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Few aspects regarding the building of the rule of law

Lecturer Magureanu Alexandru Florin, PhD

Spiru Haret University, Faculty of Juridical and Administrative Sciences Brasov
magureanu_alexandru_1982@yahoo.com

Abstract. *Delegating the sovereignty from the citizens to the Government is necessary, to a certain degree, in order to ensure the efficiency of the constitution and the separation of powers, as well as the process of lawmaking. However the complex structure that we now call a "state" and that already seems to have reached its limitations is often perceived as a cold, impersonal structure, in which citizens are becoming only an insignificant part, an interchangeable wheel in a grand design. Thus the decision tends to become more distant from the citizens, than it was in the Greek democracy for example. The new means of communication, especially the Internet, give the citizen the possibility to be closer to the decisions taken by the legislator. The building of a "virtual agora" in which citizens are asked to participate directly to their own governing seems an achievable dream. Main difficulties towards such an ambitious goal are no longer of a technological nature, but of transforming the traditional law making process, the somehow rigid essential characteristics that the rule of law must have, with the direct exercise of sovereignty, by the citizens, if not in all matters, at least at a local, administrative level.*

Keywords: legal certainty, legitimate expectations, negotiation, law

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1. Introduction

New means of communication and the new technological achievements are not changing only the way we live, but also the way we are governed, the legitimate expectations that the citizens have towards governing and especially towards the rule of law, in the states governed by such rules and not by abusive decisions. It is certain that the citizens will demand to be more involved in all processes concerning them, especially in the law-making process. The governed are now closer to the decisions taken by the public authorities. The future can bring a more effective of informing the citizens about decisions that will affect their lives and also, in a certain extent, the taking of decisions directly, by the citizens, a direct exercise of sovereignty. It remains to be seen if such a "virtual *agora*" can be achieved. It is certain however that, what we could call a *live* constitution, although appealing as a principle, can present many weaknesses, especially the danger of taking important decisions in the spur of the moment. Such decisions will evidently lack the necessary objectivism, a certain distancing that is necessary for any law and the more so for a constitution. The constitution of a state or group of states consecrates principles that are fundamental, cultural,

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economic, social and juridical values. Acknowledging the fact that the power of the constitution originates from the people, which chooses to delegate such power, for a better administration, we must also acknowledge that the fundamental values defended by the constitution are the essential values of that nation or group of nations, thus becoming the duty of that state or group of states the important task of defending and promoting them. Such values cannot always be negotiated, and certainly cannot be changed overnight, as endurance over time can help creating the necessary objectivity and trust in those values. The procedures of modifying a Constitution are not only intricate but also limited, in the sense that there are certain barriers that prevent the enactment of new constitutional provisions. For example, a new provision could not be contrary to fundamental rights and freedoms recognized and guaranteed by international treaties. Also, in a democratic law, the content of a constitution is strongly influenced and limited by the general principles of law. Also, we must take into consideration the fact that both human rights and the increasing influence of international law over national law systems are also having an important contribution in the creation and the shaping of the rule of law.

2. Essential characteristics of the rule of law

2.1. The rule of law must assume the application of same standards.

The legal norm must apply same standards, in a similar manner, for all the situations that may occur in real life and for all categories of peoples, in other words, the rule of law must be general, must have an impersonal character and must be opposable "*ergaomnes*". An individual will tend to obey a rule of law when he will be convinced that other members of the society obey that norm. Repeated violations of the law, and especially violations that are not punished, by some individuals, will make those that obey that law to fill wronged. A law that would imply different standards, unjustified use o different criteria, based on personal qualities (such as social status, wealth, gender, age etc.), would be the contrary of any ideals that a democratic state should have.

The final goal of any law is to maintain the social order and to promote (as law cannot be considered as merely an arbiter or a punisher but also a catalyst in the development of certain social values) and protect a social value. The laws must adopt only after rigorous investigations, economic, sociological and psychological studies, after serious scientific analysis in the area where they will be applied, and not to the advantage of certain individuals or groups of interests.

