# THE MEANING OF THE LAW

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1. The term "law" (*lex* in Latin[1], *loi* in French, *legge*, in Italian, *ley* in Spanish, *lei* in Portuguese, *nomos* in Greek, *law* or *statute* in English[2], *wet* in Dutch, *gezetz* in German, *prawo* or *ustawa* in Polish, *törvény* in Humgarian) is undoubtedly is one of the most widely used in the legal language.

Most European states practice written law. It expresses itself, first of all, in the form of legislative acts (laws). Inspired by *Contrat social* (The Social Contract) of Jean-Jacques Rousseau, the Declaration of the Rights of Man and the Citizen (August 26, 1789) states that the law presents an incontestable advantage; it enjoys an indisputable legitimacy; it is "the expression of the general will"[3].

The same declaration specifies the scope of the law: it is particularly intended to establish the conditions under which rights and freedoms are exercised (Constitutional Council, Decision 44 DC, July 16, 1971). In the same sense, the Belgian Constitution proclaimed, as early as in 1831, that "*Belgians are equal before the law*" (Article 6, currently: 10)[4]. In various forms, the same idea is found in several European constitutions (see, for example, the Constitution of Luxembourg, Article 11, paragraph 2, the Basic Law of the Federal Republic of Germany, Article 3.1, and the Federal Constitutional Law of the Republic of Austria, Article 7.1.).

In a state of *common law*, the situation is different. The judge is to fulfil an essential, not to say primordial role in the application of the law. By virtue of the *stare decisis* rule, he considers that decisions of higher courts are precedents. If the judge cannot ignore the content of the law as soon as it is formulated in a *statute*, he does not lose any prerogative; it is his responsibility to interpret the law, that is, to give it a precise meaning, and to apply it to the dispute brought to his examination.

International law and, in particular, European law, accredits these ways of reasoning and expression. The Charter of Fundamental Rights of the European Union specifies, for example, in Article 52 that "*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law*", in the precise meaning of the word, and that the interventions of the latter must "*respect the essence of the said rights and freedoms*"[5].

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*1 In the Latin language, the word lex comes from the verb legare. It expresses an idea that it is someting referred to delegation. It is about giving people the right to make a valid decision on a set of social issues.*

*2 The terms statute and act of Parliament are considered to be equivalent. The first is more often used to designate the law in general, while the second one is used in the official title of a law.*

*3 See the famous work by R. CARRE de MALBERG, La loi, expression de la volonté générale (The Law as the Expression of the General Will), Paris, Sirey, 1931, reissued by Economica, 1984.*

*4 It must be recognized that the word "legislative act (law)" is sometimes used as a synonym for "law". For example, "no one is supposed to ignore the law" means that no one is supposed to ignore all the acts of positive law. In this sense, the word does not refer to a legislative act with legislative force, but refers to any act of general scope that may be applicable in a specific case.*

*5 In the Resolution Kruslin vs. France (April 24, 1990), the European Court of Human Rights, for its part, retains a broad meaning of the word "law". It understands it in a substantive and non-formal conception. It does not*

**2. It is, however, necessary to observe that the term "law" is polysemic**. It is understood differently depending on times, places and institutional regimes[6]. Even in one state and at the same moment, the word can have different meanings. To avoid confusion and misunderstanding, it seems useful to recall here the various meanings that the term "law" has received in the constitutions of European states and, more broadly, in their legal systems.

The observations are based, at the same time, on texts, theories and practices.

Contrary to the popular belief, the ordinary law (or the law, without further details) is only one of the forms of law. The legislative power, that is, the power to pass the law, requires different expressions. It implements various procedures and rules on the basis of different majorities.

If constants are emerging, specific regimes, with particular names, are manifested almost everywhere.

There is a tendency to consider that better knowledge of the institutions and sources of law in the European States could help harmonise the vocabulary or, in any case, to adopt a more precise terminology. And, why not, allow the elaboration of law, more coherent and more permeable to the legislative evolutions that occur, at the same time, in neighbouring states.

**3. In this respect, it is necessary to apply a set of distinctions.**

In all European states, the so-called constitutional law (Section 1), the law in general (Section 2), the organic law (to which the special law is attached) (Section 3) should not be confused. It is also necessary to distinguish between the substantive law and the formal law (Section 4), to take into account the referendum law (Section 5) and various enabling acts (Section 6). In compound states, of course, the land distinction between the federal law and the federated law (or between the national law and the regional law) must be taken into account (Section 7).

