PREDICTABILITY AND ACCESSIBILITY OF THE LAW

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Abstract

„Where the force of the laws and the authority of their defenders cease, there can be neither liberty nor safety for any," wrote Shakespeare.

The rule of law presupposes the obligation to respect the Constitution and the laws, as provided by the provisions of art. 1 para. (5) of the Constitution. In order for the law to be accepted and respected, it must present a certain legal security, assuming the requirements of accessibility and predictability, logical coherence and stability, features designed to capture the trust of citizens in its provisions.

The need to match laws with time and not time with laws has been emphasized since antiquity. But, as we will show in the present study, the belief in the perfectibility of the law was gradually deprived of rights.

The lack of accessibility and predictability of legal provisions is increasingly invoked before the Constitutional Court, which ruled, in numerous cases, on the violation of these requirements, by reference to the ECtHR jurisprudence, as the existence of interpretation problems and law enforcement is inherent in any legal system, given the fact that, inevitably, legal norms have a certain degree of generality.

As the Constitutional Court ruled in its jurisprudence, the obligation to respect the laws does not imply, by its content, the provision of an inflexible legislative framework. Legislative intervention is necessary both to adapt the normative acts to the existing economic, social and political realities, but also to ensure a unitary legislative framework, which contributes to a better application of the law and to the removal of any ambiguous situations or inequities in the application of the law[1]*.*

Keywords: *law, predictability, accessibility, jurisprudence, interpretation.*

1. Introduction

The law means legal order, according to Mircea Djuvara; the necessity of the law arises from a principle of the justice: the need for security of the society. „Nothing can more easily give rise to injustice than the arbitrary liberty of the one applying the law, to enforce it in an invariable manner, according to one's discretions. It is actually one of the most important needs which ensures the legal order, that everyone knows, as far as possible, what rule will be applicable and not to be left prey to personal inspirations and the instability they can lead to, in one's activity".

There has been constantly stated in the case-law of the court of contentious constitutional that the rule of law is a mechanism the operation of which entails the establishment of a climate of order, in which the recognition and valorization of an individual's rights cannot be conceived in an absolute and discretionary way, but only in relation with the observance of the rights of the others and of the community as a whole[2]. The rule of law entails the obligation to observe the Constitution and the laws, as provided by art. 1 para. (5) of the Fundamental Law.

2. Paper content

Considering the principle of general applicability of laws, the Strasbourg Court[3] held that their wording cannot have an absolute precision. One of the standard regulatory techniques is to resort to general categories rather than exhaustive lists. Therefore, a great number of laws use, by force of nature, more or less ambiguous

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[1] CCR dec. no. 1237/2010, published in Official Gazette of Romania no. 785/24.11.2010.

[2] Decision no. 659/2010 on the constitutional challenge of art. 9 of Law no. 10/2001 regarding the legal regime of certain buildings taken over abusively during 6 March 1945-22 December 1989, published in Official Gazette of Romania no. 408/18.06.2010.

[3] For more information on the predictability and accessibility of the law under the magnifying glass of the ECtHR, please see L.-C. Spătaru-Negură, *Protecția internațională a Drepturilor Omului – Note de curs* (International Protection of Human Rights – Course Notes), Hamangiu Publishing House, Bucharest, 2019, pp. 155, 164, 168, 173, 178.

formulas, the interpretation and application of which depend on practice. No matter how clearly a legal[4] rule is drafted, there is an inevitable element of legal interpretation in any legal system[5].

The need to clarify unclear points and adapt to changing circumstances will always exist. Again, although certainty is highly desirable, it might entail excessive rigidity, but the law must be able to adapt to changing circumstances. The decision-making role given to the courts aims precisely to remove the doubts that persist when interpreting the rules, the progressive development of criminal law by means of the case-law as a source of law being a necessary and well-rooted component in the legal tradition of the member states[6].

