CONSTITUTIONAL LAW CONNOTATIONS OF LEGAL CERTAINTY IN THE RULE OF LAW

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Abstract

The Rule of law must accomplish the rule of law, both in its relations with citizens and in relations with the governing bodies. An main foundation of the Rule of law consists of the principle of legal security which implies that individuals, as beneficiaries of the law, to be able, without putting too much effort, to decide what is allowed and what is prohibited by the applicable law. To achieve this outcome, the legal norms adopted must be clear and understandable and not be subject over the time to so frequent and especially, unpredictable changes. The principle of legal security is also known as the principle of legal certainty because it consists of the uncertainty that the enforcement of legal norms in a given situation to be predictable, the incident legal norm to be easily to establish, its recipients to be certain a legal provision corresponding offense is applied, and not another one, and that it will be interpreted in a uniform manner and a legal norm which did not come to the notice of recipients can not be applied

Key words*: rule of law, legal security, legal certainty, constitutional order, political organization of society.*

JEL Classification: [K10]

Throughout the historical evolution, the political organization of society, particularly through its main institution, the State, was realized more and more on perfecting the State structure in relation to natural or legal persons of the State and the rigorous legal norms, which set both their rights and freedoms, but also duties of the State bodies to act within the legal norms intendment. The very name of Rule of law (Rechsstaat) indicates that the State exercises its political power based on legal norms (Flaminzeanu, Butculescu, Ispas, 2014, pp. 270-271), by force of argument rather than the argument of force.

Montesquieu said that (Montesquieu, 1997, p. 20) "the language of laws should be simple ... When the law is written in a pompous style, it is no longer considered only a parade object... Laws should not be subtle; they are designed for people with modest possibilities of understanding. When exceptions, limitations, amendments to the law are not necessary, it is better not to exist. Such details always send to new details. No amendments should be made to a law without good reason. In designing laws, is should be borne in mind that they should not disturb the nature of things".

The concept of Rule of law has existed since the Ancient times, period in which many philosophical schools of law, especially Greek ones, such as the Sophists' school (*Sophists,* were thinkers who promote their ideas in the 5th Century. Among the Sophists there are: Protagoras, Gorgias, Thrasymacos, Hippias, Critias, Antiphon

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etc.) or the Lawmen' school (*Fa-Kia, Lawmen's' school*, founded by Han Hi-Tzî in the 3rd Century II a.n.Ch. Lawmen claimed that the law, *fa*, has a necessary, inward power, so it must be strictly observed) in Ancient China, but also a number of thinkers like Plato and Aristotle, have founded on the concept of foundation of the Rule of law. Later in the classical period, the Rule of law appeared with the modern society, with the transformation of society on other principles of law, on secular and rational principles.

In the Romanian law, the events of December 1989 led to a return to the principles of political-judicial democracy and consequently the Rule of law was enshrined by the fundamental legal norm, the current Constitution of Romania 2003 revised by the Constitution of Romania adopted on November 21st, 1991, in which the Rule of law, as the supreme value, is enshrined by the provisions of art. 1, paragraph (3): "Romania is a Rule of law, democratic and social...".

The Rule of law is defined as a political-legal concept defining one of the features of the form of a democratic system of government in terms of relations between the State and the law, between power and law, by ensuring the rule of law and the fundamental rights and freedoms of man in exercising the power" (Ceterchi and Craiovan, 1993, p. 116).

In another view (Draganu, 1992, pp. 18-20), the Rule of law must be understood as a State that is organized on the principle of separation of powers, under which justice becomes a real independence and pursuing by its legislation to promote the rights and freedoms inherent to human nature, ensures the strict compliance with its regulations of by all its bodies in all their activity.

The Rule of law must accomplish the rule of law, both in its relations with citizens and in relations with the governing bodies. "The State must be a Rule of law ... in the sense that the State must work under the law, but not in the sense that it must propose as sole aim the law. In other words, the existence and manifestation of the State involves a certain "power status" limited to the extent possible, to an impedance to become a prerogative at the mercy of those who exercise it. The State can and should include within its scope all activities and should encourage welfare everywhere, but always under the form of the law, so that its every act must be based on law that is the manifestation of the general will" (Del Vecchio, 1996, p. 292). However the law, in the Rule of law, is not an exclusive subjective product of the will of the legislature, but it is the necessary part in the law, which is created on an objective basis in that society (Turpin, 1994, p. 19).

The collocation "Rule of law" is built from the association of two words - "state" and "law". Between the State and the law there is a strong relationship where the law has the role of "restraint" of power, of legal shield against a potential anarchy (Roubier, 2010, p. 466), of framing of this power within the limits of order and equilibration of potential tensions that may arise in the process of exercise of social management through State activity. In another sense, the State is obliged to guarantee the achievement of law and the restoring of the legal order violated by the subjects of law through illegal activities.

