

# THE LEGISLATIVE TECHNIQUE AND PRESUMPTION OF THE OBLIGATION TO KNOW THE LAW

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## **Abstract**

*Entitled as such to bring forward the law, the legislative institutions shall find the most appropriate expression in the legal language, in the content of legal norms and the manner this language is perceived by those to whom it addresses. In this respect, it makes use of certain specific procedures for bringing forward legal rules, procedures whose purpose is to explain and express as clearly as possible the legal rules it decides upon. The important proceedings used by the legislator are presumptions and fictions where the presumption considers that something is true, without any evidence and without proving its existence and the fiction is a certain process of the legislator or the judge by means of which a fact is deemed to exist or to be established although it does not actually exist neither has it really been established. An important presumption one can operate with is the presumption to know the law upon its publication, an presumption otherwise considered to be conclusive, unlikely to be challenged by anyone and under no circumstances. This presumption can have hard and undesirable effects in so that the individual called to account for the violation of law can bring evidence to testify he was actually in the effective impossibility of knowing the law.*

**Keywords:** legal rule, legal proceedings, legal presumption, legal fiction, knowledge of the law.

**JEL Classification:** K10

## **1. Introduction**

The main task of any rule of law, either constructive or enforcing for rights and obligations, is and must be to express the truth<sup>2</sup> even if it is constructive or sanctions of rights and obligations. A legal rule whose purpose would be to neglect the truth, at least in terms of logical constraints, but obviously going further than that, could not be related to the term *law*, which, among other things, supposes that something be or be done in compliance with justice and truth. The truth must be supported by evidence in order to be proved it is true.

The legislator shall have in view the fact that the addressees of legal rules are individuals<sup>3</sup> with different level of knowledge, with different possibilities of receiving a regulative message, that the actual development of relations in life can determine the occurrence of difficult situations in enforcing the rule. Its art consists in building rules to prevent such difficulties.

In performing his legal framework, relying on the objective analysis of reality and on an appropriate reasoning in logical terms, the legislator shall set out carefully the relationship between the fact generating rights and the closely related fact by using a certain legislative technique<sup>4</sup>.

## **2. The legislative technique – concept**

This legislative technique is part of the legal technique and it consists in a set of methods and proceedings meant to ensure legal regulations an appropriate form<sup>5</sup>.

The legislative technique<sup>6</sup> is strictly concerned with providing regulatory solutions by the legislator, a process otherwise acting like a synthesis or a balance sheet of experiences acquired in

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<sup>2</sup> Niemesch Mihail, *Teoria generala a dreptului*, Hamangiu Publishing House, Bucharest, 2014, p. 77.

<sup>3</sup> Friedmann-Nicolescu Iosif, *Interpretation of the legal standard between tradition and reform*, in „Revue europeenne du droit social – Supplement”, Bibliotheca Publishing House, Targoviste, 2015, p.79.

<sup>4</sup> Djuvara Mircea, *Teoria generala a dreptului*, Vol.II, Librarie Soccec&Co. SA Publishing House, Bucharest, 1930, p.564.

<sup>5</sup> See Cătălin-Silviu Săraru, *Elemente de Teoria generală a dreptului pentru învățământul economic. Caiet de seminar*, C.H. Beck Publishing House, Bucharest, 2010, p. 85.

<sup>6</sup> Popescu Sofia, Tandareanu Victoria, *Probleme actuale ale tehnicii legislative*, Bucharest, Lumina Lex Publishing House, 2003, pp. 34–39.

the past by the attendees to the social life, experiences filtered in terms of the valuable judgements of the legislator.

In order to be able to join the practical exercise of justice administration, the science of legislation first brings forward the ideas, the guiding principles of positive law<sup>7</sup>. In this way, enactment knows two great moments: the evidence of the existence of social situations requiring legal regulation; the separation of the legal ideal that should apply to those situations depending on legal consciousness of society.

The fact that the law is *built* shall not determine us to consider that this legal building could be arbitrarily erected as it is the masterpiece of a nation appreciating its facts, its relations and generally all the realities concerning social order, the security or human relations, *the public good*.

This concept of *legal construct* represents a legal logical and complex proceeding whose main purpose is to provide a logical, synthetic and consistent configuration of the legal solutions representing the result of certain logical operations based on the analysis of a significant number of particular and general legal rules which have common ideas and that is why they can be organised around it. The function of legal constructs is to induce an element of logical coherence into the range of legal regulations. The *legal construct* makes use of the artificial proceeding of fiction to provide an explanatory principle for a variety of rules likely to be organised around this principle and which can determine the achievement of the goals envisaged by the legislator<sup>8</sup>. Among the most commonly used proceedings of achieving legal construct there are *presumptions* and *fictions*.