Here we propose the key to understanding. It is in the extension of Hans Kelsen's works. In any case, the author of the standard, the legislator, is the same. On the other hand, there appear differences between standards qualified in one way or another for "laws". They develop on three different grounds: the subject, the value (or the place in the hierarchy of standards) and the procedure (or the

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*require the intervention of a representative parliamentary authority.*

6 *The observation deserves to be nuanced. There is, however, some correspondence between the way in which the relationship between the Parliament and the government is organized and the way in which the hierarchy of sources of a law is conceived, for example, sources of a law and a regulation.*

conditions of elaboration).

One question remains. Is it, each time, the same law?

# .**SECTION I.**– CONSTITUTIONAL LAW

**1. In my opinion, the term "constitutional law"** conceals a contradiction *in terminis*. I prefer to speak more simply and more exactly: "constitution"[7]. I tend to ban the term "constitutional law" from analyses and discourses.

The constitution is not a law. A law, important as it is, is not part of the constitution. Logically, it is not possible to explain that a constitutional court can verify the conformity of the law with the constitution whereas the latter would be only a particular form of law[8].

The constitution has a characteristic, which no law, even if it is qualified as constitutional, can have. It is "inviolable", even in view of variable factors. It is editable. A revision must be carried out according to a different (and, in a way, more cumbersome and more difficult) procedure compared to the one set up for the making or revision of the law. On the other hand, the constitution most often executes a jurisdictional type of control which tends to ensure the respect of its prescriptions compared to any other normative provisions.

A fundamental hierarchical difference is thus established between the "constitution" and the different forms of law. With all consequences of which we are aware. As John Marshall, the Chief Justice of the Supreme Court of the USA, stated in 1803, "*a legislative act contrary to the Constitution is not law"* (Marbury vs. Madison); as the French Constitutional Council affirmed, for its part, in 1985, "*the law passed (...) expresses the general will only if it complies with the Constitution"* (Constitutional Council, Évolution de la Nouvelle Calédonie (Development of New Caledonia), August 23).

The Spanish Constitution (Art. 9, paragraph 3) is undoubtedly the one that most clearly emphasises the "normative hierarchy" that is established between the constitution and the other rules of law[9]. The Finnish Constitution of 1999 (in force since 1 March 2000) also speaks of the "supremacy of the Constitution"; it obliges the judge to make constitutional provisions prevail over those which can come from ordinary laws. It demands that the judge exclude the latter when they present defects of constitutionality, at least formally[10].

As for the Basic Law of the Federal Republic of Germany, it lays down, in a manner which cannot be clearer, two rules in its Article 20, 3. The first: "**the leg-**

*7 F. DELPEREE, J'écris ton nom, Constitution (I am inscribing your name, Constitution), Bruxelles, L'Académie en poche, 2016.*

*8 See the Constitution of the Republic of Bulgaria, Art. 5, paragraph 1: "The Constitution is the supreme law and the other laws cannot be contrary to it".*

*9 Spain, Constitution, Art. 9.1. « Citizens and public authorities are subject to the Constitution and other norms of the legal order» and Art. 9.3. «The Constitution guarantees the principle of legality, the hierarchy of norms... ».*

*10 A. PIZZORUSSO, "La loi" (The Law), in D. CHAGNOLLIAUD and M. TROPER, Traité international de droit constitutionnel (The International Treaty and the Constitutional Law), Paris, Dalloz, 200X, vol. II, p. 333, note 17.*

**islative power is bound by the constitutional order**"; the second: "**the executive and judicial powers are bound by law and the rule of law**".

**2. The term "constitutional law"** is nevertheless used in the doctrine and in all legal systems. Even if the meaning of the expression used is not always clear.

"In a broad sense, the term is synonymous with constitution ... In a stricter sense, the term refers to the law amending or supplementing the constitution"[11]. Today, it is generally used to designate the document that contains the draft, and then the result of an operation that involves a revision of the constitution, that is to say, that modifies, repeals or supplements certain provisions of the basic text. It is the most obvious manifestation of the derived constituent power. Because of its author, its purpose and the conditions of its elaboration, it obviously escapes any control of constitutionality[12].

In French law, for example, the constitutional law is adopted in accordance with the procedure laid down in Article 89 of the Constitution. The revision initiative belongs to the President of the Republic on the proposal of the Prime Minister and members of the Parliament. Both assemblies must vote the draft or the proposal within the same term. The revision is final only if approved by a referendum (*infra*). However, in the case of a draft, the President of the Republic may dispense with the referendum procedure; in this case, he submits it to the Parliament convened in the Congress; the draft revision must be adopted by a three-fifths majority of the votes.