2.2. The rule of law must be written, public and clear

According to Hegel [1], to hang the laws, as Dimysius the Tirant, so high that no citizen could read them or to bury them in the complicated mechanism of justice, in erudite books, collections of decisions and so on and more than that, in a foreign language, so that the knowledge of the law can only be accessible to the few that trained in this profession is all but one and the same injustice.

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No one can invoke not knowing the law as an excuse to elude a rule of law. There is thus the presumption that all the recipients of a law have knowledge of that particular rule and that they understand it, and in order for this to happen it is necessary that a rule of law is formulated in a clear, obvious fashion, with a non-ambiguous content, that it contains clear terms that can be understood by anyone. We can identify a principle of law, related to the general principle of legality, the principle according to which "no one can invoke not knowing the law as an excuse for breaking it" (*nemocenseturignorarelegem*). As a result of this principle, there is an absolute presumption that all citizens know what the law stipulates, starting at the date when a certain rule of law enters into force. A law becomes abiding, in the E. U. (and in most of the civilized world), only after it appears in an official publication. In Romania this publication is called The Official Monitor and a law entries into force in 3 days after its publication or at a later date stipulated in the law, as the legislator must take into consideration a certain period of time, in some cases, considering that many of the rules of law cannot become realities over night. At a European level the publication is The Official Journal of the European Union, published in the language of every member state. Every person should have the possibility to access directly and free of any cost these official publications.

In order for a rule of law to be clearly determined, there must be a general consensus, between the legislator and the civil society, regarding the expressions, the terms that it is using. The clarity of a law does not refer only to the objectives that the rule is trying to achieve but also to the meaning of the words that are chosen and also to the meaning that those expressions have for the community were the law will be applied.

The conceptualization of the provisions of the law, by those that must comply with them must be in consensus with the real will of the legislator. In the same degree, the legislator must choose the expressions with responsibility and care, avoiding, as often as possible the use of terms that are of a very specialized, technical nature.

The confusion, the lack of understanding of the real meaning of a rule of law may have catastrophic effects. The lack of clarity can lead not only to mistaken interpretations but also, to certain „blockages" or at least important meltdowns in the process of applying the law. Lack of clarity can also lead to what I would call a "legal inertia" a situation where trust in the rule of law nearly disappears and it is replaced by the trust in other institutions (as the church for example), or in customary law.

The hierarchy of the rules of law, the interpretation as well as the judicial system, meaning the judges that apply the law are elements that can make a decisive difference in the streamlining of the legal system.

2.3. The law must be the expression of a certainty

Legal certainty surmises that the individual knows or at least has the possibility to know which will be the consequences of breaching a certain law. Legal certainty surmises the premise that the individual knows the law and can act accordingly. The punishment for a crime must be stipulated clearly by the law. Even if, for example, the citizens of a country don`t know the exact quantum of the punishments stipulated in a Criminal Code, they have the possibility to learn this, if the law is public and easily accessible. The

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punishment applies only when the author had the freedom of will and of action. So, the person that commits a crime is aware of the existence of the rule of law, of his deed and of the consequences (or he should have been aware). Also he is aware of the punishment that he is likely to receive. Quite often the fear of punishment is what stops someone to commit a crime. For this purpose, but also as an individual right, the punishment must be known or foreseeable. According to Takis Tridimas [2], the common knowledge of the laws and of the customs creates expectations related to the consequences and the reactions chained to the actions that take the form of a "multidimensional conceptual map", dynamic and relativist of the possible forms of relations.

The concept of legal certainty is in a close relation with the concept of legitimate expectations of the citizens, expectations that they have from the rule of law. In fact, these concepts are so closely connected that the European Court of Justice does not make a clear distinction between them. The jurisprudence from France and Germany recognize, in a large degree, the notion of "legitimate expectations" (although in my opinion "legitimate expectation" has a larger understanding –for example the expectation that the fundamental rights and freedoms are respected, or to have access to education, decent healthcare etc. are part of the large concept we call "legitimate expectations).

