

COMPARATIVE AND CONSTITUTIONAL LAW ELEMENTS REGARDING THE STRUCTURE OF LEGAL ORDERS AND THEIR FUNDAMENTAL ELEMENTS

Professor Emilian CIONGARU, PhD.

University Bioterra Bucharest-Romania;
Associate Scientific Researcher – Romanian Academy,
Institute of Legal Research „Acad. Andrei Radulescu”
emil_ciongaru@yahoo.com

Abstract

The science of comparative law as well as the science of comparative constitutional law can reveal that other legal orders solve the same problem through closer or simpler legal institutions and can show why and how some national legal institutions are outdated or lacking in substance. In the knowledge of the science of comparative law and constitutional law, the comparative knowledge of isolated legal institutions is only a step towards the knowledge and understanding of the whole: the legal order first, and then the respective legal system. In any legal order, the fundamental legal elements combine in an order which is not egalitarian and horizontal, but, on the contrary, hierarchical and vertical. This order is ruled, directly or implicitly, by the value system which - clearly, visibly and consciously, or confusedly, invisibly and unconsciously - is at the basis of any legal order. What is therefore essential for the relation between two legal orders, as well as for their classification, are not their common point, nor their points of opposition, but the elements where their similarities lie and the elements where their divergences lie. Indeed, whatever the differences between them may be, two legal orders must be considered typologically related and classified into the same legal system as soon as their determining elements become similar. On the contrary, whatever their similarities may be, two legal orders must be classified into different legal systems, as soon as their determining elements oppose each other.

Keywords: *legal order; fundamental element; comparative law; constitutional law; fungible elements.*

Legal orders - conceptual and introductory elements

A legal order can be defined [1] as the entirety of legal regulations, principles and notions applicable within the society of which the relations are regulated by legal regulations [2] which may be called legal principles, notions and institutions, fundamental legal elements.

If a legal order is seen as a whole, the fundamental legal elements [3] can be considered the cells of this organism, and lawyers and especially comparative law professionals have always seen the fundamental legal elements as elements of equal value, which might be wrong, because they do not differentiate between them, but, in reality, legal orders are not simply the sum of the fundamental legal elements, and what is important for the global knowledge of a legal order is not the thorough knowledge of

the entirety of these elements, but knowing the place and the role which some of them play within the legal order.[4]

In any legal order, the fundamental legal elements combine in an order which is not egalitarian and horizontal, but, on the contrary, hierarchical and vertical. This order is ruled, directly or implicitly, by the value system which - clearly, visibly and consciously, or confusedly, invisibly and unconsciously - is at the basis of any legal order. It might not be considered wrong to compare the structure of a legal order with that of an atom made up of a nucleus surrounded by a veil of electrons, a sort of cloud which envelopes the nucleus. Thus, in the centre of each legal order there is a nucleus of fundamental legal elements made up of the determinant elements, and, around this nucleus, which represents the fundamental structure of the respective legal order, a multitude of elements which are called fungible, revolve. That is why a thorough analysis is needed in order to show how the determining elements differ from the fungible elements.[5]

The analysis of significances of determining and perishable (fungible) elements

All fundamental legal elements primarily have a technical meaning. In this respect, there are no major differences between determining and fungible elements. Still, determining elements additionally have an ideological and teleological [6] meaning, explained by the fact that these fundamental legal elements are in direct relationship with the value system on which any legal order is built, either consciously and deliberately, or even accidentally. The determining elements, individually but especially in correlation, express the systems of principles and values, as well as the teleological finality of the legal order in question.

These elements are called determining because they attribute to any legal order its specific individuality; they create it by imposing their fundamental structure; they condition these fundamental structures and, through them, the specific profile and morphology for each legal order. The preponderant position of the determining elements reverberates onto other fundamental legal elements and forms - in principle - the entirety of the legal order. These elements thus make up the central nucleus around

which the other fundamental legal elements, the fungible elements, the role of which is more technical than ideological or teleological, are ordered and combined.

