the law can not be equated;

secondly, in historical order, the law comes first, the constitution appearing later;

thirdly, the constitution appears as a historical category, excelling in the evolution of the legal system;

finally, the constitution expresses a new political, social and legal ideology.

2. Order of law, social order, legal order – concepts

Any society is interested in maintaining order, balance, structures and forms of organization and management, to ensure the functioning of all institutions, the normal development of the actions of individuals and groups. The *norms and penalties* that ensure the orientation of human behaviors are central to the notion of *social order*.

Social norms are social requirements expressed in norms of what is possible and payable. They regulate the variety of social, political, economic, moral relations, ensuring the conduct of activities in all areas.

The different categories of norms[2] in place in society give rise to specific types of social order. This explains the fact that within the same society operate an economic order, a moral order, a legal order, etc. Within each society, between these distinctive normative orders, there is a complete compatibility. Their synthesis is what we generically call the *social order*. In this broader framework of social order, any human society develops a *legal order*.

[*] Asoc.Prof.Ph.D. – Faculty of Law – "Bioterra" University of Bucharest; Asoc.Researcher - Romanian Academy – Institute of Legal Research "Acad. Andrei Radulescu" (e-mail: **emilian.ciongaru@yahoo.com**).

[1] Georg Wilhelm Friedrich Hegel, Principles of philosophy of law (translate by Virgil Bogdan and Constantin Floru), (Bucharest, IRI Publishing House, 1996), pp. 205-207.

[2] Andre Jean Arnaud, *Dicţionnaire encyclopedique de theorie et de sociologie du droit,* (La Librairie générale de droit et de jurisprudence, Paris,1993) pp.94-98.

By *legal order* or *order of law* one can understand *all the legal norms with the legal relationships arising under them*. The legal order is based and operates on the norms of law[3] established in the society. It is the core of social order, the fundamental condition of social equilibrium, the guarantee of essential rights of members of society and normal functioning of institutions. The legal order is an organic whole, a full legal reality that corresponds to a particular collectivity.

The *legal order is a coercive order*, based on public norms to guide and control individual and group behaviours, to ensure the cohesion and stability of society.

The *legal order* generates and reinforces the *order of law*, noting, however, that this order of law includes the scope for institutional-functional setting of *power*, the exercise of full and unimpeded thereof, self-limiting only by observing the private life of the person, sphere in which it is manifested as being in the field of freedom. No less true, by a relationship this time weaker in terms of bi-univocacy, the order of law is intended to strengthen institutional mechanisms and procedures by which de legal order is produced and self-reproduced, therefore, again in a kelsenian sense, a new legal field *growing positive*, finding its validity by an operation of inferation of the basic norm - *the constitution* - but also, at the same time, by arranging some reproductive procedures, validated by reference to this fundamental norm.

From a conceptual point of view, the *legal order* should not be confused with the *order of law*, as they are distinct in scope and content. The *order of law* implies, more or less visibly, the manifestation of the State as a political organization of society, involving the permanent activation of institutional means to exercise coercion, both in private and public area of activities of the person and involves permanent reference to legal order, existence that determines the being of the *order of law*. The relation between the *order of law* and the *legal order* is not a perfect bi-univocity, but assumes a certain position of determination from the part of the *legal order*.

The *order of law* is the awareness of people, either individually or collectively considered, of the prescriptive content of the command given by the authors that produce legal norms, the awareness of the fact that ignoring this *sollen*-sentence or deviation from this falls under the coercive power of bodies established with substantive jurisdiction to exercise certain coercive attributes, therefore competences by establishing norms meant to exercise control and domination of state power over the individual. Said another way, *the order of law* may be affirmed as *limitation in actu* of the free will of the individual. The person's behaviour is expressed into acts and facts only according to what the State requires, as a way of political organization, by its will, or at least only such expression is or would be correct in relation to the legislator's command, otherwise, by logical consistency, being followed by a legal sanction.