But how can we bring together the society need for security and belief in the accessibility and predictability of the law[7], in logical coherence and stability with the risks represented by legislative inflation, the cult of impermanence or with the current tendency to regulate and deregulate everything? These phenomena led to a crisis of conscience and a real reflex of the individual to reject law. The current state suffers from „legislative bulimia": the legislative system „disperses" itself in regulations that do not have enough time to crystallize, therefore they are poorly drafted and poorly coordinated with the rest of the legal system[8].

Modern legislator has significantly moved away from Rousseau, the creator of the modern term of law, the one who has essentially contributed to the development of the rule of law concept: „I therefore give the name "Republic" to every State that is governed by laws, no matter what the form of its administration may be: for only in such a case does the public interest govern, and the res publica rank as a reality". He shared the belief in the cult of the law, a concept that reigned in France starting from the era of the French Revolution: „It is to law alone that men owe justice and liberty. It is this salutary organ of the will of all which establishes in civil rights the natural equality between men".

There were cases when the belief in the predictability of the law was forfeited. Francois Gény campaigned for the release of the judge from the strict letter of the law. The author reacted against the doctrine of that time which considered the law as the only source of the law[9]. By means of his scientific endeavors, Gény wanted to put an end to the „fetishism of the written law" and the belief in its sufficiency, by considering that it is incomplete and that „no matter how much acuity we adjudicate to it, the human mind is not capable of fully comprehending the image of the world in which it moves". The law cannot satisfy all the requirements of social life, it cannot keep up with the dynamics of the society. This is why, when the law does not offer solutions, the judge, helped by the doctrine, must discover them by free scientific research, in terms of habits and in what Gény called *la nature des choses positives*[10].

In order for the law to be accepted and observed, it must demonstrate a certain legal security, assuming the requirement of approachability, logical coherence, stability and predictability, features meant to capture the trust of the citizens in its provisions. The legal security of the individual directly depends on the legal security of the community in which he lives. In this regard, art. 4 of the Constitution is not limited to voice that the *state* is based on the unity of the Romanian people and the solidarity of its citizens, but establishes that Romania is the common and indivisible *homeland* of all its citizens.

We are wondering, however, how the simple citizen, lacking specialized knowledge, can obey the law, when it changes frantically, is obscure, inconsistent or reveals so many deficiencies of legislative technique? In an ideational vision, which reminds us of Socrates, the answer is simple: the good citizen must also obey the bad laws in order not to encourage bad citizen to break the good ones. In Socratic conception, obedience to the law is a duty and his end stands testimony to this.

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[4] For more about legality, see E.E. Ștefan, *Legalitate şi moralitate în activitatea autorităţilor publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

[5] E. Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in proceeding CKS-eBook 2013.

[6] CCR dec. no. 297/2018 on the constitutional challenge of art. 155 para. (1) CP, published in Official Gazette of Romania no. 518/25.06.2018.

[7] Please also see M.-C. Cliza, C.-C. Ulariu, *Drept administrativ. Partea generală* (Administrative Law. General Part), C.H. Beck Publishing House, Bucharest, 2023, p. 186.

[8] D.C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului*, C.H. Beck Publishing House, Bucharest, 2006, p. 381.

[9] For more about the source of the law, see E.E. Ștefan, *Drept administrativ Partea I, Curs universitar*, IIIrd ed., revised, supplemented and updated, Universul Juridic Publishing House, Bucharest, 2019, pp. 40-49.

[10] For more information, see N. Popa, E. Anghel, C. Ene-Dinu, L. Spătaru Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd ed., revised and supplemented, C.H. Beck Publishing House, Bucharest, 2017.

Nowadays, the excess of normativism, incoherence of laws, the violation of the principle of normative hierarchy[11], instrumentalization of law, the interference of politics in the legal field and the „juristocracy" unjustifiably complicate the implementation of the law. Paradoxically, beyond the normative avalanche, we are often faced with a legislative vacuum. The citizen can only be perplexed and outraged, as his absorption capacity is limited[12].