**3. Under the influence of the Anglo-Saxon terminology**, the expression "fundamental law" (*Grundgezetz,* in German, ou *Grondwet,* in Dutch) or "supreme law" is also used. It elicits the same comments as the term "constitutional law". It is usually the case in the Federal Republic of Germany that the expression *"Grundgesetz für die Bundesrepublik Deutschland" (GG) (the Basic Law of the Federal Republic of Germany)* was privileged in 1949 to indicate that, pending reunification, the state and its institutions were at a transitional stage. The integration of the eastern lands into federal Germany has not caused, however, the announced change of this name.

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*11 J.-L. PEZANT, see Loi constitutionnelle (Constitution law), in Dictionnaire constitutionnel (Constitution Dictionary) (edited by O. DUHAMEL and Y. MENY), Paris, PUF, 1992.*

*12 Among the French "laws of the Republic", it is necessary to take into account those whose particularity is that they contain "fundamental principles", particularly in the area of public liberties (PFRLR). Their existence is mentioned in the preamble of the Constitution of 1946, itself quoted by the Constitution of 1958. The situation does not fail to be ordinary. The said principles have a constitutional character; as such, they serve as "parameters of assessment of the constitutionality of the law" (Juan Ruiz Manero); they are part of what is known as the "constitutional block". Their identification nevertheless depends on an express intervention of an ordinary (Constitutional Council, July 16, 1971, No. 71-44, Liberté d'association (Freedom of Associations)) ; it is up to the Council of State or the Constitutional Council to recognize them as such (Constitutional Council, July 20, 1988, No. 88-214 DC, Loi portant amnistie (Amnesty Law),Collection, p. 119).*

**4. In brief,**

- *the constitution (also called constitutional law, fundamental law or supreme law) has, by definition, a constitutional objective: to establish the essential rules of organisation and functioning of the state, and to specify the rights and duties of citizens,*
- *of course, it has the constitutional value,*
- *its adoption is subject to the compliance with a particular procedure which is prescribed in the constitution itself and which proves to be more complicated than the one required for the adoption of an ordinary law.*

Procedures for revising the Constitution, for example, through constitutional laws, are diverse. They are known. We refer to this subject in the work published under the editorship of S. GAMBINO and G. D'IGNAZIO (*La revizione costituzionale e i suoi limiti. Fra teoria constituzionale, diritto interno, esperienze straniere (Constitutional revision and its limits. On the basis of constitutional theory, domestic law, foreign experiences),* Milan, Giuffrè, 2007). It goes without saying that the inviolability or the flexibility of the revision procedures can contribute to stabilizing the constitutional system or, on the contrary, to promoting rapid changes.

# **SECTION II.** – THE LAW WITHOUT A QUALIFIER

**1. When it is used without a qualifier** or when it is described as "ordinary", the expression "law" begins to be understood in the organic sense of the term. As Luis Maria Diez Picazo points out, "**in European constitutional practice, it is the purely formal concept of law that has finally prevailed**" (« Le concept de loi » (The Concept of Law), *Annuaire international de justice constitutionnelle (International Directory of Constitutional Justice),* 2003, p. 463).

There are no constitutional or legislative issues that would be one or the other, "by nature". While certain subjects, such as those related to the methods of appointment and election of the principal public authorities, normally find their place in the constitution, they may also be the subject of laws – ordinary, organic or special – or even be registered in separate documents, such as assembly rules. Conversely, issues of minor importance may, for circumstantial reasons, be the subject of constitutional laws.

**2. The law is so named because of its author. It is the work of the legislature.** It is up to each constitution to define the institutions that make up this power and prescribe the process of making laws.

Sometimes it is stated that it is the deliberation of the Parliament (of a unicameral or a bicameral structure) which serves to carry out legislative work (see, for example, Article 1, paragraph 2 (b) of the Hungarian Basic Law: "*The Parliament adopt the laws of the Parliament*"). Sometimes it is considered that the law is a collegiate work which requires the deliberation of one or two chambers (houses) and the sanction for the intervention of the authorities entrusted with the executive function (see, for example, the Greek Constitution, Article 26, paragraph 1: "*The legislative function is exercised by the House of Deputies and the President of the Republic*") and the Belgian Constitution (Article 36: "*The legislative power is exercised collectively by the King, the Chamber of Representatives and the Senate*").

It is generally considered that the law must, at least, be passed in a representative parliamentary assembly. It must be put to vote if a double majority is collected. First, the majority of the members of the assembly must be present (quorum of attendance). Then, among the members present, a majority of representatives must speak in favour of the proposal or draft under discussion (quorum of votes)[13].