Another main foundation of the Rule of law consists of the principle of legal security which implies that individuals, as beneficiaries of the law, to be able, without putting too much effort, to decide what is allowed and what is prohibited by the applicable law. To achieve this outcome, the legal norms adopted must be clear and understandable and not be subject over the time to so frequent and especially, unpredictable changes. From the formal legal point of view, legal security is represented by the quality of legal norms, and from the temporal point of view, it is represented by the predictability of legal norms.

The principle of *legal security* is also known as the principle of *legal certainty* because it consists of the uncertainty that the enforcement of legal norms in a given situation to be predictable, the incident legal norm to be easily to establish, its recipients to be certain a legal provision corresponding offense is applied, and not another one, and that it will be interpreted in a uniform manner and a legal norm which did not come to the notice of recipients cannot be applied.

As per the issue of quality of the legal norm, by its very definition (Popa, 2008, p. 123) of general, impersonal and mandatory norm of conduct, for the compliance of which the State uses its power of coercion, a number of features can be extracted in the sense that the legal norm is enacted with the aim of imposing a certain conduct, of prohibiting a certain behavior or of punishing misconduct. Legal norms should not be developed to create illusions or cause ambiguity and deception. They must have a regulatory role because without this role the purpose of the necessary norms may be diminished and a series of doubts and interpretations on the real effect pursued by the provisions of law provisions can be induced. To know what a legal norm provides, it is not enough that its text to be accessible in print, that is, only to be published to become accessible, but the legal norm has to be intelligible in the sense of being legible as regards accuracy and precision of statements, but also their consistency. Accuracy of the legal norm also requires that the norms established by its provisions to acquire their full force in the context of the legal corpus of those norms which are called to govern, integrate, without making in this purpose any reference or appeal to too many provisions external or complementary to the text of that legal norm.

The principle of legal security also implies that the existing law should be predictable, known and understood (Chevalier, 2012, p. 101) and that legal solutions to remain relatively stable. This principle is rather a creation of ECtHR (The European Court of Human Rights highlighted in their jurisprudence, for example in the *Marcks versus Belgium* case, 1979, the importance of observing the principle of legal security, regarded as necessarily inherent to both the Convention law and to the Community law. *Brumărescu versus Romania* case, published in the Official Gazette no. 414 of August 31, 2000, in which the ECtHR held that one of the fundamental elements of the rule of law is the principle of security of legal relations, which requires that a final solution given by the courts in a dispute should not be called into question.) jurisprudence, not being established by the norms of constitutional law expressly plays the role of foundation of the Rule of law, state that is appreciated greatly depending on the quality and accuracy of its laws.

During the classical age, the concept of legal security was enshrined by the principle of law retroactivity provided for by art. 2 of the Napoleonic Civil Code of 1804 which stipulated that: "The law only rules for the future; it has no retroactive effect". From the moment it was noticed, however, that the law is not able to regulate all situations arising in practice, it was invoked the principle of legal security (Cristau, 2002, p. 281) which in practice imposes norms of law very clear and precise as regards the absence of retroactivity, unless more favorable cases, category where no criminal penalty provisions is included (The current Constitution of Romania of 2003 revised by the Constitution of Romania adopted on November 21st, 1991, stipulates in article 15, paragraph (2) that "Law only stipulates for the future, except for the more favorable criminal or penalty law.").

The concept of "legal security", as doctrinal interpretation, for judicial practitioners evokes ordinary specialty notions such as retroactivity of laws, appearance of law theory, legality of indictment and penalty or even the obscurity of law texts. In essence, this principle is characterized by the fact that it needs to ensure people's protection against a potential danger that can come even from the law, against an insecurity that the law can create or that it is likely to create (François, 1993, p. 10). In this context it was opined (Lambert, 2003, p. 6) that a more appropriate term than that of "judicial security" would be the one used in the Dutch doctrine – Rechtzekerheid – reliability of law.

In the context of Europeanization and globalization, new regulatory areas emerged, new resources of law have been developed, as factors that led to the significant increase in complexity of law having, as an immediate consequence, a massive regulation, the development of a large number of legal norms. All they have done is to ensure a greater concern of bodies with powers in this regard, to ensure the legal security of persons as beneficiaries of these norms. We find specific examples in the jurisprudence of the Constitutional Court and the European Court of Human Rights, courts have an increasing frequency in invoking the requirements of accessibility and predictability of the law (Tutunaru, 2014, p. 3).