### 3. The presumption – concept

*The presumption* consists in a legislative technique proceeding<sup>9</sup> used for completing and conceptualizing<sup>10</sup> the right by means of which the legislator accepts or enforces the change of a probability into certitude through which one may hope to establish, on a scientific base, a probability likely to represent the basis of certain legal regulations, thus involving a fair reflection of what happens in most cases.

The basics of presumptions consist in the change of a probability<sup>11</sup> into certitude. In this respect, one may speak not about a distortion of reality but about an artifice. This artifice usually has an economic role and a role of legal stability.

Presumptions are classified into<sup>12</sup>: *relative* presumptions (*juris tantum*) that can be refuted by contrary evidence (that the husband is not the father of the child, or the offender is guilty) *absolute presumptions* (*juris et de jure*) that cannot be overturned by any trial means<sup>13</sup> and *mixed presumptions* that can be challenged under certain conditions or with certain evidence.

Most times the probability on which the presumption relies is decided on scientific basis<sup>14</sup> or on factual evidence. Hence, we can speak about the difference between the process of presumption and that of fiction. In case of presumptions it is likely to refer to a certain reflection of reality while in case of fictions we are dealing with a conscious and deliberate distortion of the real facts in order to achieve certain goals of legislative policy. So if we are dealing with a deliberate deviation from the truth, the process involved is the fiction.

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<sup>7</sup> Djuvara Mircea, *Teoria generala a dreptului. Drept rational, izvoare si drept pozitiv*. All Beck Publishing House, Bucharest, 1999, p.372.

<sup>8</sup> Butculescu Claudiu-Ramon, *Jurisprudenta – interfata interpretativa a normelor juridice in sistemul dreptului*, in Volme of International Scientific Conference with the theme “Challenges and Strategies in public order and public security”, Universitaria Publishing House, Bucharest, 2015, p.291.

<sup>9</sup> Mihai C. Gheorghe, *Teoria dreptului*, C.H.Beck Publishing House, Bucharest, 2008, p.105.

<sup>10</sup> Mateut Gheorghita, Mihaila Arthur, *Logica juridica*, Lumina Lex Publishing House, Bucharest, 1998, p.238.

<sup>11</sup> Hamangiu Constanti, Rosetti-Balanescu Ion, Baicoianu Alexandru, *Tratat de drept civil roman*, Vol. II, All Beck Publishing House, Bucharest, 2002, p.448.

<sup>12</sup> Mihai C. Gheorghe, *op.cit.*, p.106.

<sup>13</sup> Beleiu Gheorghe, Nicolae Marian, Trusca Petrica, *Drept civil roman. Introducere in dreptul civil. Subiectele dreptului civil*, 7<sup>th</sup> edition, Universul Juridic Publishing House, Bucharest, 2003, pp.127 and next.

<sup>14</sup> Boroi Gabriel, *Drept civil. Partea generala. Persoanele*. All Beck Publishing House, Bucharest, 2001, p.130.

The *fiction proceeding* consists in an artificial assimilation of certain things which are actually different (sometimes even contrary). Fiction sometimes affirms as real certain things that do not exist as real, other times it denies things otherwise existing, assimilates things or situations considering them present before they actually existed or considers that certain things occurred later than they actually occurred.

Fiction, as an imaginary representation (does not have a correspondent in reality) is (as well as presumption) a way by which *a legal reality* is created – as a reality conventionally accepted: in terms of law, therefore, the legal fiction is an artifice created through the legislative construct by means of which the legal reality expressed and registered in regulatory texts does not exist in actual reality<sup>15</sup>.

#### 4. The presumption of knowing the law – concept

*The presumption of knowing the law* is part of a system of presumptions created by the Roman private law, especially by praetors, by means of which they used to avoid certain formal difficult proceedings and the simplifying statement of a claimant was deemed as true until the contrary could be supported by evidence, a presumption otherwise useful nowadays being secured indirectly in legal rules.

In any constitutional state, all social rules, especially the legal rules are established in writing and they are sometimes guaranteed by the state by the binding force they are assigned with, which is likely to be achieved if necessary through the coercive force of the state. Considering these requirements, the action of informing in order to be acquainted with all such legal rules becomes vital for every individual within the community because taking action unwittingly is not excusable in front of the law.