The other fundamental legal elements, which are called fungible elements, are by far the most numerous. However, they only have a secondary importance, as they complete the profile of the respective legal order, without determining it.

These elements are fungible, because changing or replacing them does not change the fundamental structures, leaving the initial morphology, specific to the legal order which contains them, intact. Their importance is, in principle, limited to the respective regulation or legal institution; their influence does not reverberate over the entirety of the legal order in any way; their meaning is no longer general, but limited; it is not central, but peripheral; it is not determining, but subordinate. Thus, the two categories do not have the same value at all.

The analysis of distinctive criteria of the two types of legal elements of juridical order

An objective analysis allows to observe that within a legal order [7] certain fundamental legal elements are more important than others and that the structural profile of the legal orders is determined by some of them, the position of which is central, the influence of which reflects onto the entire legal order. This dominant position manifests over the entirety of the legal order or over a great part of its institutions and elements.

Their importance is no longer limited, marginal and subordinate, but general, central and determining. Thus, for instance, the economic constitution, the official ideology, the principle of the separation or unity of state powers, the certainty or uncertainty relationships which connects the law to the factors which have created it, just like the principles for the interpretation of the law or the role of the judge are legal institutions which directly or indirectly influence the entire legal order, and therefore necessarily determine all the other fundamental legal elements. Given their central place and the fact that they determine the structural profile of the legal order, changing them equates to changing the specific structure of the legal order taken into consideration. On the contrary, other legal elements have a limited significance and

they do not determine the specific character of the legal order and do not influence the entirety of the legal order. Their position is marginal and determined. Thus, for instance, the technical determination of marriage and divorce, the content of parental power, the right to inheritance of the surviving spouse or the limits of the freedom of disposition through testament, of the administrative act or its conditions for withdrawal, and others as well, only have a limited significance, because they can be changed or replaced without affecting, through it, the specific character of the legal order in question.

The former are determining elements and the latter are fungible elements. The difference between the two and between the structures they form resides in the fact that the former specify the fundamental structure of the legal order, and changing or replacing them would mean to modify or change the profile of this legal order itself. On the contrary, the fungible elements can be replaced, without changing anything fundamental or specific in the given legal order.

Identification and characteristics of determinants elements

Before showing what the determining elements[8] are in general, it is imperative to state that they represent groups of elements rather than individual elements, and that they are so complementary and interconnected that the same elements can often be present in different categories.

The most important determining elements may be *the conception regarding law and the role of law* within the legal order taken into account. It is an element which, directly or indirectly, determines the entirety of the elements which form this legal order. The conception regarding law may vary from one legal order to another, which makes its functions and role potentially different.

In turn, this determining element is influenced by another: *ideology or doctrine*[9], *official or not*, which influences law and which states its relations to power. They may be officious, hidden, implicit and lax, as in the European [10] and Anglo-Saxon systems, where law may even oppose ideology, which lawyers ignore most of the time.

The third determining element contains *the uncertainty relations which exist between what is given and what is built*. These relations may be uncertainty relations, as in the legal orders from European or Anglo-Saxon legal systems.

The fourth determining element may be identified as being *the economic constitution of the respective legal order*, and lawyers are far from learning the exceptional importance of this notion for understanding each legal order. Still, the economic constitution dominates the issue of ownership, inheritance, freedom of transferring ownership, the issue of agreements and contractual freedom, freedom of trade, freedom of profession, not to mention another series of very important implications not only in civil law, but also in commercial and economic law.

The fifth determining element is made up of *the conception and the role of the state*. Here as well there are a complexity of issues and elements which, in the European system, may be designated through the idea of rule of law. The role of the state [11], its relations to the law, the position of political parties within the state, the principle of unity or plurality of powers, the relation of state and power, the fundamental rights of the citizens must be added to this element.

The sixth determining element includes *the sources of law and their hierarchy*, as they are not the same in all legal orders.