In order to demonstrate the aforementioned, we shall analyze a specific case: the legislator's passivity and the non-unitary jurisprudential interpretation of a legal text - art. 155 para. (1) CP – generated in practice a sequence of decisions that are difficult to apply and assimilate, which failed to shed light in an area that required a lot of legislative strictness: the area of criminal liability.

The first step made in the effort to clarify the controversial issues involved by this law text consisted in submitting it to the constitutional review, in order to verify the compliance with the Basic Law and the fundamental principles and values it comprises[13]. Therefore, the Constitutional Court was notified on the constitutional challenge of art. 155 para. (1) CP, motivated by the fact that the phrase „*any act of procedure*" lacks clarity, precision and predictability[14], by violating the provisions of art. 1 para. (5) of the Constitution. The authors of this constitutional challenge raise the issue of the acts by which the course of criminal liability limitation can be interrupted, arguing that not every procedural act should have the aforementioned effect. In this respect, reference is made to the legislative solution regulated by the Criminal Code of 1969, according to which the term of the limitation was interrupted by the performance of any act which, according to the law, had to be communicated to the defender in the course of a criminal trial.

The Criminal Code in force, unlike the Criminal Code of 1969, does no longer provide that the procedural act carried out must be communicated to the defendant in order to produce the effect of interrupting criminal liability limitation, according to art. 155 para. (1) CP, and that, in all investigated case-files that have almost reach the expiry of the criminal liability statute of limitation, formal procedural acts could be carried out in order to prevent the effect triggered by the challenged text.

The Constitutional Court held that, in order to obtain the removal of the criminal liability, the statute of limitation must run without the intervention of any act of nature to bring back the committed facts to the public consciousness. In this regard, art. 155 para. (1) CP provides the interruption of the criminal liability statute of limitation by fulfilling any act of procedure in the case, and according to the provisions of para. (2) of the same art. 155, a new statute of limitation starts running after each and every interruption.

Criminal law, as a whole, is subject both to the requirements of the quality of the law, established by the constitutional provisions of art. 1 para. (5), as well as those of the principle of legality of incrimination and punishment, as regulated by art. 23 para. (12) of the Constitution. These provisions require not only the clear, precise and predictable regulation of the facts that constitute crimes, but also the conditions under which a person can be held criminally liable for committing them. However, the criminal liability limitation is part of the regulations that aim to engage criminal liability.

The statute of limitation is provided by the general part of the Criminal Code. In this regard, art. 154 CP in force provides criminal liability statute of limitation, established by the legislator by reference to the severity of the incriminated facts, and consequently, to the special limits of the criminal penalties provided for the regulated offenses. As the criminal liability limitation is a substantive criminal law institution based on time, the legal provisions regulating criminal liability statute of limitation and the modality of their application are of considerable importance, both for the activity of the judicial bodies of the state, and for individuals who commit crimes.

Taking into account all these considerations, it is necessary to guarantee the predictable nature of the effects of the provisions of art. 155 para. (1) CP on the individual who committed a fact provided for by the criminal law, including by ensuring the possibility of knowing the aspect of the intervention of the interruption

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[11] For more informatios about the principle of normative hierarchy, see E.E. Ștefan*, Drept administrativ Partea a II-a, Curs universitar,* IVth ed., revised and updated, Universul Juridic Publishing House, Bucharest, 2022, pp. 59-61.

[12] See also E. Anghel, *General principles of law*, in Lex ET Scientia International Journal - Juridical Series, LESIJ.JS XXIII no. 2/2016.

[13] For details regarding the constitutional review procedure, see, for instance: I. Muraru, N.M. Vlădoiu, A. Muraru, S.G. Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009; I. Muraru, N.M. Vlădoiu, *Contencios constituțional. Proceduri și teorie*, 2nd ed., Hamangiu Publishing House, Bucharest, 2019; S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021.