Nevertheless this system has a lot of drawbacks too, in so that the citizen, although being permanently subject to rights and obligations regarding information and knowledge of the law, does not always have the possibility to actually perform all these. In the new context, that of integration into the European Union, the obligation to make domestic legislation comply with the European legislation faces a certain lack of order in the regulatory system, generating a great number of laws likely to cause cognitive disorder while the whole legislation can suffer, as soon as important laws are adjusted and amended several times, such operations being sometimes performed by means of emergency ordinances or common ordinances which, in their turn will be adjusted by adopting laws and the terms short enough.

In the process of bringing forward legal rules, the legislator has in view major social interests, aiming at providing guarantees for the good development of interpersonal relations and to protect social values.

In certain circumstances, the legislator supposes that something, without having been proven, really exists as there really is, the presumption to know the law, with its consequence: *nemo censetur ignorare legem* (nobody can provide excuses for not knowing the law), a presumption in virtue of which the state requires its citizens or other individuals being on its territory to know the legislation of that country and to be informed about the legal regulations likely to produce effects on facts which have occurred only after their coming into force<sup>16</sup>. This principle can be explained by the fact that people, in order to control their behaviour, in accordance with the law provisions, must know such provisions first.

The coming into force of a legal rule refers to the actual date when the normative act containing that legal rule comes into force and becomes enforceable for the law subjects<sup>17</sup>. For this, the legislator should inform the citizens, institutions and state bodies as well as all those called to observe the law, on the content of the normative act issued, by publishing the normative acts, laws, decisions and governmental ordinances and those issued by the central state bodies in an official

<sup>15</sup> Deleanu Ion, *Fictiunile juridice*, All Beck Publishing House, Bucharest, 2005, p.1; Cătălin-Silviu Săraru, op. cit., p. 86, 87.

<sup>16</sup> Vonica Romul Petru, *Introducere generală în drept*, Lumina Lex Publishing House, 2000, p. 264.

<sup>17</sup> Craiovan Ion, *Tratat de teoria generala a dreptului*, Universul Juridic Publishing House, Bucharest, 2007, p.363.

publication, such as the Official Gazette in Romania. The regulation concerning the coming into force of the legal rule is established in the Constitution in Art. 78: "The law shall be published in the Official Gazette and shall come into force within 3 days upon publication or on a later date provided in its text." The term of 3 days is referred to in calendar days. An exception to this rule is the provision under art. 115 paragraph 5 of the Constitution, namely: "The emergency ordinance shall come into force only after it has been submitted for debate in emergency in the competence room to be notified and after its publication in the Official Gazette." This exception is justified by the existence of a situation whose regulation cannot be delayed. In article 11 of Law no. 24/2004 on the legislative technique rules for drafting normative acts it is mentioned that the normative acts included under art. 10, paragraph (1), except laws and ordinances, shall come into force upon their publication in the Official Gazette of Romania, Part I, if they do not include a further date.

These provisions of Law no. 24/2004 are subject to be criticized, as they approve the application of constitutional provisions only for laws and ordinances issued by the Government, under an enabling law, the other normative acts making an exception to this rule. The date of coming into force of the normative acts shall not be mistaken with the date on which that normative act was passed with approval of the Parliament and then promulgated by the President of the country.

### 5. The obligation of knowing the law between presumption and fiction

Consequently, the principle *nemo censetur ignorare legem* does not stand for the presumption of knowing the law in any circumstances but only for the fact that the law is binding for everyone, even for those who get used to ignoring it or for those who have not made enough efforts to know the content or the meaning of the normative act accurately. In this regard, the principle is not an obstacle for submitting the mistake of law, but only an impediment in applying the law relying on the fact that the law is completely left aside<sup>18</sup>. Nobody contests the need and utility of this presumption, not only for the checking, in every case, of the level to which the law is known would be unimaginably difficult but also for the fact that the security and stability of the law order shall prevail over private interests.

The presumption of knowing the law is considered as conclusive, it cannot be disputed by anyone and in any conditions but the consequences of this presumption may appear to be too serious unlike the situations that can easily be imagined, when the one called to account for his violation of law was actually unable to know the law and he can make proof of such an impossibility for knowing the law.

Once it has come into force, the legal rule completely governs all social relations and from this moment nobody can avoid the provisions of the legal rule on the ground that he does not know it. This rule becomes obvious as the authority of the legal rule, its compulsoriness, would be doubted if we could admit the excuse for being ignorant.

