

LEGAL NATURE OF THE CONSTRAINT

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Abstract:

Responsibility, as one of the fundamental principles of law, implies „the task of liability” as a function for the purposes of acceptance of a derogatory behavior.

Although the concept of responsibility has been claimed by morality, the science of law has adopted the traits of this concept in a creative way, by adapting it to the specifics of its object of research.

The science of law has developed „the task of liability”, by creating the concept of constraint, which highlights a certain behavior

Key words: *state of law; state power; legal constraint; legal liability; government authority*

INTRODUCTION

In the legal doctrine, the state does not know a unanimously accepted definition, it being defined as: political organization on a certain territory, made up of all state organs; a way of organizing the political power in the form of the state power in order to fulfill the will of the holder of this power, that is the people, whether the exercise of it is carried out directly by the people or indirectly, through its representative bodies; the main political institution of the society exercising the sovereign power ensuring the organization and the management of the society through the prerogative it has to elaborate and apply the right, which observance can be guaranteed by the force of constraint.²

The state of law is not just a formal legality which assures regularity and consistency in establishing and implementing the democratic order in the country, but justice based on the recognition and full acceptance of the human personality. The principle of the state of

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²Gheorghe Costachi and Petru Hlipca, "Organization and operation of power of the state of law," *Journal of Philosophy, Sociology and Political Sciences*, 3 (2013): 375.

law, enshrined in the preamble to the Constitution, addresses the Constitution in its integrity. This principle substantiates the need for adequate protection against arbitrariness by the public authorities.¹

The constitutional valence of the principle of state of law implies supreme values, that implies the „power” of the law, the subordination of the state to the law, the legal option of „the law” to oversee and exercise a control of politics, as well as the suppression of any abusive aspirations of state entities. The effects of the state of law generate a series of guarantees: correlation of laws, observance of human rights and fundamental freedoms, ensuring good investment stability, and consequently respect for judicial guarantees.

These guarantees also produce judicial control of the acts issued by state authorities, respect for the security of the legal relationship, the establishment of political pluralism, as well as the freedom of opinion and expression, freedom of association.

In order to comply with these guarantees and for the good functioning of the state of law, an order ambience is required, within which the exploitation of these freedoms and range of „rights” of an individual / person are not absolute, being in correlation and interdependence with the freedoms and the range of „rights” of other individuals / persons or communities.

THE CONTENT OF THE PAPER

During the course of the period of development of the human society, a certain power of administration and management of the social community was stressed. Regardless of the type and the quality of the power for exercising it, it was necessary to apply the method of convincing and constraint.

In the legal doctrine, the existence of a distinction between power and authority is envisaged, consisting in the fact that the exercise of power leads to force, violence and constraint, while authority manifests itself rather as value above the interests of individuals, decision-makers or governors. The authority belongs to an institution (president, judge, general, parent, etc.) which requires respect, compliance of individuals without resorting to force, influence, and persuasions. The Authority is

¹ Alexandru Tanase et al., *Compendium of the jurisprudence of the Constitutional Court of the Republic of Moldova* (Romania, 2017), 9.

present in any group, community or corporation with hierarchical internal organization; the more it is present in political society, in the world of political agents. The functioning of the authority in the state of law implies the submission, compliance of the members of society with the requirements of the norms of law. In this case, the relations of domination - obedience, command - listening, decision - execution do not imply for the citizens the violation of their own freedoms or their quality of active participants in decision-making or expressing opinions on the content of draft laws¹.

Considering that the method of persuasion, in narrow sense, represents the psychic phenomenon and an element of human consciousness, certain means influence the person's conduct.

Equally an instrument in influencing the behavior of a person or social group is the constraint.

In substance - constraint is the objective aimed at the safety of the person, of the community as a social group, of acts or deeds that disregard the norms of cohabitation in a certain social environment.

However, the achievement of these tasks in democracy must respect the values of the state of law, democracy itself and respect for the rights of the person. Therefore, the means to achieve these objectives shall be done in line with the legal, appropriate and effective character, achieved in the right term, being in compatibility connection with the process of modernization and technologization of the social community, in particular, and of the state - in general.

These procedural acts, *inter alia*, have the objective of protecting against certain criminal phenomena such as the one of corruption.

For these reasons, it must be stated that the protection of the rights and interests of a person is not an absolute action without a limitation, being impossible to them to be exercised in *absurdum*, but can be subject to restrictions that are justified by reference to the aim pursued. As an example: the right to justice, viewed in the light of Article 6 of the ECHR, is a guaranteed, but not an absolute right, being restricted by the observance of a number of formal and substantive conditions of the act of referring the court.

In this regard, we will be in the presence of a behavior that highlights two interdependent conditions:

¹ Martian Iovan, *Power, Authority, and Counterfeiting of Power Abuse* (Chisinau: Scientific Annals, IVth edition, 2003), 85.

- *the freedom of the person* – which consists in the possibility that each member of the social group or of the society as a whole has or ought to have, oriented to act in accordance with its interests, without being subjected to a physical [which is the pressure that a force which cannot be resisted is exercised on the physical energy of a person, so that a crime or a criminal offense is committed] or psychic [being the action directed towards the person's psyche, towards the person's internal forum, having a non-physical character, the psychic constraint having a psychological composition of manipulation, psychic conditioning] constraint.
- *the ability of the person to decide* – being the option and willingness of the individual to choose between several solutions and willingness to act, highlighting also a person's responsibility for his behavior.