*13 A disputed question is how to interpret "abstentions". Should we equate them with positive votes (on the pretext that, according to the saying, "silence gives consent")? Should we put them in the negative votes (to the extent that they do not adhere to the solution that is advocated)? Or, as in Belgium, does it mean that they "are not counted" - it is therefore*

**3. Constitutional regimes differ on one important point.**

Sometimes the constitution refrains from specifying what the powers that belong to the ordinary legislator are; the latter is presumed to have general jurisdiction, subject to the powers that the constitution expressly assigns to other public authorities.

Sometimes the constitution supplements the general clause of competences by specifying that certain matters are "reserved" to the legislator, that they must be regulated "by the law" and that they may not be delegated to other public authorities, in particular, to executive ones (*infra*).

Sometimes the Constitution, like that of the Fifth Republic (Articles 34 and 37), establishes the principle – undoubtedly new – of regulatory competence; consequently, the competence of the legislator is limited: it is exercised only in the most important matters, which appear in the list which the Constitution established, and which may be subsequently supplemented.

**4. An ordinary law may be subject to constitutional control.** This control is executed not only by comparison with the constitution itself, but also by comparison with other categories of laws - organic laws or special laws (*infra*) - and even with international treaties, to which it is subordinate. According to the classical analysis conducted by V. Crisafulli[14], the law so defined has a double "legislative force". On the one hand, it has an active force, namely the faculty to innovate, being subject only to constitutional control, but being able to modify or repeal acts of the identical or lower value. On the other hand, it has a passive force, namely the power to resist modification or repeal by acts that do not fall within the category of formal laws.

**5. In brief,**

- *the ordinary law has a subject; it intervenes either in an indeterminate field whose boundaries are not defined by the constitution, or in the competences which the constitution expressly attributes to it,*
- *it does not have any constitutional value; moreover, it is usually subject to constitutional control,*
- *it is developed according to the procedure prescribed by the constitution and clarified by the rules of assembly.*

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*sufficient that the positive votes outweigh the negative votes in order for the text under discussion to be considered adopted?*

*14 V. CRISAFULLI, Lezioni di diritto constituzionale (Lessons of Constitutional Law), Padoue, Cedam, 1984, vol. II, p. 350 (as cited in M. BAUDREZ, Les actes législatifs du gouvernement en Italie. Contribution à l'étude de la loi en droit constitutionnel italien (Legislative acts of the government in Italy. Contribution to the study of laws in Italian constitutional law), Paris, Economica, 1994, p. 17).*

# SECTION III. – ORGANIC LAW

Organic law can be found in various legal systems – French, Spanish, Belgian …[15]. In other systems, the term is used, but there is no need to give it a technical meaning; the name merely qualifies laws that aim to ensure the "organization of public authorities"; the development of such laws is not subject to particular rules of majority or procedure.

**1. In France, it is generally considered that** «there is no ideal definition of organic laws. We can consider, although it is not entirely correct, that the organic laws specify or even supplement certain constitutional provisions. In fact, organic laws are enumerated by the Constitution in various articles, and the laws thus qualified must be adopted according to a particular procedure. An ordinary law cannot therefore contain provisions of an organic nature"[16].

**2. As it is developed in French law,** the organic law is an autonomous source of law. It differs from both the constitutional norm and the legislative (ordinary) norm. It occupies an intermediate place between these laws.

Most of the provisions applicable to the ordinary law may apply to the organic law. According to Article 46 of the French Constitution, peculiarities nevertheless appear. Thus, because of the importance of their content, the provisions of the organic law are compulsorily submitted to the Constitutional Council before being promulgated. For this purpose, the Council verifies that the organic law has been adopted in accordance with the procedure prescribed in Article 46; it ensures that the law has not exceeded its area of competence, but also that it has exercised it fully (Constitutional Council, July 30, 2003, No. 2003-478, DC, §§ 5-6).

*15 Moldova and Romania also have constitutions that refer to organic laws. The Republic of Latvia between 1991 and 1998 had an organic law ( Konstitucionālais likums). The law regulated human rights (« Cilvēka un pilsoņa tiesības un pienākumi »). Today, this matter is included in the constitution. The Basic Law of Hungary (2012) mentions dozens of areas to be regulated by organic laws adopted by a two-thirds majority.*

*16 M. LASCOMBE, Code constitutionnel et des droits fondamentaux, commenté (Constitutional Code and Fundamental Rights, commented), Paris, Dalloz, 2011, p. 653. M. VERPEAUX, P. DE MONTALIVET, A. ROBLOT-TROIZIER and A. VIDAL-NAQUET (Droit constitutionnel. Les grandes décisions de la jurisprudence (Constitutional law. Major case law decisions), Paris, PUF, 2011, coll. Thémis Droit), in their turn, say: "This category of laws is largely indeterminate. Firstly, because they cannot be defined: the laws to which the Constitution confers this character are organic and are intended to supplement, specify and implement the constitutional provisions which provide for the adoption of such a law. Secondly, because there is no organic field in nature: these laws intervene in the fields that are more and more varied due to constitutional revisions; their unity results only from the procedure for their adoption, procedure provided for in Article 46 of the Constitution (…). Finally, the category is indeterminate because the place of organic laws in the hierarchy of norms is not specified either by the constitutional text or by the constitutional jurisprudence" (p. 394).*