In the theory of law<sup>19</sup>, there are still admitted two exceptions: when a part of the country remains isolated from the rest of the country, in a case of force majeure, a situation when ignorance can be objective and in terms of conventions (in civil or commercial law) when a person concludes a contract without knowing the consequences the legal rule determines to arise from the contract, that person may request the cancellation of the contract claiming that he was in mistake of law which otherwise is vitiating his/her will<sup>20</sup>.

Following the legal conflicts among citizens as well as the way they understand the law daily, we can easily conclude that the legal rule is not known. Under these circumstances, the mistake of law is highly frequent. The free access to justice becomes thus a purely constitutional principle. The man in need, without financial possibilities, cannot afford to be informed or apply to

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<sup>18</sup> Deleanu Ion, *op.cit.* p.140.

<sup>19</sup> Popa Nicolae, *Teoria generală a dreptului*, CH Beck Publishing House, Bucharest, 2008, p. 134.

<sup>20</sup> Popa Nicolae, *Teoria generală a dreptului*, ACTAMI Publishing House, Bucharest, 1992, pp. 111–112.

legal consultancy – as both methods are highly expensive – in order to be informed about the latest legal news.

There is the possibility of purchasing collections of normative acts or making a subscription for the Official Gazette or for the Internet, of using legal informatic programs, but they are difficult to access, due to their costs even for legal advisers. Even seeing the Official Gazette, otherwise found in any public library or in other institutions willing to make it available for free is difficult due to the complexity of the legal field and to the lack of legal knowledge necessary for searching and understanding such rules.

The obligation to know the law to which the citizen is compelled to should comply with the obligation of providing to everybody<sup>21</sup>, for free, this information. There is no public legal consultancy institution which can, either by local offices or publications, help citizens successfully fulfil their duties as citizens concerning the knowledge of laws.

This requirement is not explicitly entailed under the Constitution, but it results indirectly from a number of constitutional provisions. Thus, under art. 1, paragraph. 5, it is stated that: „*In Romania, observing the Constitution, its supremacy and its laws is mandatory.*” We hence deduce that in order to be able to comply with a law one must know the provisions and the compulsoriness of complying with the supremacy of the law relies on the knowledge of the law. Under art. 16, paragraph 2, it is stated that „*No one is above the law.*” Here we can also infer the obligation of knowing the law to be able to determine the limits of the law where the law allows us to perform. Article 17 stipulates that „*Romanian citizens abroad shall enjoy the protection of the Romanian state,*” which means that the Romanian State undertakes, first, to inform the citizens about the laws of other states. This obligation to provide information shall not be exhausted by art. 31 of the Constitution entitled *the Right to Information*.

This constitutional provision is developed by other laws on access to public information<sup>22</sup>, but in a sense almost useless and uninteresting and useless for most people. Thus, art. 2, section b) defines public interest information as „*any information related to or resulting from the activities of public authorities or public institutions, irrespective of the medium or form or mode of expression of the information*”, a form which, with some indulgence could determine a shadow of the possibility that citizens can also apply to the general information on the legal field. But that hope is shattered by art. 5, where, the duty to inform of the public authority or institution is restricted to those normative acts governing the organization and its operation. What is that public authority obliged to ensure citizen access to the most important information of public interest: the law? Publication of the law in the Official Gazette and the coming into force may lead to the understanding that the legal material published is the primary prerequisite knowledge of the law; therefore it is opposable to all.

The difficulty to understand mainly the meaning of the law emphasises the assimilation of the possibility to know the law with its effective understanding. To consider the principle *nemo censetur ignorare legem* as a conclusive presumption<sup>23</sup> of knowing the law for achieving general interest, social stability, the effectiveness of the law, the harmony between the actual state and the law state, the prevention of anarchy, all these would have a contrary effect as they ignore the human element, the value of the law relying on the circumstances proper to every individual. That is why we consider that, the saying *nemo censetur ignorare legem* does not have an absolute power. That is why a contract could be cancelled not only for a mistake of fact but for an mistake of law as well<sup>24</sup>.

In a different viewpoint<sup>25</sup> the principle *nemo censetur ignorare legem* is considered to be an absolute presumption of knowing the law, a presumption unlikely to be overturned by a contrary

<sup>21</sup> Tutunaru Mircea, *The presumption of innocence under the state of law*, in „Revue europeenne du droit social – Supplement”, Editura Bibliotheca, Târgoviște, 2015, p.177.