Thus responsibility is thus presented as a conscious attitude, which is assumed by the person towards his own actions in relation to the rules in the community. On the other hand, this attitude is the commitment of the person to achieve the goals that are set in the community, and consequently the identification of the individual and his own values with the interests and values of the collectivity as a social community.

Therefore, the violation or disregard of the values set in the community leads to the accountability of the person, so there are differences between these two elements: responsibility and accountability.

As indicated *above*, the influence of the person's behavior is also achieved by the effect of constraint - being the form that causes the person to act in a certain way.

Regarding the functionality of the state of law, we can say that the observance of the requirements of the state of law implies that the state itself at one point bears the coat of constraint orders.

The state of law thus becomes a constraint order, an order that justified the police state, a theory that has produced important changes in the traditional legal thinking, capturing the attention of the theorists of law. The criticisms come from several directions, of which we can recall, on the one hand, the critique of the state's identification with the law, the critique of the application to the juridical order of a formal mathematical logic or, on the one hand, a critique of the concept of purity of the object of the science of law. Thus, the one that led to the establishment of a state

of law is the identification of the state with the law, the theory characterized by objectivism, resulting from the very importance the author attaches to the legal norm and the constructivism elaborated on the basis of a concept of prioritization in the legal system based on the constitutional norm.¹

Since the state of law constituted the culmination of the constitutionalization, having as an essential feature the subordination of all to the law, including the state (through its institutions), impose certain duties of the state:

- compliance with the law by the one who has edited it - being obligations stemming from the principle of the preeminence of the right;
- respect for the foreseeable and clear nature of the laws that dictate them;
- the implementation of justice only on the basis of law, so that the establishment and guaranteeing of the rights of the person is achieved at the level of the international standards.

The state of law has generated the power to be structured and subject to the law, being carried out a competition exercise between:

- the values of the state of law and the values of the person,
- the needs of the state and the needs of the person,
- including the existence of mechanisms made available to the person to ask the state to verify the quality of the law - by exercising the constitutionality control of the laws.

The Constitutional Court of the Republic of Moldova, by the decision number 2 of 09.02.2016 interpreting Article 135 of the Constitution²[(1) *The Constitutional Court: a) exercises, upon appeal, the review of constitutionality over laws and decisions of the Parliament, decrees of the President, decisions and ordinances of the Government, as well as over international treaties to which the Republic of Moldova is a party; b) gives the interpretation of the Constitution;[...].g) solves the pleas of unconstitutionality of legal acts, as claimed by the Supreme Court of Justice;[...].(2) The Constitutional Court carries out its activity on the initiative brought forward by the subjects provided for by the Law*

¹Vanghelie Mariana-Mihaela, *Administrative Constraint and State of law* - Summary - Doctoral Thesis (Bucharest: 2015), 5.

²*Constitution of the Republic of Moldova*, adopted at 29.07.1994.

on the Constitutional Court”], held *inter alia*, that, starting from the subsidiary nature of ECHR mechanisms, Member States have the obligation to extend national human rights protection mechanisms in line with the commitments deriving from the ECtHR's streamlining process undertaken at the Conferences from Interlaken (February 18 - 19, 2010), Izmir (April 26 - 27, 2011) and Brighton (April 19 - 20, 2012).

The exception of unconstitutionality is a means of defense by which the party called before a court invokes the unconstitutionality of a legal norm. The exception of unconstitutionality, with its peculiarities, represents a means of indirect access of persons to the constitutional litigation court through the court¹.

In the same context, the Constitutional Court in the *mentioned* decision (point 79-80) found that „the concrete constitutionality control of exceptional status is the only instrument by means of which the citizen has the possibility to act in order to defend himself against the legislator himself, if, by law, its constitutional rights are violated”; „the right of citizens to have access to the constitutional court by way of the unconstitutionality exception is an aspect of the right to a fair trial. This indirect way, which allows to the citizens the access to constitutional justice, also gives the Constitutional Court as a guarantor of the supremacy of the Constitution, to exercise the control over the legislative power with regard to respect the fundamental rights and freedoms catalog”.

Another instrument defining the state of law, by which the person in order to respect his rights and interests, has the mechanism to check the functionality of the state institutions through the judicial control of the administrative acts issued by the state authority.

This exercise of the procedure is carried out by the notification of the court of common law, subject to following certain conditions of form and content of the act of referral (the request for summons) and the procedures to be accomplished (court procedures, compliance with rules of evidence, etc.).

¹Decision number 2 of 09.02.2016 of the Constitutional Court for the interpretation of Article 135 paragraph (1) letters (a) and (g) of the Constitution of the Republic of Moldova (exception of unconstitutionality), point 53-54, *The Official Gazette* 55-58/9, Chisinau (2016).

Constraint, therefore, does not produce negative effects through its „existence”, but by the functions it exercises ordains and creates a balance between the state and the person, viewed as a distinct subject of law.

Thus, even if the constraint places certain borders on the exercise of the rights and interests of the individual, mutually, the citizen, with all the rights at his disposal, can influence the state's activity by imposing certain rules of good functioning.

CONCLUSIONS

Taking into account the principles of the state of law, which is organized and functions within the limits of the desired parameters, the legal nature of the constraint is governed by the same valence of legality and the preeminence of law. However, the compliance with these requirements would be inconceivable in the absence of separation of powers in the state and in the absence of an independent justice.

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