The *order of law* is a function-concept that has the role of ensuring the achievement of a/some general and sectoral policies to reduce, generally, inevitable social entropy. What the *order of law* is reflecting is the functional entwining of order (positive or negative) expressed by the law-making authority with the means/ways of an anytime and immediate, in general rule, coercive interventions of the State through its function-bodies, to ensure and preserve the balance between freedom and civic and political obedience, the State, as a political organization, considering that such a balance is beneficial to its security and citizens' security, that such a balance is a way of manifesting as subject producer of order in international relations[4], that, especially, such a balance is correspondent to certain standards of internal and external public morality. By its content, the concept of *public order* does not empower or allow or provide for an exemption, but actually *imposes* a *must*, mediating the coercive relationship between the State and the individual, especially as regards repressive-type impunity, by means of a system of courts or administrative authorities having well-prescribed roles using procedures of competence.

The concept of *legal order* is not an attribute only of domestic law, whereas any legal order, any order of law, any national public order is inter-positioned to such other orders in the field of existence of an international society and increasingly internationalized as effect of a nearly complete globalization. As such, symmetrically to a domestic legal law, the doctrine argued that there is *an international general judicial order*[5], with certain particular features given by the very nature of public international law, by its specific creation as normative field as the totality of legal norms.

The legal order is a term synonymous with the normative order[6] but claiming the reality that every State is or represents an order of law, such an attribute is, however, relatively, because under certain socio-political determinations, the order of

[3] Iosif Friedmann-Nicolescu, *Interpretation of the legal standard between tradition and reform*, Revue Europeenne du droit social. (Bibliotheca Publishing House, Targoviste, Romania, 2015), pp.78-79.

[4] Mihail Niemesch, *Principles of international law and some determining aids of determination of the international law*, Revue Europeenne du droit social. (Bibliotheca Publishing House, Targoviste, Romania, 2015), pp. 126-127.

[5] Raluca Miga-Besteliu, *International Law. Introduction to Public International Law*, Bucharest, ALL Beck, 1997; Adrian Năstase, B. Aurescu, *Contemporary International Law* (second edition, revised and supplemented.), (Bucharest, ALL Beck, 2000) pp. 131-133.

[6] Ion Craiovan, *Philosophy of Law or the Law as Philosophy*, (Universul Juridic, Bucharest, 2010), pp.36-39.

law can be overthrown, replaced, sometimes brutally, with another order of law, without the State to cease its existence as a political organization of that given society[7]; at most, one can appreciate an involutive stage that would be placed upon the State in question following a change in its order of law, this order being understood as a public order[8].

Legal orders are far from being opposed one to each other, entirely and trait to trait. Most often, if not always, they are opposed and come close one to each other at the same time. The observation is accurate for the legal orders of the same legal system, as to the legal orders belonging to different legal systems. The most important is to know what are the elements by which the legal orders are similar or opposed to each other, because, ultimately, on these elements will depend their typological relatedness and the classification of two or more legal orders in one and the same legal system or different legal systems.

The normative layer of which the legal order system is composed consists of legal norms defined as general and binding norms of conduct set by law or use. They have a decisive role in ensuring the order of law as they promote core values and human relationships, defend State institutions, and ensure the rights and freedoms of individuals. Therefore the power of influence and coercion of legal norms is greater than that of the moral, religious, politeness norms.

The legal norms have certain specific features which differentiate them from the non-judicial norms, namely:

express the elaboration and implementation procedure. The legal norms are enacted, promulgated and enforced by the legitimate public authority subject to certain legislative procedures and techniques, while moral norms are the product of anonymous, spontaneous and diffuse collective work of individuals, groups and social collectivities, being developed mostly in unwritten form within the unorganized procedure;

their action in time and space takes the written form (laws, decrees, decisions) and therefore legal norms know a certain determination in time and space, their emergence, modification or disappearance can be determined spatially and temporally;

in terms of form and structure, regardless of variety, legal norms are characterized by a unitary structure within which can be identified three elements (hypothesis, disposition, sanction), while the non-legal norms do not know, most part of the case, these elements;

in terms of efficiency and validity, being accompanied by organized penalties, legal norms act over the entire society, their non-compliance or breach calling for intervention of specialized bodies of public authority.

Admitting that the legal norm is the rational expression of the law or the solemn pronouncement of the law, it is better distinguished that *the legal norm is the primary means of achieving and maintaining social order, of protecting the rights and freedoms of citizens*.