[14] For more information about clarity, precision and predictability of the law, see R.-M. Popescu, *Claritatea, precizia și previzibilitatea - cerințe necesare pentru respectarea Constituției, a supremației sale și a legilor în Româ*nia, in Dreptul no. 7/2017, pp. 78-87.

of the criminal liability limitation and the beginning of a new statute of limitation. However, according to the case-law of the Constitutional Court, a legal provision must be precise, unequivocal and establish clear, predictable and accessible norms the application of which does not allow arbitrariness or abuse, and the legal norm must regulate in a unitary and uniform manner and establish minimum requirements applicable to all its recipients[15].

Notwithstanding, the Constitutional Court noted that **the provisions of art. 155 para. (1) CP establish a legislative solution likely to create for the person having the capacity of suspect or defendant an uncertain legal situation regarding the conditions of his/her criminal liability for the committed facts. For these grounds, it notes that the provisions of art. 155 para. (1) CP are unforeseeable and, at the same time, contrary to the principle of legality of incrimination, since the phrase „any procedural act" in their content also includes acts that are not communicated to the suspect or defendant, by not allowing him/her to know the aspect of the interruption of the limitation and the beginning of a new statute of limitation.**

The Constitutional Court noted that the legislative solution provided by the old Criminal Code met the conditions of predictability as it provided for the interruption of the criminal liability limitation only by fulfilling an act that, according to the law, had to be communicated in the case in which the person in question had the capacity of suspect or defendant.

Given these considerations, **by means of dec. no. 297/2018, the Constitutional Court admitted the constitutional challenge and noted that the legislative solution providing the interruption of the criminal liability statute of limitation by fulfilling „any procedural act in the case", in the content of the provisions of art. 155 para. (1) CP was not constitutional.**

However, after the pronouncement of this admission decision, the High Court of Cassation and Justice was referred to with a **referral in the interests of the law[16] after it was found that the interpretation and application of the provisions of art. 155 para. (1) CP is not carried out in an unitary manner**.

The first jurisprudential orientation appreciated that, currently, as an effect of declaring the unconstitutionality of the provisions of art. 155 para. (1) CP, the interruption of the criminal liability limitation is no longer possible. It was shown that, by not defining the causes of the interruption of the criminal liability limitation, the court shall be bound to apply the provisions on the criminal liability limitation provided by art. 154 CP, since it cannot apply law by analogy or to substitute the lack of a regulation, and the rewording of the norm of the old Criminal Code would entail a reactivation of a provision that was expressly repealed by the enforcement of the new Criminal Code. Furthermore, the courts of law do not have the jurisdiction to supplement the provisions of art. 155 para. (1) Cp, this being an exclusive prerogative of the legislator.

The second majority jurisprudential orientation held that, essentially, the effects of CCR dec. no. 297/2018 do not extend to the entire institution of the interruption of the criminal liability statute of limitation, but, according to the considerations of the decision of the constitutional court, the cause of interruption is incidental only in the case of procedural documents which, according to the law, must be communicated to the suspect or the defendant. Therefore, the provisions of art. 155 para. (1) CP remained in the active background of the legislation and continue to produce effects, but the only acts that can have the effect of interrupting criminal liability limitation are those to be communicated to the suspect or defendant.

Although the legal issue interpreted in a non-unitary manner raises controversies, unfortunately it could not be settled by way of the referral in the interests of the law[17], this being **dismissed as inadmissible by dec. no. 25/2019 in the interests of the law** motivated by the fact that the High Court of Cassation and Justice does not have the jurisdiction to rule on the effects of the decision of the Constitutional Court or to issue binding rulings that contradict the decisions of the Constitutional Court [18].

In 2022, the Constitutional Court was referred to again in order to pronounce on the provisions of art. 155 para. (1) CP. The authors of the challenge showed that, after the pronouncement of Decision no. 297/2018,

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[15] CCR dec. no. 637/13.10.2015 on the constitutional challenge of art. 26 para. (3) of Law no. 360/2002 on the Statute of the Policeman, published in the Official Gazette of Romania, Part I, no. 906/08.12.2015, para. 34.

