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LEGALITY IN THE IMPLEMENTATION OF THE PRINCIPLE OF SEPARATION OF POWERS

LEGALIDADE NA IMPLEMENTAÇÃO DO PRINCÍPIO DE SEPARAÇÃO DE PODERES*

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Abstract: The article discusses the theoretical and legal aspects of determining the content, essence, and guarantees of legality. The purpose of the article is to study the legality in the implementation of the principle of separation of powers, taking into account the fact that there is a traditional idea in the general theory of law that the order and consistency of relations regulated by law are reflected in the "legality" category. The leading method of studying the problem was the inductive method of scientific research, which allowed studying various manifestations of legality in the behavior of participants in public relations on specific examples. It has been concluded that the legality and the rule of law are the results of the implementation of the law, are objective, and exist in any historical period in any state. They differ in level and content, but they exist objectively since there is a right. It is with the emergence of law as a specific regulator of public relations that legality and public order arise as the results of the implementation of the requirements of legal norms. However, these are different results in terms of content and internal quality. Legality is expressed in lawful behavior, in the legal effectiveness of the law. The idea of legality is inseparable from law and the state.

Keywords: Separation of powers. Legality. Public order. Rule of law. Democracy.

Resumo: O artigo discute os aspectos teóricos e legais da determinação do conteúdo, essência e garantias de legalidade. O objetivo do artigo é estudar a legalidade na implementação do princípio de separação de poderes, levando em conta o fato de que existe uma idéia tradicional na teoria geral do direito de que a ordem e a coerência das relações reguladas por lei se refletem na categoria

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"legalidade". O principal método de estudo do problema foi o método indutivo de pesquisa científica, que permitiu estudar várias manifestações de legalidade no comportamento dos participantes das relações públicas sobre exemplos específicos. Concluiu-se que a legalidade e o Estado de direito são os resultados da implementação da lei, são objetivos e existem em qualquer período histórico em qualquer estado. Eles diferem em nível e conteúdo, mas existem objetivamente, uma vez que existe um direito. É com a emergência da lei como um regulador específico das relações públicas que a legalidade e a ordem pública surgem como resultados da implementação dos requisitos das normas legais. Entretanto, estes são resultados diferentes em termos de conteúdo e qualidade interna. A legalidade se expressa no comportamento lícito, na eficácia jurídica da lei. A idéia de legalidade é inseparável da lei e do Estado.

Palavras-chave: Separação de poderes. Legalidade. Ordem pública. Estado de direito. Democracia.

1. INTRODUCTION

Legality is a complex and multifaceted phenomenon, the role and significance of which is extremely difficult to overestimate both in the field of theory and in the field of legal practice. The idea of legality is inseparable from law and the state. There is a traditional idea in the general theory of law that the order and consistency of relations regulated by law are reflected in the"legality" category. Law, as a special social regulator, is designed to bring the most significant social relations from the point of view of society and the state into a harmonious, orderly system. The stability and well-being of society directly depend on how effectively legal norms cope with their purpose.

2. METHODS

The scientific methodological study of the concept and content of legality in the implementation of the principle of separation of powers dictates the need to determine their positions, first of all, on the issue of the correlation of the legality and public order concepts. The understanding of the essence and content of legality is facilitated by such a method of scientific knowledge as classification (on the example of guarantees of legality).

Much attention is paid to human rights guarantees in the legal literature. The question arises: how do the concepts of "guarantees of human rights" and "guarantees of legality" relate? Guarantees of legality are not only what counteracts its violation, but also those factors, positive influence of which contributes to the emergence of legality, that is, contributes to the commission by persons of lawful actions aimed at satisfying their legitimate interests. Given the above, human rights guarantees should be considered as an

element of the system of guarantees of legality. It should be emphasized that human rights do not have an absolute value.

The problem of understanding and improving the effectiveness of guarantees of legality is important. Its solution has both theoretical and practical significance, while it is particularly complicated by the fact that a significant number of guarantees, paradoxical as it may sound, need their implementation guarantees (Nazarov, 2005).