Considering the entire social order, social penalties and legal penalties have an important place. The sanction, as part of the norm, refers to the measures and means to be adopted against those individuals who break the norms and the prescriptive regulations.

4. Priciple of legality – concept

The ideal of legality and equality was born as a requirement of natural law and it has been sought to justify it with religious, psychological and philosophical arguments, but all proved untenable. It is a fact that people are endowed differently by nature; thus, the requirement that all people be treated equally can not be based on any theory that all would be alike. Insufficient argumentation if the natural law is exposed most clearly when dealing with the principle of equality and legality. For understanding these principles, one must start from a historical examination. Thus, in modern times, as earlier, it was appealed to these principles as a means to abolish feudal differentiation of individuals' legal rights. As long as individual development and development of some sections of the people is hampered by barriers, social life will be disturbed by violent social movements. People without rights are always a threat to social order. Their common interest in removing such barriers unites them; they are prepared to resort to violence because they can not get what they want by peaceful means. Social peace is attained only when it allows all members of the society to participate in democratic institutions. And this means equality before the law, that is, before legality.

3. Rule of law and principle of legality in rule of law

Legality is a principle of social and State life consisting in compliance with the legal norms by all participants in social relations.

---

[7] Mircea Djuvara, *Summary of Legal Philosophy*. Fascicule 1., ("Universul" newspaper printing press, Bucharest, 1941), pp. 44 and following.

[8] Ioan Muraru, Gheorghe Iancu, *The Romanian Constitutions (Textes, notes, comparative presentation*), 3rd edition, (Bucharest, Regia Autonoma „Monitorul Oficial", 1995.).

In a Rule of law, lawfulness requires duty of every citizen to observe the general provisions of the law. The principle of legality is a universal principle that requires all subjects of legal relations to comply with the law in their work.

Due to the fundamental importance of laws, and mainly of the Constitution, legality is considered a principle of constitutional democracy.[9]

Strengthening of the legality is prevented by the breach of the principles of law supremacy, of equality of all before the law, of social equity and of dysfunctions of the activity of legal norms enforcement bodies.

Trying to define legality, one can say that it is a principle, a method and a strict compliance regime, unyielding enforcement of legal norms by all participants in social relations.

The principle of legality involves primarily that the most important social relationships are governed by general and impersonal legal norms, by a democratically elected representative body, expressing the real will and fundamental interests of the nation.

Secondly, the principle of legality implies that the overall conduct of individuals, as the work of public authorities and other social organizations, to conform to the general and impersonal norms adopted by the legislative authority.

Viewed from the perspective of the principle of legality, relations between the State and the law are expressed most suggestively by the doctrine of the order of law. According to this theory[10], the State is obliged to obey its own laws that otherwise expresses the fundamental interests of the society. Therefore, the State, the public authorities, the civil servants are obliged to observe the law, like any other citizen.

The order of law is another legal category close to legality. It is an essential element in society's life. The order of law is obtained when the principle of legality prevails (if everyone complies with the law provisions). The order of law is a state of social relation governed by the legal norms that correspond to the legal provisions of laws and other normative acts.

The concepts of legality and order of law are close and interdependent. The order of law can not exist without legality, and legality weakens if there are flaws in the order of law.

The idea of the order of law is inextricably linked to the role of justice, the promotion of legality in the activity of State bodies, the firm defending of the rights and freedoms of citizens. Referring to the true meaning and the deep implications of the concept of order of law, Professor Ion Deleanu highlighted, in an assessment as successful as possible, that ″by an original feedback circuit, the law once created is imposed to the State - subject of law itself - like other subjects. To have the strength to impose, some minimum conditions are essential: by postulating through norms of law of some moral and political values which are authentic and persuasive for the global civil society and for the individual; by establishing a democratic ambience; by strengthening the principle of State responsibility; by institutionalization of effective means of control over its activity; by establishing a coherent and stable legal order; by strictly promoting the principle of legality and the principle of constitutionality; by transforming the human being into a cardinal axiological reference″.[11]

The Rule of law was the criterion for the classification of States in of law and despotic, in legislator State, administrator State or judge State. The Rule of law must not be confused with the principle of legality, because it is more than that. [12]

The complex content of the Rule of law consists of: the lordship of law; the capitalization at their actual sizes of the real fundamental rights and freedoms; achieving the mutual balance/cooperation of public authorities and achieving the free access to justice.