<sup>22</sup> Established by Law no. 544/2001 on free access to public information, published in the Official Gazette no. 663/23 oct. 2001.

<sup>23</sup> Deleanu Ion, *Cunoașterea legii și eroarea de drept*. In: the Magazine „the Law”, no. 7/2004, p. 42

<sup>24</sup> Ungureanu Octavian, *Drept civil. Introducere*, Bucharest, Rosetti Publishing House, 2005, p.141

<sup>25</sup> Popa Nicolae, *Teoria generală a dreptului*, CH Beck Publishing House, Bucharest, 2008, p. 136.

proof. On the basis of such a presumption, all citizens shall know the laws because the lack of knowing one's rights can become harmful (*ignorantia juris nocet*).

Generally speaking, in the field of law, the mistake of law is more and more admissible. In criminal law, the mistake of law was assimilated with the mistake of fact, while in the civil law, the mistake of law occurs by means of the mistake of fact. However, the mistake of law is more easily approvable in terms of expressed rules and mandatory rules. In all cases, the mistake of law relies on two theories<sup>26</sup>, namely on the *theory of cause* and the *theory of vice of consent*.

In art. 1207, paragraph (3), the New Civil Code aims at detailing the admissibility and predictability of the mistake of law, by providing that the mistake of law is regarded as essential provided that we consider a legal rule decisive, according to the will of the parties, for concluding a contract. After analyzing article 1207, paragraph (3) and art. 1208 paragraph (2) in the New Civil Code, we find out that in order to be in the presence of mistake of law, vice of consent<sup>27</sup>, there must be met the following conditions: a) the determined character of the legal norm, b) the legal rule to be ignored or its content or its significance be wrongly represented by errans; c) the mistake be excusable, in the sense of not affecting the accessible and predictable legal provisions

According to article 1208, paragraph (2), the mistake of law is considered inexpiable when it considers *accessible and predictable* legal provisions. By the regulations brought to the mistake of law and to its requirements of being pardonable, they have reached equilibrium between the thesis admitting the mistake of law and the presumption of knowing the law. Thus, the *accessible and predictable* legal provisions are presumed to be known, excluded from the area of mistakes of law without establishing certain categories of rules (for example mandatory or of public policy). They do not stipulate any criterion of determining the accessible and predictable character of the legal provisions excluded from the area of mistakes of law.

By analogy with the manner of appreciating the inexpiable character of the mistake of fact under paragraph (1) we could apply to the inexpiable mistake of law the same subjective-objective criterion, meaning that we may consider the knowledge, age etc., as well as the frequent use of the legal rule in a certain field of activity, of its dissemination through different media. Obviously, the discussion is independent from the aspect of coming into force of the legal rules by their publication in the Official Gazette, as well as from the obligation to comply with them.

## 6. Conclusions

In conclusion we may say that, unfortunately, the law is provided to the public as a piece of information, but the basis of this information is not within reach. The fact that the obligation to know the law is not introduced among the basic obligations is like an acceptance of the mistake of law. As far as the principle is not enforced by law, it is left outside the legal presumptions. Otherwise, the principle *nemo censetur ignorare legem* is considered not to be included in the area of presumptions as it lacks the elements specific to presumptions. Relying only on the act of publishing the law in order to be known, the probability that the purposes of this principle be achieved is slim. The term of three days upon its publication for coming into force is not necessary to support the idea that the law is known by the majority of those interested.

Thus, the state can guarantee the basic rights and obligations by establishing enforcing and prohibitive legal rules but it is not able to guarantee anybody that everyone shall know these rules and consequently, shall not violate them. As the legislation becomes more and more complex by diversification of social and legal relations, by the interaction between the laws, by the difficulty in understanding the logics and language of law, it turns into a more difficult to understand field for the ordinary individual. That is why, when mentioning the necessity to know the law, we have to envisage the extension of the meaning of this notion to the understanding of a law

<sup>26</sup> Decottignes Roger, *L'erreur de droit*, in *Revue trimestrielle de droit civil*, Paris, 1951, pp.312 and next apud Ion Deleanu, *Fictiunile juridice*, p.151.

<sup>27</sup> Poenaru Emil *Drept civil. Teoria generala. Persoanele*, All Beck Publishing House, Bucharest, 2002, p.127.

Consequently, knowing the law, without considering the understanding of a law, shall be included in the category of legal fictions and be eliminated from the category of conclusive presumptions – which cannot be questioned in any way.

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