[16] For more information, see C. Ene-Dinu, *Constitutionality and referral in the interests of the law*, in LESIJ - Lex ET Scientia International Journal nr. XXIX, vol. 1/2022 (June), pp. 66-74.

[17] For more information, see C. Ene-Dinu, *Rolul practicii judecătorești în elaborarea dreptului*, Universul Juridic Publishing House, Bucharest, 2022.

[18] HCCJ dec. no. 25/2019 on the referral in the interests of the law for the interpretation and application of the provisions of art. 155 para. (1) CP on the interruption of the criminal liability limitation by fulfilling any act of procedure in the case, after the publication in the Official Gazette of Romania of the CCR dec. no. 297/26.04.2018.

whereby the Constitutional Court noted that the legislative solution providing the interruption of the criminal liability statute of limitation by fulfilling „any procedural act in the case" was not constitutional, the courts of law had to note that the provisions of art. 155 para. (1) CP ceased their legal effects, 45 days after the publication of the admission decision. But in practice, the courts ruled that the decision of the Constitutional Court is an interpretive decision, and not a pure and simple one of immediate application. In this context, it was shown that the challenged provisions of the law were not clear, foreseeable and predictable, as they did not allow the defendant to know under what conditions and by means of what acts the criminal liability limitation was interrupted.

By means of **dec. no. 358/2022**[19], the Constitutional Court showed that it had established that a decision was simple/extreme or interpretive/subject to interpretation, also revealed the answer to the question whether the intervention of the legislator was necessary/mandatory in order to agree with the Constitution, in respect of those found by the court of contentious constitutional, of those provisions found to be unconstitutional. Therefore, it was considered that, as a rule, the establishment of the nature of the decision, *i.e.*, simple/extreme determines the necessity/obligation of the legislator to intervene from the legislative point of view, while the assignment of the nature of interpretative decision/ subject to interpretation does not give rise to such an obligation, but rather determines an obligation of the judicial bodies (and the other bodies called to apply the law) to interpret the Court's decision and establish its effects in order to apply it to the specific case.

The Court holds that **dec. no. 297/2018 sanctions the „legislative solution" contained by the challenged text of law, therefore, by applying traditional/classical criteria, it shall no longer fall within the category of interpretative/subject to interpretation decision**. Furthermore, the operative part of the decision does not even include the phrase specific to a decision by which the constitutional interpretation of the norm is established.

The Court also notes that para. 34 of dec. no. 297/2018, highlighted the **reference points of the constitutional conduct that the legislator, and not the judicial bodies, being bound to fall in with, with the obligation, established under art. 147 of the Constitution**, **to intervene from the legislative point of view and to establish clearly and predictably the cases of interruption of the criminal liability limitation.**

However, the Court notes that, **due to the legislator's silence, the identification of cases of interruption of criminal liability limitation remained an operation carried out by the judicial body, reaching a new situation lacking clarity and predictability, a situation which also determined the different application to similar situations of the challenged provisions** (confirmed by the fact that the High Court of Cassation and Justice found the existence of a non-unitary practice). Therefore, **the lack of intervention of the legislator determined the need for the judicial body to replace it by outlining the applicable normative framework in the event of the interruption of the of criminal liability limitation and, implicitly, the application of the criminal law by analogy**. However, the Court constantly held in its case-law that, the provisions of art. 61 para. (1) of the Constitution establish that „the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country", and its legislative competence regarding a certain field cannot be limited if the law thus adopted complies with the requirements of the Fundamental Law[20]. Furthermore, the Court ruled that allowing the person who interprets and applies the criminal law, in the absence of an express rule, to establish himself the rule according to which he is going to solve a case, taking as a model another ruling pronounced in another regulated framework, represents an application by analogy of the criminal law.