The principle of legal security has been established and has experienced a continuous development in European law too, both at the general level of the Member States and in matters of protection of rights and freedoms of individuals. In light of these trends, the Court of Justice of the European Union ruled that the principle of legal security forms part of the European legal order and must be observed by both the EU institutions and the Member States when they exercise their powers conferred by the EU Directives – Collection of Jurisprudence of the European Court of Justice*, 1998, p. I-08153, Case C-381/97, Belgocodex*, para. 26.

Given the fact that people, through their free will, violate prohibitions, obligations or other norms established by legal norms, the legal security does not have an absolute character, but a character of relativity. However, the persons concerned shall paradoxically beneficiate, by means of the same violated or challenged law, of defense mechanisms, legal treatment or other legal guarantees by which they are penalized proportionally to the offenses committed. Hence, according

to art. 21 para. (3) of the Constitution, "the parties have the right to a fair trial and settlement of matters within a reasonable time" and, according to art. 124 para. (1), "justice is carried out in the name of law", so that enforceable judgments (genuine legal norms) have the power of a law and establish an absolute duty to be performed by the person for whom it was ruled. Where one would question the absolute nature of this obligation or would leave the slightest possibility to avoid the enforcement of this obligation imposed by a court, then it would seriously infringed the principle of legality, the authority res judicata and the principle of legal security, which would cancel the effects of a court judgment - legal norm and would empty of content the subjective law recognized by judicial way.

The jurisprudence of the Court of First Instance also enshrines the principle of legal security by providing that: "the principle of legal certainty requires that all acts of the institutions which produce legal effects to be clear, precise and to observe the interests in such a way that it can know with certainty when the respective act begins to exist and begins to produce legal effects. This need for legal security is required with particular rigor when it comes to an act likely to generate financial consequences, to allow those interested in knowing precisely the obligations imposed on them". (Auby, Delphine, 2007, p. 480).

As per the example of legal security in the Romanian business law, referring to public procurement agreements, contracting authorities should pay maximum attention to alteration or amendment of agreements during their execution, because in order to avoid affecting the original conditions of competition, such amendments implemented without a re-tendering procedure are only allowed in very limited circumstances, and under the principle of legal security it is required that the assessment of the obligation to conduct a procedure for awarding a contract is always to take place at the moment of conclusion of the transaction. Consequently, from the point of view of the contracting authority and their contractual partner and that of unrestrained competitors, it is necessary that at the time of the transaction to be already able to determine whether a tender procedure should or should not be carried. Consideration of some subsequent circumstances is possible at most where they could be predicted with certainty from the moment of the transaction.

Taking into account the principle referring to the work of drafting, amendment, repealing, correlation and systematization of the regulatory documents, the principle of legal security mainly comprises the following requirements: the non-retroactivity of the law, the accessibility and predictability of the law, the ensuring of a uniform interpretation of the law. (Predescu and Safta, 2009).

Referring to the principle of retroactivity of the law, it is provided by art. 15 para. 2 of the Romanian Constitution which states that "the law only stipulates for the future, except for the more favorable criminal law", while ensuring stability of won legal rights. Therefore, the legal norm must produce rights and obligations only for facts and acts committed after its entry into force. No law subject could not foresee what and how the legislator would regulate, and his behavior is normal and natural if conducted within the rule of law in force (at the date of the infringement), whose

observance he owes, and not of a future law the provisions of which he could not know. The principle of retroactivity of the law ensures: stability of the won legal right (that cannot be suppressed by a new law); it prevents misuse of law by amending laws, in case of rotation at leadership level; it ensures the legitimacy of the law, its recognition as binding and fair; one cannot claim compliance with a non-existent law, until entry into force.

The principle of accessibility and foreseeability of the law implies that: accessibility of the law refers mainly to the public disclosure thereof, which is achieved through the publication of regulatory documents. But for a law to have legal effect, it should be known by its recipients; the effects of the law occur, therefore, after bringing it to the attention of the public after its entry into force and predictability of the law means that a legal norm must be clear, intelligible, whereas those to whom it is addressed must not only be informed in advance of consequences of their acts and facts, but also to understand the legal consequences thereof. In the European Court of Human Rights jurisprudence, it was highlighted the importance of ensuring accessibility and foreseeability by cases such as the *Sunday Times versus the United Kingdom of Great Britain and Northern Ireland,* in 1979, where the European Court of Human Rights held that it cannot be considered law than a norm formulated with sufficient precision to enable the individual to regulate their conduct (Niemesch, 2014, p. 8). The individual must be able to foresee the consequences that may arise from a determined act; "a norm is predictable only if it is formulated with sufficient precision so as to enable any individual - who in need can appeal to appropriate advice - to regulate their conduct"; "in particular, a norm is predictable when it offers a certain guarantee against arbitrary interferences by the public power".