**3. The formation procedure is also different.** Longer deadlines are provided than in the ordinary legislative procedure; an extended agreement within the Parliament is sought on this occasion[17]. During the parliamentary procedure, in case of disagreement of the Senate, the organic law must be adopted by the National Assembly by an absolute majority. An organic law related to the Senate must imperatively be approved by the Senate.

**4. The organic law is a «law of application of the Constitution"** (Jean-Louis Pezant, see Law, in *Dictionnaire constitutionnel (Constitutional Dictionary)*, 1992). It has a sphere of competence reserved for it; this is determined by various articles of the Constitution related to the organization and functioning of public authorities. The Constitutional Council has developed a jurisprudence which seeks, in particular, to establish the principle according to which the organic laws are applied only in the domains and for the objectives strictly limited by the Constitution.

**5. The relationship with constitutional and legislative norms is complex.** On the one hand, organic laws are subject to the Constitution; they are subject to a mandatory and integral control of constitutionality. On the other hand, relations with other legislative sources are more determined by the principle of competence than by the hierarchical principle; the condition of the organic law places it at a level higher than that of the ordinary law.

**6. The organic law also takes place in the Spanish legal system.** It is provided for by the Constitution (Art. 81. 1) [18] and by the organic law on the Constitutional Court (Art. 27, paragraphs 2 and 28). It presents itself on an intermediate level between constitutional sources and legislative sources. It tends to supplement the constitutional norm without being itself constitutionalised. It can be invalidated for «grounds of unconstitutionality, both formal and substantive" (Constitution, Art. 28).

**7. The "special law"** (in Belgian law) is characterized by its subject: it can only be applied in the areas that the constitution has determined; it prolongs and specifies the constitutional operation. It is also distinguished from the ordinary law by the conditions of a procedure which governs its adoption: it must collect, within each chamber, a two-thirds majority of the votes, it being understood

*17 M. VERPEAUX and others, op. cit., ibidem.*

*18 "The organic laws are those that refer to the development of fundamental rights and public freedoms, those that approve the statutes of autonomy and the general electoral system, as well as the other laws provided for in the Constitution" (Art. 81.1.).*

that a majority must be collected in the linguistic groups (French and Dutch) of deputies and senators. It may be subject to the constitutional control.

**8. In brief,**

- *— the organic law (or the corresponding special law) has a subject close to the general planning of the institutions of a state,*
- *it has a value which is not constitutional but is mandatory for an ordinary legislator,*
- *it is drawn up according to a procedure which the constitution determines and which is, as a general rule, more complex than a procedure required to adopt an ordinary law.*

# **SECTION IV.**– SUBSTANTIVE LAW AND FORMAL LAW

Among ordinary laws, a distinction is generally made between substantive law and formal law. Both are the work of the legislature, but their content differs, which affects the conditions of their development.

**1. The material law is, as the saying goes,** "a general, impersonal and abstract work". It establishes the rights and duties of citizens; it establishes the status of institutions, it defines the policies that public authorities are empowered to pursue.

As its name suggests, the formal law is taken in the form of an act even if it is not part of this same general concern. For example, laws on persons' naturalisation, finance laws (budget and accounts) and laws on accession to international treaties.

**2. Because of their subject, formal laws have special** procedures: naturalisations are, for example, the subject of a privileged examination by the parliamentary assembly; however, the budget is prepared by the government; the international treaties are negotiated by the government with one or more foreign partners before being submitted to the assembly, and the assembly may not amend a treaty which has already been signed.

**3. In brief,**

- *the substantive law has a strictly legislative content,*
- *it has a legislative value,*
- *it is drawn up under the conditions of a procedure prescribed by the Constitution.*
- *In its turn,*
- *the formal law does not have a strictly legislative content,*
- *it has a legislative value and may be subject to the constitutional control,*
- *it is drawn up according to a procedure distinct from that of the substantive law*[19]*.*

19 *"When it has a specific purpose, the ordinary law may get a special name, accompanied*

# SECTION V.–REFERENDUM LAW

As a reference, let us mention the referendum law. It is an instrument that aims to amend the Constitution (see, for example, Article 89 of the French Constitution) or a law (see, for example, Article 11 of the same Constitution). Simply speaking, people can, directly and without amending, adopt the text which is put to vote. The constitutional judge refuses, most often, to verify the conformity of such a text to the Constitution.