Another factor that essentially contributes to the legal certainty is the force of *res iudicata,* which surmises that it is forbidden to start a new trial when there is a definitive decision, in a case, between the same persons, with the same object, if there are no new evidences. A court decision that is definitive, that cannot be appealed against is considered to reflect the true. *Res iudicata* is an essential condition for the fulfilment of justice and to ensure a climate of certainty.

Finally, another factor that contributes to the legal certainty is the interdiction to use analogy when imposing a punishment. According to E.C.H.R. [3] (interpreting the art. 7 of the European Convention on human rights), the principle of legality also surmises the interdiction that the law should be applied through analogy, through extended interpretation of a case, at the expense of the defendant.

2.4. The law must provide only for the future

While a law is in force, it has a continuous application, without interruption. A law is in force until the moment of its abrogation. No matter how serious, how odious a deed may be, it cannot be punished, as long as there is no law to incriminate it. The principle of non-retroactivity is formulated in all the democratic constitutions [for example art. 15 of the Romanian Constitution which stipulates that the law provides only for the future, excepting the more favorable criminal law. Art. 7, para. (1) of the Constitution states that no one can be condemned for an action or an omission that, at the time when it was committed, was not considered a crime, according to national or international law.]. The principle that we analyze is essential in certain branches of law, such as criminal law.

A new law can only regulate legal relations that are born while it is has entered into force. In conclusion, the new law will not regulate the deeds that were committed before its entry into force. The justification of this principle resides in the fact that the new norm, that incriminates the deed, was not known (not even foreseeable) by the offender. It would be irrational to punish someone for a an action or

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an omission that was permitted by the old law (*nullumcrimen, nullapoena sine legepraevia*). The principle has appeared as a political claim against the Feudal regime, and later it has gained a prominent position in the Declaration of the Rights of Man and of the Citizen (1789).

The non-retroactivity of the law is a way of protecting fundamental rights and freedoms against the arbitrary of the state, a guarantee that contributes to the forming of the legal certainty. There are only some situations, strictly determined, in which the provisions of the law may be applied retroactively.

2.5. The rule of law must use criteria of differentiation of the human beings that are accepted by the society and that do not violate the fundamental rights and freedoms

This criterion becomes applicable especially when a rule of law uses different degrees of generality, when it circumstantiates the type of recipients.

The rule of law differentiates, almost always, according to different qualities of the persons. For example the rule of law requests a certain age to vote, to become legal reliable and so on. In some situations, the law protects certain categories of persons. This way they gain some advantages. A differentiate treatment that the law applies doesn`t necessary mean a breach of the fundamental rights, on the contrary, applying the same treatment in all situations that may occur can be considered a type of injustice. But it would be an inacceptable criterion of differentiation that only some of the pregnant women or only some of the minors would gain an advantage, as a result of a legal provision. Differentiated treatment for a group o people (minors, persons with disabilities etc.) is a necessity, inside certain boundaries, as long as this treatment has a logical, objective justification, and as long as it surmises an identical treatment, in similar situations, inside a group of people.

2.6. The rule of law must be compulsory

Disregarding the branch of law that a norm belongs too, the law has, since the moment it entries into force, a mandatory character. The power of the state legitimates and guarantees the application of the law, assuming the task to punish any relevant violation.

Although the primary purpose of the law is not to punish but to protect, the punishment is, sadly, a necessity for any type of government (excepting perhaps an ideal one –in the words of Saint Augustine – "love and do what you want"). Not punishing crimes that are incriminated by law will inevitably lead to a weakened authority.

As they are destined to impose a law order in a society, the rules of law must be compulsory (or at least most of them), otherwise there would not be a certainty that the legislator will be able to impose social order. Although some of the rules of law contain permissive provisions, most of the norms are compulsory [4].