As per ensuring uniform interpretation of the law, this principle is also imposed by the constitutional principle (The current Constitution of Romania of 2003 revised by the Constitution of Romania adopted on November 21st, 1991 stipulates in article 16, para. (1) that: "All citizens are equal before the law and public authorities, without privileges and discriminations" and in para. (2) "Nobody is above the law".) of equality of all citizens before the law and therefore the judicial authority, this principle would be seriously affected if in the application of the one and the same law, the solutions of courts would be different and even contradictory.

The European Court of Human Rights in *Păduraru versus Romania* case in 2005, stated that "the absence of a mechanism which ensures consistency in the practice of the national courts, such profound and long-standing differences in approach in the case-law, concerning a matter of considerable importance to society, are such as to create continual uncertainty and to reduce the public's confidence in the judicial system, which is one of the essential components of a State based on the rule of law".

In conclusion, the legal security requirements make necessary the displacement of some potential deviations that may disqualify or disregard the law and the legislature and could threaten social order and cohesion. In order to achieve these objectives, it is not sufficient to identify the harms committed, but to create remedies

to fit their wideness. Like any new strategy, these too are achieved with great efforts of organization, but alteration of judicial mentalities cannot be done without the indictment of a solemn command meant to discipline or balance a potential excess of regulation, to be most often performed in the way of fundamental legal norms - constitutional, if necessary -, because otherwise the law can remain lifeless, existing only declaratively. National legal systems in many countries, exposed to new influences of the European law, but also to the European Convention of Human Rights law, should give greater emphasis to this new principle of law, the principle of legal certainty. The gravity of the legal implications of the non-uniform application and interpretation also results from nature almost irreparable of the judgments to be given by courts of first instance and from the very specific mechanism of inconsistent practice in the sense that parties having the same legal situation should not receive contradictory solutions. Also, the concrete effects of non-uniform interpretation of the law convey to concluding that the principle of legal security, threatened and/or violated is not - in itself - enough to provide a disentanglement or an explanation to any citizen-plaintiff that he is irrevocably recognized a right, while under the same conditions and enforcement of the same legal text, that right is not recognized to another plaintiff. In this context, it can be concluded that errors must be eliminated in qualification and delivery of legal solutions to legal matters submitted for rulings in law and in fact, the introductory actions of identical claims must also receive enforcement and uniform solutions from a legal and, by default, judiciary point of view.

Bibliography

1. I. Flaminzeanu, Cl.Butculescu, O.F. Ispas, 2014. *The juridical norms with exceptional character*, in Volume of Scientific sesion of Institute of Legal Research, Bucharest: Universul Juridic Publishing House.
2. Montesquieu, 1997. *Intendment of Laws,* Bucharest: Humanitas.
3. I. Ceterchi şi I. Craiovan, 1993. *Introduction to the General Theory of Law*, Bucharest: All.
4. T. Drăganu, 1992. *Introduction to the Theory and Practice of the State of Law*, Cluj-Napoca: Dacia.
5. G.del Vecchio*, 1996. Legal Philosophy Lessons*, Bucharest: Europa Nova.
6. D. Turpin, 1994. *Droit constitutionnel*, Paris: Presses Universitaires de France.
7. P. Roubier, 1946. *Théorie générale du droit*, Paris: Libraire Recueil Sirey, *apud* I. Craiovan. 2010. *Philosophy of Law or Law as Philosophy*, Bucharest: Universul Juridic.
8. N. Popa, 2008. *General Theory of Law,* 3rd Edition, Bucharest: C.H. Beck.
9. J. Chevalier, 2012. *State of Law*, translation by Diana Danisor, Craiova: Universitaria.
10. A. Cristau, 2002. *L'exigence de sécurité juridique*, in Paris: Recueil Dalloz.
11. L. François, 1993. *Le problème de la sécurité juridique*, in *La sécurité juridique*,

Liège: Jeune Barreau de Liège.
12. P. Lambert, 2003. *Le principe général de la sécurité juridique et les validations législatives*, in *Sécurité juridique et fiscalité*, Bruxelles: Bruylant.
13. M. Tutunaru, 2014. *Concept of right to life. Content and insights*, in "Volume of International Conference *Education And Creativity For A Knowledge Based Society*"– 8th edition, Bucharest.
14. J. B. Auby, D.B. Delphine, 2007. *Les principes de sécurité juridique et de confiance légitime*, European administrative law, Bruxelles: Bruylant.
15. I. Predescu, M. Safta, 2009. *The Principle of Legal Security, Foundation of the State of law. Jurisprudential Highlights*, in "Romanian Constitutional Court Bulletin" no. 1.
16. M. Niemesch, 2014. *Considerations on the principles of criminal legal liability from the perspective of general theory of law in the new Romanian legislation*, in "Volume of International Conference - *The new criminal legislation - milestone in the development of Romanian law*", Bucharest: Universul Juridic Publishing House.