# SECTION VI.– ENABLING (OR DELEGATION) ACTS

As Pierre Bon writes, "**the possibility for an Act of the Parliament to empower the government to act on its behalf is admitted practically in all constitutional orders**". And the author adds: "Sometimes it is easy. This is the case in Italy, where, since the second half of the 19th century, it seems to have never given rise to major objections. This is also the case in Spain: applied since 1845, developing under the Restoration, provided for the first time expressly by the Republican Constitution of 1931, systematically used under the regime of General Franco, it appeared at the Constituent Assembly of 1978 as a secular institution that he has no reluctance to take over " (*International Directory of Constitutional Justice (AIJC)*, p. 475).

Since 1831, the Belgian Constitution has also specified that the King (i.e. the government) has no other powers than those which the Constitution confers upon him but also "*the particular laws brought under the Constitution itself*" (These laws are called laws on "special powers"). See also article 43, paragraph 4, of the Constitution of Greece: "*Laws passed by the House of Deputies in the plenary assembly may delegate the power to issue regulatory decrees on matters prescribed by them within a general framework. These laws outline the general principles and directions of the regulations to be followed, and set the terms during which the delegation will be used*".

*by a procedure of development having certain peculiarities, without its nature being changed." (J.-L. PEZANT, see Law, in Dictionnaire constitutionnel (Constitutional Dictionary)...,cited).*

**1. The delegation law is an ordinary law. It is most often a government initiative.**

**2. It determines the particular areas in which the executive authorities are empowered to act. Hence this name retained in Belgium:** the law is called a law on "special powers" to indicate that the authorization cannot be general; delegated skills must be properly outlined; they can only be applied in the areas that the Constitution specifically reserves for the law.

**3. As a general rule, the law only involves delegation** of the legislative function for a specified period.

**4. The Italian doctrine has debated the existence of what it calls "interposed norms".** Article 76 of the Constitution establishes the rule that "the exercise of the legislative function may be delegated to the Government only if the principles and criteria have been determined and only for a fixed period and for defined objectives".

**5. The delegation law may be subject to the constitutional control.** It especially refers to actions performed under such authority.

In brief,

- *the delegation law is a law that aims to empower the government to intervene in a field of competence which is normally legislative;*
- *the delegation law has a value which is that of an ordinary law; it must respect the Constitution and may be subject to the constitutional control,*
- *the delegation law is a law developed according to the procedure valid for the ordinary law.*

# **SECTION VII.** – FEDERAL LAW AND FEDERATED LAW

The federative system rests, as we know, on a double constitutional division, which implies the division into particular territories (communities, regions, cantons, lands, federated "states"…) and political responsibility. These are distributed among the federal state and the federated communities. It is generally considered that a strict system of sharing federal and federated responsibilities is a guarantee of the proper functioning of the federative system as a whole.

**1. In several federal states** (Austria, Belgium, the Federal Republic of Germany, Switzerland…), the term "federal law" is used to designate texts of a legislative nature which are adopted by the assembly or legislatures of the federal state.

**2. In these same states, the term "federated law"** is used by the doctrine even if it is not used as such in the constitutional texts. Other names, such as "decrees" or "ordinances", may be used to indicate the source of these other legislative acts. See, for example, Article 117, paragraph 1 of the Italian Constitution: "*In the following subjects, and within the limits of the fundamental principles laid down by the laws of the state, the region adopts legislative norms which shall not be in contradiction with the national interest or with interests of the regions: (...)*" and paragraph 2 of the same article: "*The laws of the Republic may give the region the power to adopt provisions for their implementation*".

**3. The principle of equality commands,** in fact, relations between the federal state and the federated authorities[20]. There is a corollary. The federal law and the federated law enjoy the same status. Both laws are subject to control by the provisions of the Federal Constitution.

It should be noted, however, that in some federal states, "federal law prevails cantonal law", at least in the areas of competence that fall under the so called "competing jurisdictions" and that the constitutional control sometimes operates, as in Switzerland, in one way only: the federated law is subject to such control, while the federal law is not.

*20 F. DELPEREE and M. VERDUSSEN, "L'égalité, mesure du fédéralisme" (Equality As a Measure of Federalism), in Jean-François Gaudreault-DesBien and Fabien Gélinas (dir.), Le fédéralisme dans tous ses états. Gouvernance, identité et méthodologie (Federalism in all its states. Governance, identity and methodology), Bruxelles,Bruylant et Cowansville, Yvon Blais, 2005, p. 193-208.*

The law is the privileged instrument of parliamentary actions. It is the expression of the political will that a democratically elected assembly is able to bring to its ranks. It intends to control the actions of other public authorities and the behaviour of citizens.