The Rule of law must be accompanied by a guarantee system[13], which has as its purpose the self-limitation of the State by the law. This guarantee scheme is based on the following main norms: any amendment of the Constitution to be dealt with only by an expressly authorized assembly, elected on democratic bases and which should carry out the review procedure; the review itself does not have to affect the fundamental values of constitutional democracy; the existence of a constitutional control; the restriction on the exercise of rights and fundamental freedoms by law only if necessary, only in proportion to the situation that caused it, without prejudice of the right or freedom and for the grounds expressly provided in the Constitution and the non-limitation of the free access to justice.

The social nature of the State is a current corrective brought to the classical liberalism. The essence of liberalism was constituted by individualism and freedom, which required non-

[9] Constantin Ionescu, *Fundamental Principles of Constitutional Democracy*, (Bucharest: Lumina Lex, 1997), p. 206.

[10] Giorgio del Vecchio, *Lessons of Legal philosophy*, (Bucharest, Europa Nova Publishing House, 1993), p. 269.

[11] Ion Deleanu, *Constitutional Law and Political Institutions. Treaty*, vol. I, (Europa Nova, Bucharest, 1996), p.13.

[12] Ioan Santai, *State and Law. Between legal exegez and fenomenologic approached*, in vol. For a General Theory of state and of law, (Arvin Press Publishing House, Bucharest, 2003), pp. 114 și urm.

[13] Mircea Tutunaru, *The presumption of innocence under the state of law*, Revue Europeenne du droit social. (Bibliotheca Publishing House, Targoviste, Romania, 2015), p. 178.

interference of the State in the social or economic life. In current circumstances, such a doctrine can not fit the realities of many countries of the world, where the material conditions can not provide a decent living, health of population, environmental protection, development of education system, etc., all united under the umbrella of the notion of general interest. The State must intervene for achieving the general interest, that is, to have a proactive rather than passive attitude, as demanded by the classical liberal doctrine. In this regard, the State must protect the weak individual; must support economic sectors required to promote the general interest; must ensure the functioning of public services and social protection.

The democratic nature of the State implies: a pluralistic system; Government members' accountability; the obligation to comply with the laws; the impartial pursuit of justice by independent and irremovable judges; the order of law, the exercise of sovereignty by the people; ensuring people's participation in solving public affairs; the enforcement of the principle of separation/balance and collaboration of public authorities; decentralization.

All these implications include: achieving balance of powers and ensuring the supremacy of the constitution, a democratic State being found where these two traits are met.

Attempting a synthesis of the relationship between modernity and tradition in the constitutional law, with profound implications for the principle of legality, one can emphasize the following:

some concepts of constitutional law have evolved naturally over time, acquiring new connotations that have defined much deeper and more clearly their profile. Thus, one can mention the concept of sovereignty, the human rights etc.;

there was recorded continuously a greater flexibility in the implementation of separation of powers, which remains a fundamental principle of political organization. In this regard, it may be mentioned, for instance, the responsibility of the Government to legislate on certain conditions, for a fixed term, under strict parliamentary control, by way of ordinance;

in modern constitutional law arose, however, new institutions designed to assure into a greater extent the human rights and the observance of democratic principles, in a word, the functioning of the order of law mechanisms. Among these new institutions is, of course, the institution of the Ombudsman (The People's Lawyer), the courts of audit, the constitutional courts (or the constitutional councils);

as a consequence of developments mentioned earlier, new opportunities to guarantee the constitutional rights of citizens emerged, judiciary ways have improved, whilst being carried out a junction between internal mechanisms to protect the rights of citizens (justice, administrative litigation, exception of unconstitutionality in the process) and international mechanisms, such as, for example, the recognition of the right of citizens prejudiced in their rights, which have exhausted domestic remedies, to appeal to the European Court of Human Rights.