2.7. The rule of law must be an act emanating from a competent authority

According to the principle of legality, a rule of law can be promulgated only by the competent

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organisms of the state. The laws have a high degree of impersonality and, we could say that they may be compared to a computer program that "sees" only in the limits of the parameters that it was designed to. Still there are some factors that condition the laws that give them a humane dimension, such as the principle of respecting human rights or, in the case of applying the law, the persons called to fulfil this difficult task, must apply the law considering the particularities of every case.

The fact that only the competent authorities can promulgate laws is an essential condition, in order to ensure the objectivity of the laws and also to essentially contribute to legal certainty. The elaboration of the law must be based on rigorous scientific criteria. Being such a complex process, the elaboration of normative acts must seek a multidisciplinary support.

2.8. The law must be accepted and its utility must be recognized by the society where it is applied

Although this criterion is not indissolubly linked with the legal validity of a norm, the law will not be efficient, will not fulfil its purpose unless the value that it protects will be recognized by the individuals that are forced to obey it. The idea of law unaccompanied by the value that it protects is not strong enough to ensure the efficiency of the legal norm. The notion of law is far too abstract to ensure its protection, and we even dare say validity, if it doesn`t consecrate an essential value, or if it doesn`t play a part, no matter how small in the protection or promotion even of such a value. The internalization of the legal provisions is a sine qua non condition for any rule of law, as the compliance is a key element for the rule of law. When there is a large opposition to a law, this raises serious question marks regarding the purpose of that law, of the reason behind the provisions of the legal norm. Repeatedly violating a rule of law can be a relevant hint regarding the efficiency of the law.

2.9. The law must contain general and impersonal provisions

The conduct prescribed by a law is meant to be applied to an unlimited number of cases and persons [5]. By prescribing conducts that establish rights and obligations to the participants at the legal life, in a generic manner, the law becomes an abstract standard, depending on which the conduct of a concrete subject is considered lawful or unlawful.

The rule of law has the calling of being applied to an infinite number of real life situations, in the area that it regulates. The sanction that follows after the violation of the legal provisions can be applied to any person that through his actions or inactions enters in a conflict with the legal provisions. The generality that the law has refers at the totality of persons that fall under the provisions of the law, as well as to the totality of situations that the rule of law can be applied to. Only the generality of the legal norm can confer a unit of equal measurement, and unique criterion in appreciating the conduct of the individuals, from a point of view of conformation with the requirements of the law [6].

The norms must have an impersonal character, even if there are laws that target a certain category of persons (for example public servants). When it applies to a category of persons, the rule of law doesn`t

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achieve this considering the personal features of the subjects, but by considering the function that the person has, and thus entering under the provisions of that norm.

2.10. The rule of law must be consistent with constitutional provisions, with some international acts and with the general principles of law

A strong connection exists between the legal norms. The norms form branches of law, which at their turn give birth to a law system. This system, although composed by different laws must have an unitary, coherent structure. When enacting a law, the legislator must take into account all these correlations, must compute all the implications that the new law may have, the subsequent legal modifications, the domains affected because of the change, as well as the possible conflicts that may emerge [7].

The general principles of law have, also, an essential role in the elaboration and in the process of applying the rules of law. The general principles confer coherence and, at the same time the elasticity that is necessary to any system of law.

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4. References

[1] G.W. Hegel, *Principiile filosofiei dreptului*, (Principles of law philosophy)Iri Publishing House, Bucharest, 1996, p. 212
[2] Takis Tridimas, *The general principles of EC law*, Oxford University Press, 1999, p. 163
[3] Başkaya&Okçuoğlu v. Turcia, Nr. 23536/94.
[4] Măgureanu Alexandru Florin, *Principiile generale ale dreptului* (General principles of law), Ed. Universul Juridic, Bucharest, 2011, pp. 87-88
[5] Radu I. Motica, Gh. Mihai, *Teoria generală a dreptului* (General Theory of Law), All Beck Publishing House, Bucharest, 2001, p. 81
[6] Sofia Popescu, *Teoria generală a dreptului* (General Theory of Law), Lumina Lex Publishing House, 2000, p. 284
[7] Nicolae Popa, Teoria generală a dreptului, Actami Publishing House, p. 217