The seventh determining element includes *the interpretation of laws and of law*, as well as the position of the judge and his role in the interpretation process.[12]

Finally, the last determining element concerns *the legal notions and the fundamental legal categories*. They may exist in some legal orders but not in others. Here, for instance, there is a very important point of divergence between the European system, based on notions, classifications and categories originating from Roman law, and the Anglo-American system, which has created its own notions and classifications.

The role of this short enumeration is only to take a glance at the determining elements. In addition, this enumeration should be completed with two observations.

On the one hand, it is possible that there are some determining elements specific to certain systems in addition to these general determining elements. Thus, it is possible for some determining elements to be present in some systems and absent in others.[13]

On the other hand, one element or another may be simultaneously connected to one determining element or another. Thus, for instance, the freedom of trade or certain freedom may be connected either to the determining element of economic structure, or to the one regarding fundamental freedoms, or, finally, to the conception regarding the

state.[14] Whatever the potential details which may be completed or changed, what seems essential is the fact that, in general, these elements themselves state the true structures of legal orders.

The fundamental characteristics of the determining elements of juridical order

This short enumeration intends to also summarise the main characteristics of the above-mentioned elements.

Thus, on the one hand, these characteristics mark the determining elements, and, on the other, they allow their distinction from the fungible elements. Indeed, the main characteristics of the determining elements may be identified as: uniqueness, their irreplaceable character, their determining character and their complementarity.

The first characteristic, uniqueness, results from the fact that each determining element, as well as the solution it proposes, are unique in the respective legal order.

The second characteristic assumes the fact that each determining element is irreplaceable, which means that each legal order would cease to be itself without the respective determining elements. Replacing the determining elements with others would necessarily lead to changing the specific profile of the given legal order, as well as that of the system it belongs to.[15]

The third characteristic is that these elements are determining for the profile of the respective legal order. This means that they directly or indirectly influence the entirety or the majority of the other legal elements of this order. Replacing these determining elements with others would mean changing the profile of the entire legal order [16], influencing, in a different manner and through other determining elements, the other legal elements which make up this legal order.

The fourth characteristic is complementarity and the tight solidarity existing between the determining elements. The existence of some means the existence of others, which signifies that, in reality, it is difficult to change just one of these elements without changing the others.

In reality, the four characteristics only express one and the same reality, namely that they are but four aspects of the same phenomenon, and recognising them really means acknowledging the same principles. Thus, uniqueness is explained by, and, in

turn, explains the irreplaceable character, as well as the strict connection which unites these elements to the legal order taken into consideration, therefore their determining character.

Through these characteristics themselves, the determining elements oppose the fungible elements which are rather accessory than fundamental to each legal order, being determined rather than determining.

Instead of uniqueness, the fungible elements are characterised by the plurality of solutions. This means that the elements in question, as well as the solutions arising from them, may be replaced with others, without the respective legal order suffering any fundamental change. This is because of and also explained by their loose connection to the legal order, or, since the fungible elements are characterised by the plurality of solutions and by the fact that they only have a weak and accidental relation to the legal order, it can be explained why these fungible elements can be replaced and why, by replacing them, the morphological profile and the fundamental characteristics of the legal order analysed do not change [17].

The fundamental contributions of the theory of determining elements for fundamenting the science of comparative law

Still, the new contributions of the theory of determining elements, and especially what and how it contributes to fundamenting the science of comparative law as an autonomous subject must be analysed. It may be said that this theory brings objective criteria able to order the subject, thus fundamenting the science of comparative law.[18]

Distinguishing the determining elements from the fungible elements means refusing to admit the point of view, implicitly accepted by all comparative specialists, and which is the basis for micro-comparison, thus the basis for all comparative efforts, namely that all fundamental legal elements within a legal order have the same value. Admitting that, if all the legal elements which make up a legal order have a technical value, some legal elements also have an ideological and teleological value, means first refusing the micro-results that micro-comparison reaches.