3. RESULTS

Following Part 3 of Article 55 of the Constitution of the Russian Federation, "The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring the defense of the country and security of the State". The listed goals, for the achievement of which human rights may be restricted, are designed to protect the common interests, that is, the interests of the entire society and the state. Thus, the legally established possibility of restricting human rights is a guarantee of ensuring the rights of society and the state (Syrykh, 2005).

In this regard, in the structure of guarantees of legality, depending on the subject, it is necessary to distinguish between guarantees of human rights and guarantees of the rights of society.

The guarantees of the protection of individual rights should include the activities of law enforcement agencies. However, the law enforcement activity of the state, aimed at preventing, detecting, suppressing offenses and crimes, as well as bringing the perpetrators to appropriate responsibility, itself needs guarantees. This is due to two circumstances: firstly, without a clear definition of the powers of these bodies and the necessary financial, material, technical, personnel support, their activities will not be effective, and, consequently, its role as a guarantor of legality will be largely conditional; and secondly, the law enforcement activity itself in some cases may be illegal, unlawful (Andreev, 2007). In this case, we can name internal and interdepartmental supervision, the activities of public non-governmental organizations, self-defense of citizens' rights, etc. among the guarantees, that is, means of counteraction (Shamba, 1985).

4. DISCUSSION

Legality as strict and unswerving observance of legal norms is the basis of the legal order, however, if the legal norms are socially inadequate (that is, they do not express the interests of social groups), then their strict implementation leads to a drop in the level of the legal order. The decline in the level of the legal order is expressed in social consequences: economic crises, a decline in the standard of living of citizens, etc. Legality and public order differ in the facilitating mechanism. For example, the increase in the level of legality is primarily related to the activities of law enforcement agencies and measures to prevent, detect, and suppress various kinds of offenses and crimes. Increasing the level of the legal order is made possible by improving legislation, eliminating gaps and conflicts, ensuring the social adequacy of legal norms (Vasilev, 2021). Thus, the relationship (and, above all, the difference) between legality and public order should be considered in terms of content, type of determination, and mechanism of enforcement (Saulyak, 2010).

The problems of legality and public order have always been in the focus of legal science. To one degree or another, such legal scholars as V.S. Afanasyev (1993), A.B. Lisyutkin (2002), P.S. Nazarov (2005), V.M. Syrykh (2005), T.M. Shamba (1985), and others addressed them in their works. It is possible to find a wide variety of definitions of this concept in the legal literature. The definition proposed by Professor V.S. Afanasyev should be recognized as the most successful one. In his opinion, legality is "the principle, method, and mode of compliance of the behavior (activity) of participants in public relations and its results with the norms of law expressed in laws, subordinate normative acts based on them and other sources of law" (Afanasyev, 1993).

In this definition, two circumstances attract attention. Firstly, legality is understood in three meanings (as a principle, method, and regime). Secondly, the proposed definition indicates a feature that seems to reflect the essence of the "legality" concept to the maximum extent.

It is necessary to pay attention to the fact that only legality itself can be a consequence of the implementation of the requirements of legality: if the requirements and principles of legality are not implemented in the behavior of subjects, then there is no legality itself. It seems necessary to give a philosophical interpretation of the "structure" concept before proceeding to the critical analysis of the indicated approaches and the presentation of one's vision of this problem. The idea of the "structure", which can be obtained by referring to encyclopedic dictionaries, is generally of the same type and is

reduced to understanding it as a set of stable relations and connections between elements (Dukhno, 2015). At the same time, there are also some discrepancies in the interpretations. In particular, the definition of a structure in the philosophical dictionary indicates not only the unity of stable relationships between its elements but also the laws of these relationships.

The definition of structure in the brief philosophical dictionary emphasizes that the structure is formed not by any connections and relationships, but, first of all, by natural, essential ones (Alekseev, 2005). There is no mention of regular connections in the philosophical encyclopedic dictionary, and the structure is defined as a set of stable connections of an object that ensure its integrity (Ilichev et al., 1983). It seems that the definitions of the "structure" concept available in the encyclopedic literature are not perfect. The "structure" concept covers not only the relations between the elements but also the elements themselves (Alekseev, 2005). V.V. Borisov is right, he emphasizes that the structure is the unity of the elements, the relationships between them, their properties, and integrity (Borisov, 1977). Having learned the structure, it is possible to understand the phenomenon itself. Understanding the structure as a unity of elements and the relations between them makes it necessary to analyze the legal order in static and dynamic aspects (Dukhno, 2015).