The study you have just read shows that the legislative phenomenon is more diversified than it might appear at first glance. Appellations can be misleading or equivocal. They do not reflect the variety of legislative instruments.

It is not just a question of conceptualisation. It is a question of understanding the state's constitutional system in force (or that could be in force).

# GLOSSARY

**Constitution:** a rule of law which, when it is established by the original constituent power, is intended to create a state, to establish its principal institutions and to determine the conditions for the exercise of political power or which, when it is established by the derived constituent power, is intended to revise these conditions.

**Framework Law:** a rule of law with a very general content which defines the principles or orientations of a specific reform or policy and whose implementation is entrusted to executive and administrative authorities; in a federal state, it may contain the provisions that must be respected by a member of the federation in the exercise of its powers.

**Constitutional Act or, strictly speaking, Constitutional Review Act:** a rule of law which is the work of the derivative constituent power, the purpose of which is to revise or amend the constitution in force, either by adding new provisions to it, or correcting or repealing the existing provisions. As such, it is at the top of the hierarchy of domestic law.

**Law of Accession:** a formal law by which the legislature agrees to the provisions of a treaty concluded by the executive power and allows its provisions to have effect in the domestic legal order.

**Budget Law:** a finance law which provides and authorises, for the coming year, all the revenues and expenditures of the state.

**Naturalisation Law:** a formal law whose objective is to confer the nationality of a state on one or more persons of foreign nationality.

**Law of Exception:** an established rule of law, in derogation of the constitutional law, and allowing the government to implement legislation in exceptional, urgent or unforeseen circumstances; it is generally only of provisional value and must be approved as soon as possible by the Parliament.

**Enabling (or Delegation) Act:** a rule of law which is established by legislative authorities and authorises the government to adopt, for a specified period, administrative acts in matters which are normally within the scope of the law.

**Federal Law:** a rule of law which is, in a federal state, developed by federal legislative authorities in areas which fall under the federal jurisdiction (exclusive or concurrent).

**Federated Law:** a rule of law which is, in a federal state, drawn up by authorities of federated units in the areas of the federated jurisdiction.

**Fundamental Law** (used in Anglo-Saxon countries): a rule of law which is established by the original constituent power and which establishes, sometimes provisionally, the institutions of the state, which determines their organisation and the rules of their functioning.

**Ordinary Law:** a general and impersonal rule of law which is, at the initiative of the parliament or the government, the subject of deliberation in one (or two) parliamentary assemblies, which received an absolute majority of the votes, which is sanctioned and promulgated by executive authorities before being published by them and which, as such, is in the hierarchy of norms below the Constitution and above administrative acts, whether regulatory or individual.

**Organic Law:** a supra-legislative and infra-constitutional rule of law which is adopted by the legislature in areas which fall within the "organisation of public authorities" according to a procedure different from that required for the adoption of an ordinary law, but less rigorous than that required for the revision of the Constitution.

**Programme Law:** a rule of law which determines the objectives to be attained by public authorities in a specific field, for example in the political and social field; it may also contain commitments covering several financial years.

**Referendum Law:** a rule of law which is adopted directly by people in a referendum and which enjoys, according to its purpose, a value equivalent to either that of the Constitution or that of a law.

**Special Law:** (used in Belgium): a rule of law which is established by the legislative power which, acting according to particular procedural rules, is applied in the fields determined by the constitution.

# ADDITIONAL COMMENT TO REPORT **"THE MEANING OF THE LAW"**

**Francis DELPEREE**

Some conclusions or recommendations can be made after reading the note on the "**meaning of the law**". For the convenience of the reader, here follows the order proposed by the initial note.

## 1. CONSTITUTION (OR CONSTITUTIONAL LAW).

Article 5, paragraph 2 of the Constitution of Ukraine states the following: "*The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State, its bodies or officials*". Section XIII of the Constitution somewhat tempers the scope of this statement. It prescribes how amendments can be introduced into the Constitution. "*The President of Ukraine or (...) no fewer National deputies of Ukraine than one third of the constitutional composition of the Verkhovna Rada of Ukraine*" (Art. 154).

The procedure laid down in Article 155 provides for the meeting, at a first parliamentary session, of a "*majority of the constitutional composition*", and later on, at a subsequent session, of "*no less than two-thirds*" of the same composition.

The procedure laid down in Article 156 requires, for its part, the meeting of a majority of "*no less than two thirds of the constitutional composition of the Verkhovna Rada of Ukraine*" and the approval of the law, it is assumed by the majority, by the referendum.