Control of the constitutionality of laws is one of the legal guarantees of the supremacy of the constitution. This control includes the principle of legality, because the normative acts must be developed according to an established procedure and the Constitution, on the one hand, and on the other hand, the law, including the constitution, must be observed by all State bodies. Control is understood as the activity of verifying the enforcement of the principle of compliance of the law with the constitution and as an institution of constitutional law, including norms combined with the same object of regulation. There is subject to control not only the law, as the legal act of the Parliament, but also normative acts with equal legal force with the law (ordinances, decrees-laws). Administrative deeds are not subject to this control, because public administration authorities issue these deeds in the exercise of law and detailing of constitutional provisions is done by law. Administrative deeds are subject to judicial control, within the administrative jurisdiction. Draft laws do not submit to this control either, because they are not laws and can be withdrawn from the originator until commencement of debates (on texts of legislative initiatives). There are a number of causes determining conflict between the Constitution and laws, even if they are incomprehensible because of the similarity of those who adopt them (social contradictions; contradictions between political groups; exaggerated stiffness of the constitution; violation of the legislative technique norms; harmonization of the federal interests with ones of the federal States).

4. Conclusions

In conclusion, ensuring the constitutional supremacy actually means ensuring social stability and legal order in the State. The Constitution is the seat of citizens' rights and liberties and the structural factor of the legal order which shall provide guiding principles: equality of all citizens, legality, non-retroactivity of laws etc. Legality and the order of law are presented primarily as a means of defending the rights, freedoms and legitimate interests of citizens. Building the Romanian political lifetime on the ideas of law and legality became and is becoming increasingly a prerequisite

of acceptance of Romania as a full member of the world community of States, of some international bodies. In this comprehensive effort, jurists are given an essential role, they must be the first to contribute to promoting observance for the order of law, applying consistently and justly the laws, but also directly contributing to the awareness of the entire Romanian public opinion about the value of legal norms, with the requirement of unabated observance of the law in relations between individuals, as well as between them and the authorities, within the whole mechanism of functioning of our State bodies and organizations.

References:

- Andre Jean Arnaud, *Dicţionnaire encyclopedique de theorie et de sociologie du droit*, (La Librairie générale de droit et de jurisprudence, Paris,1993);
- Constantin Ionescu, *Fundamental Principles of Constitutional Democracy*, (Bucharest: Lumina Lex, 1997);
- Georg Wilhelm Friedrich Hegel, Principles of philosophy of law (translate by Virgil Bogdan and Constantin Floru), (Bucharest, IRI Publishing House, 1996);
- Giorgio del Vecchio, *Lessons of Legal philosophy*, (Bucharest, Europa Nova Publishing House, 1993);
- Ioan Muraru, Gheorghe Iancu, *The Romanian Constitutions (Textes, notes, comparative presentation*), 3rd edition, (Bucharest, Regia Autonoma „Monitorul Oficial", 1995.);
- Ioan Santai, *State and Law. Between legal exegez and fenomenologic approached*, in vol. For a General Theory of state and of law, (Arvin Press Publishing House, Bucharest, 2003);
- Ion Craiovan, *Philosophy of Law or the Law as Philosophy*, (Universul Juridic, Bucharest, 2010);
- Ion Deleanu, *Constitutional Law and Political Institutions. Treaty*, vol. I, (Europa Nova, Bucharest, 1996);
- Iosif Friedmann-Nicolescu, *Interpretation of the legal standard between tradition and reform*, Revue Europeenne du droit social. (Bibliotheca Publishing House, Targoviste, Romania, 2015);
- Mihail Niemesch, *Principles of international law and some determining aids of determination of the international law*, Revue Europeenne du droit social. (Bibliotheca Publishing House, Targoviste, Romania, 2015);
- Mircea Djuvara, *Summary of Legal Philosophy*. Fascicule 1., ("Universul" newspaper printing press, Bucharest, 1941);
- Mircea Tutunaru, *The presumption of innocence under the state of law*, Revue Europeenne du droit social. (Bibliotheca Publishing House, Targoviste, Romania, 2015);
- Raluca Miga-Besteliu, *International Law. Introduction to Public International Law*, Bucharest, ALL Beck, 1997; Adrian Năstase, B. Aurescu, *Contemporary International Law* (second edition, revised and supplemented.), (Bucharest, All Beck, 2000).