The distinction between the determining elements and the fungible elements allows the discovery of the determining structures, therefore of the central nucleus, the

value of which resides in the fact that it contains the elements which determine the specific morphology of the legal orders. It is a change of perspective which, in reality, is a change of the scale of observation. Through the move from micro-comparison to macro-comparison is achieved, therefore the move from a comparison having as object the fundamental legal elements, seen as an infinity of cells of equal value, to a comparison the object of which are legal orders, their determining elements and structures. The result of the former is knowing the legal elements, seen individually and in isolation. This fragmentary knowledge piled on top of each other cannot be ordered and classified except by the distinction between determining and fungible elements. This distinction makes macro-comparison possible, which brings out the role of the fundamental structures in legal orders. These are stated by the determining, irreducible and irreplaceable elements, creating the specific character of each legal order. Through this, the objective and scientific criteria themselves are established, due to which legal systems may be stated, and legal orders may be classified.[19] Indeed, the theory of determining elements proposes a scientific and not arbitrary, sure and objective criterion, able to classify legal orders into legal systems, whereas knowing the dominant morphological structures of legal orders is not the sole objective of the science of comparative law. Their comparison and, ultimately, their typological classification remains one its main duties.

The opposition features of legal orders

Legal orders are far from opposing each other, wholly or feature by feature. Most often, if not always, they oppose and approach each other at the same time. The observation is accurate for the legal orders belonging to the same legal system, as well as for legal orders belonging to different legal systems.[20] It is enough to know through which elements the legal orders are similar or oppose each other, as, in the end, the typological affinity and classification of two or more legal orders from the same legal system or from different legal systems shall depend on them.

The fact that two legal orders, for instance French law and Romanian law, belong to two different legal system, does not mean that they oppose each other, feature by feature and in all respects.[21] They may have, and indeed have numerous common

elements, since Romanian law was profoundly influenced by French law and codes. Still, despite these common elements, they are fundamentally different because their determining structures which make up the central nucleus, as currently different: and whatever the similarities in their multitude of fungible elements may be, these legal orders must be classified into different legal systems.

The similarities existing between two legal orders belonging to the same legal system, for example French and German law, are very important, because they are found at the level of the fundamental structures and are based on determining elements.[22] On the contrary, the differences which separate them do not have a decisive significance because they only exist at the level of fungible elements, therefore of the elements which, ultimately, do not determine nor characterise legal orders. Thus, whatever the multitude of difference between their fungible elements may be, these legal orders must be classified into the same legal system [23], because they more or less have the same central nucleus, therefore the same determining elements. What is therefore essential for the relation between two legal orders, as well as for their classification, are not their common point, nor their points of opposition, but the elements where their similarities lie and the elements where their divergences lie.[24] Indeed, whatever the differences between them may be, two legal orders must be considered typologically related and classified into the same legal system as soon as their determining elements become similar. On the contrary, whatever their similarities may be, two legal orders must be classified into different legal systems [25], as soon as their determining elements oppose each other.

Conclusions

In conclusion, performing all this research which begins by distinguishing the determining elements from the fungible elements, by identifying the determining elements, stating the determining structures, understanding the typological affinity of legal orders, classifying legal orders into legal systems through scientific, not arbitrary, criteria ultimately means exploring new areas for solving new problems and gaining new knowledge. Undertaking all these operations does not only mean surpassing the comparative method as a method, but also moving away from it and towards the

science of comparative law, in other words, creating a new subject, in a scientific, systematic and objective way, starting from the results of micro-comparison. This seems to be the field and purpose of the science of comparative law as an autonomous science, which comparative specialists have always been searching for, without finding them.

Thus, any autonomous subject means a certain abstractisation, which is achieved starting from fact to idea, from the incoherent multitude of observations to the unity of rules, from the chaotic juxtaposition of knowledge to the hierarchy of logically determined categories.

The first duty of any science is, essentially, to reduce, frame and order the disorderly multiplicity of observations and facts belonging to a certain field, into stable and objectively determined categories.

The second duty is to explain what seems inexplicable, that is, the multitude of facts through the unity of rules and categories. This is where the role of the science of comparative law as an autonomous subject may reside: striving to order and classify in a coherent whole the chaotic multitude of micro-results which micro-comparison offers, but it can do so only based on the fundamental scientific criteria which are offered by the theory of determining elements.