Therefore, the Constitutional Court finds that the normative set in force does not provide all the legislative elements necessary for the foreseeable application of the norm sanctioned by dec. no. 297/2018. Therefore, although the Constitutional Court referred to the old regulation, by highlighting the reference points of a constitutional conduct that the legislator was bound to fall in with, by applying the provisions of the Court, this fact cannot be interpreted as a permission granted by the court of contentious constitutional to the judicial bodies to establish themselves the cases of interruption of the criminal liability limitation.

Consequently, the Court notes that, under the conditions of establishing the legal nature of dec. no. 297/2018 as simple/extreme decision, in the absence of the legislator's active intervention, mandatory according to art. 147 of the Constitution, during the period between the date of publication of the respective decision and

[19] CCR dec. no. 358/2022 on the constitutional challenge of art. 155 para. (1) CP, published in Official Gazette of Romania no. 565/09.06.2022.

[20] CCR dec. no. 308/28.03.2012 on the notification of unconstitutionality of the provisions of art. 1 letter g) of Lustration Law on temporary limitation of access to some public offices for persons who were part of the power structures and the repressive apparatus of the communist regime during 6 March 1945-22 December 1989, published in Official Gazette of Romania, Part I, no. 309/09.05.2012.

until the enforcement of a normative act that clarifies the norm, by expressly regulating the cases capable of interrupting the criminal liability statute of limitation, **the active background of the legislation does not include any case that allows the interruption of the criminal liability limitation.**

Such a consequence is the result of the legislator's failure to comply with the obligations incumbent on him according to the Fundamental Law and his passivity, even despite the fact that the decisions of the High Court of Cassation and Justice have announced the non-unitary practice resulting from the lack of legislative intervention since 2019. In this background, the Court finds that the situation created by the legislator's passivity, following the publication of the aforementioned admission decision, represents a violation of the provisions of art. 1 para. (3) and (5) of the Fundamental Law, which enshrines the rule of law nature of the Romanian state, as well as the supremacy of the Constitution. This is because the prevalence of the Constitution over the entire normative system represents the crucial principle of the rule of law[21]. The guarantor of the supremacy of the Fundamental Law is the Constitutional Court itself, by means of the decisions it pronounces, therefore neglecting the findings and provisions contained in its decisions causes the weakening of the constitutional structure that must define the rule of law[22].

In order to restore the state of constitutionality, it is necessary for the legislator to clarify and detail the provisions regarding the termination of the criminal liability statute of limitations.

3. Conclusions

A paradox of modern democracy results from this analysis: we lose ourselves in an avalanche of normative acts, in a frightening instability caused by a frantic tendency to reform. This legislative inflation is naturally accompanied by qualitative deficiencies[23] of the regulations, resulting in the devaluation of the legislative system. The weakening of the valorization function of the law has repercussions on its voluntary realization, because the law cannot be imposed by force, but by its persuasive value. In this context, the words of Hegel are particularly relevant: „In ancient times, respect and reverence for the law were universal. But now the fashion of the time has taken another turn, and thought confronts everything which has been approved"[24].

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[21] For more see E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

[22] CCR dec. no. 230/28.04.2022 on the constitutional challenge of art. 14 letter a) and of art. 26 letter d) of Law no. 51/1995 for the organization and practice of the lawyer's profession, published in Official Gazette of Romania, Part I, no. 519/26.05.2022.

[23] For an example on the lack of previsibility of law, please see M.-C. Cliza, D.-C. Borcea, L.-C. Spătaru-Negură, *To Be or Not to Be Plagiarism? Unconstitutionality Criticisms of Article 170 Para. (1) of the Romanian National Education Law*, published in CKS 2022 Proceedings, „Nicolae Titulescu" University Publishing House, Bucharest, 2022, pp. 233-240.

[24] G. W. F. Hegel, *Principiile filosofiei dreptului*, Paideia Publishing House, Bucharest, 1998, p. 12.

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