In our opinion, the concept of guarantees of legality is important for understanding legality in the theory of state and law. Guarantee (from French garantie) – guarantee, security, assurance. Guarantees of legality are a set of conditions, methods, and means of ensuring it. In other words, these are factors that have a favorable impact on the mechanism of law, contribute to the achievement of legal goals, and ensure the legality of the actions of legal entities.

It is necessary to make some clarification considering the guarantees of legality as something that ensures legality. The peculiarity of the laws of the development of society is that they, as a rule, manifest themselves in the form of trends. Thus, the existence of guarantees does not mean that the legality (law) cannot be violated. In this regard, the question arises: is it permissible to refer to those factors of public and legal life, the positive influence of which is non-permanent to "guarantees of legality"? This issue is very complex, and its solution does not lie on the surface. In search of an answer to it, we will consider how the problem of guarantees of legality is solved in the legal literature.

The understanding of the essence and content of guarantees is facilitated by such a method of scientific knowledge as classification. Depending on the direction of the action,

general and special guarantees can be distinguished. General guarantees should include those, existence, and operations of which are not specifically focused on ensuring legality. Special guarantees include those factors, action of which is subordinate to the goal of ensuring the legality. A distinctive feature of special guarantees is their consolidation in the legal norms of the law or other sources of law, that is, these are certain legal means directly aimed at ensuring the legality, the lawful implementation, and protection of human rights. In this regard, special guarantees are often called "legal".

General guarantees (sometimes called "material") include socio-economic, political, moral, and spiritual.

Socio-economic guarantees are stability, a certain qualitative level of relations in the socio-economic sphere of society. High rates of economic development, a developed social sphere contribute to the rooting in the mass consciousness of the idea of stability and confidence in the future and, ultimately, to an increase in the level of socially active legitimate activity of legal entities (Yaraya, 2018).

However, it is necessary to make a reservation and give one textbook example. The consolidation of the freedom of entrepreneurial activity in the Constitution of the Russian Federation (Part 1 of Art. 34), the development of relations in the direction of building a market economy led, among other things, to the emergence of fundamentally new socially dangerous acts classified as criminal. In particular, the current Criminal Code of the Russian Federation in Chapter 22 "Crimes in the sphere of economic activity "(Articles 169–199.2) contains the following elements of crimes that were uncharacteristic for the Soviet period of state's development: Article 171 "Illegal Enterprise"; Article 173 "False Enterprise"; Article 174 "The Legalisation (Laundering) of Funds and Other Property Acquired by Other Persons in an Illegal Way"; Article 178 "Monopolistic Actions and Restricted Competition", etc. Therefore, the development of the economy is accompanied not only by the strengthening of the legality but also by the opposite trend – destabilization, violation of the legality.

Political guarantees represent a stable and consistent development of political relations and the political system of society within the framework of such constitutional principles as democracy, separation of powers, multiparty system, ideological diversity. Political relations should be considered as a guarantee of legality only if the political life of society is characterized by the absence of acute conflicts among the political elite, among the leading political forces of the country; when the mechanism of interaction between the state and other subjects of political life is real, not fictitious, that is, when private interests

are identified and coordinated in the process of such interaction, and subsequently they are taken into account when determining the common strategic interests and development goals of society and the state (Lisyutkin, 2002).

Laws serve as the foundation, the basis of the rule of law because they formalize its structural and functional aspects and establish social relations that are subject to legal regulation, methods of their regulation, participants, and their legal states (Nazarov, 2005). They define the procedure and relationships in legal life, that is, they provide the basis without which the rule of law is unthinkable. Therefore, the legality is directly dependent on the quality of legality (Yaraya, 2018).