Thus, it may be said that the existence of the science of comparative law itself, as an autonomous subject, depends on this theory, which, otherwise allows the replacement of the Ptolemaic perspective with the Copernican one. It allows observing the exact position of legal orders and legal systems related to each other. Finally, it helps to understand - through a synthetic and coherent view resulting from a change in perspective - the legal universe in which one lives.

References:

- [1] Constantinesco, L.-J. (1997). *Treaty of comparative law*, First Volume, All Publishing House, Bucharest, p. 231.
- [2] Niemesch, M. (2014), *General theory of law*, Hamangiu Publishing House, Bucharest. p.104.
- [3] Kelsen, H. (2000). *The pure doctrine of law*. Humanitas Publishing House, București, 2000. p. 239.
- [4] Mihai, C.Gh. (2003) *Fundamentals of Law, Vol. I - Law Science and Legal Order; vol. II - The theory of the legal norm and its interpretation*. ALL Beck Publishing House, Bucharest, pp. 252-257.
- [5] Constantinesco, L.-J. (1997). *Treaty of comparative law*, First Volume, All Publishing House, Bucharest. p. 234.
- [6] Niemesch, M., *General theory of law*, Hamangiu Publishing House, Bucharest.p.192.
- [7] Raz, J. (1979) *The authority of Law*. Oxford: Clarendon Press, p.105
- [8] Constantinesco, L.-J. (1997). *Treaty of comparative law*, First Volume, All Publishing House, Bucharest. p. 233.

- [9] Craiovan, I. (2010). *Philosophy of law or law as philosophy*, Universul Juridic Publishing House, Bucharest, pp. 515-516.
- [10] Micu, G. (2007). *Community institutional legal order*, Paidea Publishing House, Bucharest. p. 265.
- [11] Malita, M. (1977). *Systems in the social sciences*. Academiei RSR Publishing House, Bucharest. p. 340.
- [12] Dworkin, R. (1994). *L'empirice du droit*. Paris: PUF. p. 141
- [13] Chevallier, J. (1983). *L'Ordre juridique*. in: *Le droit en procès*, PUF, Paris. p.5.
- [14] De Sousa Santos, B. (1989). *Towards a Postmodern Understanding of Law*, Oñati proceedings, Nr.1/1989, *Legal Culture and every-day life*, p. 149.
- [15] Oriane, P. (1982). *Introduction au système juridique*. Bruylant, Bruxelles, p.31.
- [16] Zagrebelesky, G. (1992). *Il diritto mite. Legge, diritti, giustizia*. Einaude Publishing House, Torino. p. 217.
- [17] Vrabie G. and Popescu S. (1995). *General theory of law*. Ștefan Procopiu Publishing House, Iasi. p. 186.
- [18] Constantinesco, L.-J. (1997). *Treaty of comparative law*, First Volume, All Publishing House, Bucharest. p. 234.
- [19] Popescu, S. (2014). *General considerations regarding the legal doctrine, in vol Scientific session of the Institute of Legal Research of March 7, 2014, Romanian legal doctrine: between tradition and reforms*.Universul Juridic Publishing House, Bucharest, p.197.
- [20] Bergel, J.L. (1985). *Théorie générale du droit*, Dalloz, Paris, p. 53.
- [21] Loussouarn, Y. et Bourel, P. (1999). *Droit international privé*. Dalloz, Paris. p. 107.
- [22] Pinto, R. et Grawitz, M. (2000). *Methodes des sciences sociales*. Dalloz. Paris. pp. 84-85.
- [23] Pescatore, P. (1960). *Introduction à la science du droit*, Luxembourg, p. 255.
- [24] Cabrillac, R. (2013). *Introduction générale au droit*, 10^e édition, Dalloz. Paris pp. 159-160.
- [25] Craiovan, I. (1999). *Juridical doctrine*, C.H. Beck Publishing House, Bucharest, p. 47.