One wonders about the usefulness of calculating the prescribed majorities on the basis of the "*constitutional composition of the Verkhovna Rada of Ukraine*". The same objective could be achieved if the Constitution prescribed, first, the number of deputies who must be present in the Parliament to take useful decisions, including in constitutional matters, and then to establish the rule that decisions are taken by a two-thirds majority of the deputies present. See subsequent comments about the voting on the ordinary law.

## 2. THE LAW WITHOUT A QUALIFIER

The second sentence of Article 8, paragraph 2 of the Constitution of Ukraine states the following: " *Laws and other normative legal acts are adopted on the*

*basis of the Constitution of Ukraine and shall conform to it"*. In the same spirit, Article 58, paragraph 1 states that "*laws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul the responsability of a person"*.

We wonder about the use of the expression "*other normative legal acts*". What are the legislative acts that are not laws? Are these formal laws (point 4)? Or should "*legal acts*" mean legal acts without a normative scope? The comparison of the concepts can mislead the reader.

Article 84, paragraph 2 of the Constitution states that the "*decisions of the Verkhovna Rada of Ukraine are adopted exclusively at its plenary meetings by voting*". It is stated in paragraph 3 that "*voting at the meetings of the Verkhovna Rada of Ukraine is performed by a People's Deputy of Ukraine in person"*. Article 91 adds, for its part: "*The Verkhovna Rada of Ukraine adopts laws, resolutions and other acts by the majority of its constitutional composition, except in cases envisaged by this Constitution*".

The same remark that has been made about the constitutional majority is made about the calculation of the absolute majority. In modern constitutions, the term "absolute majority" does not equate to "majority of seats". It is sufficient if the positive votes outweigh the negative votes. It is also stated that, in this case, abstentions are not taken into account for the calculation of the absolute majority.

Rules that are both more precise and more flexible should be expressed more clearly. The plan of reasoning is sketched here.

The time of the voting must be announced at a due moment and in a proper manner.

At a meeting of 450 members, the voting cannot take place if 226 members are not present. Proxies are not permitted. Nor remote voting.

Assuming that this attendance quorum is reached, it is sufficient to check whether the positive votes are more numerous than the negative ones.

One may say that the situation may lead to paradoxical results. At the very outside, a law must be able to be adopted by 16 votes against ten, 200 abstentions and 224 absentees. The absentees are wrong …

## 3. ORGANIC LAW

For the purpose of outlining or mitigating the often complex procedures of revision of the Constitution, several modern constitutions have introduced the category of organic law. We showed it. The approach cannot be accomplished without first identifying a set of "organic matters" which can, according to complex procedures and reinforced majorities, be the subject of the Parliament's examination.

It is a particularly delicate objective. It consists of dividing the legislative matter into two parts: a part that "may" be the subject of ordinary legislation

and the other part that "must" be the subject of organic legislation. Without losing sight of mixed matters which can be found in the same law.

It must be asked whether there is an additional complication, even unnecessary, in the production of the legislative norm. Such an approach could not be initiated if the jurisdictional control were not organised to channel the legislator' actions in these two fields.

## 4. SUBSTANTIVE LAW AND FORMAL LAW

See the remark concerning the meaning of "*other normative legal acts*". See also Article 117, paragraph 3 that raises the question of "*normative legal acts of the Cabinet of Ministers of Ukraine, ministries and other central bodies of executive power*".

## 5. REFERENDUM LAW.

Chapter III of the Constitution of Ukraine is devoted to "*Elections. Referendum*". It is clear that this chapter is written in a particularly concise manner. It deals, for the most part, with the right of a referendum initiative. On the other hand, it does not pronounce on the modalities and procedures that deserve to be implemented. Except in constitutional matters, it does not speak of the value that should be given to the results of the referendum. Is it enough to say that "*The expression of the will of the people is exercised through... referendum and other forms of direct democracy*" (Art. 69)?

## 6.– THE ENABLING ACT.

Article 106, paragraph 21 of the Constitution provides that the President of Ukraine "*adopts a decision, in the event of necessity, on the introduction of a state of emergency in Ukraine or in its particular area (...) with subsequent confirmation of these decisions by the Verkhovna Rada of Ukraine*".

It does not envisage any prior intervention by the Parliament for the purpose of empowering the executive authorities to adopt, for a given period and for given matters, rules of law which the Parliament is responsible to approve a posteriori.

If the phenomenon is well regulated and subject to the necessary judicial control, it gives flexibility in the management of public affairs by avoiding an authoritarian drift and preserving a minimal parliamentary control.

## 7.– FEDERAL LAW AND FEDERATED LAW

(for memory)

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