When analyzing the relationship between law, legality, and the rule of law, it is necessary to consider their connections and dependencies. Thus, if legality is analyzed as a cause, then the legal order acts as a consequence. If, when analyzing legality, the researcher primarily deals with quantitative characteristics, then when considering the rule of law – with qualitative ones. If rights and laws act as a possibility of legal regulation of public relations, then the rule of law is their reality, the reality of implementation. If legality is the quality of rule-making and legal implementation activities, then when analyzing the legal order, it acts as one of its essential properties. Law, legality, and the rule of law have different direct legal sources and beginnings, initial moments. Unfortunately, V.V. Borisov does not specify or disclose this aspect of the relationship between the categories under consideration. The position of V.V. Borisov received recognition and widespread acceptance. Many scholars who subsequently dealt with this problem took as a basis precisely those provisions that were formulated by V.V. Borisov (1977).

The existence of legality, and therefore high legal efficiency of legal norms, does not yet entail the emergence of social efficiency and, accordingly, the strengthening of the legal order (Vissarov, 2008). Legitimate activity in some cases can lead to socially harmful consequences (Vasilev, 2021).

The destructive impact that can arise as a result of compliance with the requirements of legality is a consequence of the imperfection of the system of legal norms (ROSENBERG, 1994). It should be noted that the interest in the problems of the legal order has not faded in the Russian period of development of legal science (Komarov, 1998; Makuev, 2006; Matorin, 2007). However, the relationship between legality and public order, in general, is also interpreted or not considered at all. In some cases, scholars do not formulate their point of view, but copy the provisions formulated by V.V. Borisov in the monograph "The Legal order of developed socialism. Questions of theory".

A similar trend can be traced in the educational literature of recent years. Legality and public order in textbooks are correlated as a cause and effect. The rule of law is a consequence of the implementation of legality – this is the main idea that various educational and scientific publications reflect.

At the end of the article, we will consider the relationship between public order and civil order. In the general theory of law, public order is usually considered as an order that arises as a result of the action of all social regulators, including law, morality, religion, customs, corporate, aesthetic, and other social norms. In this case, the legal order acts as an element, the most significant part in the structure of public order. Accordingly, their ratio can be represented as a whole and a part (Svinin, 2012).

Legality and public order are the fundamental categories of legal science. They reflect the results of the operation of law, so a correct idea of the content and correlation of these categories is of great importance for understanding the social purpose of law and the specifics of its regulatory impact. There is a significant number of scientific works in the legal literature devoted to the legality and the rule of law. The accumulated research experience testifies to the ambiguous and complex nature of these phenomena. The approaches that have developed to date to understand the essence of legality and public order, in general, are a reflection of the Soviet tradition in legal science. This fact cannot be evaluated negatively (Meron, 1986).

It is important to understand that many modern scientific positions and concepts are a logical development of the conclusions of the Soviet school. Meanwhile, it should be noted that a unified, holistic theory of legality and public order has not yet been developed. Some issues are understood ambiguously by scholars, others are considered very cursorily, superficially. Legality and public order have both general indicators and specific ones. The development of an objective system of indicators is of great importance. If the level of legality is determined based on established reporting forms, then the level of legal order does not yet have an unambiguous system of indicators. Building a state governed by the rule of law is impossible without a deep sense of respect for the legality and the rule of law. Law enforcement officers, lawyers, and ordinary citizens should not only understand their role and importance in the legal life of society, but also know the legal means, forms, and ways to ensure them (Svinin, 2012).

We hope that this article will contribute to the formation of the necessary system of knowledge about the legality and the rule of law and the activation of further scientific discussion on this complex problem.

5. CONCLUSION

The review and critical assessment of the approaches existing in legal science to the concept of legality in the system of separation of powers and the relationship of legality and public order allow expressing our point of view. Both legality and the rule of law are the results of the implementation of the right. They are objective and exist in any historical period in any state. They differ in level and content, but they exist objectively since there is a right. It is with the emergence of law as a specific regulator of public relations that legality and public order arise as the results of the implementation of the requirements of legal norms. However, these are different results in terms of content and internal quality. If legality in the system of separation of powers is expressed in lawful behavior, in other words, in the legal effectiveness of the law, then the rule of law characterizes the degree of satisfaction of individual and socially significant interests and needs and ultimately reflects the level of social effectiveness of the law. It should be noted that the criteria for determining the levels of legality and public order do not fully coincide.

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