

THE FUNDAMENTAL LEGAL VALUES GUARANTEED BY THE CONSTITUTION - ELEMENTS OF COMPARATIVE LAW

Professor Emilian CIONGARU, PhD.

University Titu Maiorescu Bucharest - Romania

University Bioterra Bucharest-Romania;

Associate Scientific Researcher – Romanian Academy,

Institute of Legal Research „Acad. Andrei Radulescu”

emil_ciongaru@yahoo.com

Abstract:

The practical analysis of the principles of the rule of law clearly states that the constitutional power belongs to the people and is exercised by them through their representatives - the parliamentarians - and which delegates it to them, for the most efficient management of the government, it must be accepted that the fundamental values enshrined by the Constitution are the very essential, useful and necessary values for that people, so that the duty to protect, guarantee, defend and promote them belongs to the state itself. Any constitution as a fundamental law in any constitutional state must fulfil two roles that are apparently unequivocal in the sense that the constitutional provisions must be flexible and simple enough, in order to easily adapt to any social need that may arise in the evolution of society, and in the second sense, the constitution must have an efficient, effective and long-term stability. In the absence of constitutional norms that have a very general character and that enshrine the fundamental values recognized at a certain historical moment in a constitutional state, these tasks can be quite difficult and burdensome and will never be able to be fulfilled.

Keywords: *system of law; law; principles of the rule of law; values of law; constitutional norms.*

Conceptual elements of fundamental legal values in constitutional law

The Constitution, the fundamental document of any state governed by the rule of law, enshrines: the fundamental principles specific to that form of state organization, the cultural, economic, social, legal values, etc. [1]

The emergence of democracy and constitutions in the modern era responded to the need that the law has to give itself a specific justification, but, nevertheless, neither the democratic legislations nor the constitutions will be able to satisfy the modern needs for the law to have an unequivocal foundation.

Therefore, law as a fundamental science must be based on the objective authority of science as a concept, which becomes a necessary element of positive law [2], in which case it can be considered that the law is not only based on the authority of science, but also on fundamental values protected by legal norms.

In the collision between legal validity and social validity, the condition for a system of rules to be valid from a legal point of view is that the rules belonging to the system in question are valid from a social point of view. If an attempt were made to produce a written constitution[3] for a state which had just emerged from a period of dictatorship, violence and disorder, it should be acknowledged that the effectiveness of such a work would depend on the general belief that that constitution is itself necessary, useful and effective, and the provisions of such a constitution should be simple not only in terms of specific language, but also in the intended purpose.

The constitution will have to be considered a necessary framework for the future actions of the government. In the proposed constitutional elaboration, the idea that the pursuit of an ideal of equity and justice must begin with small, simple steps that ensure a more solid future development clearly appears. The fundamental human values[4] recognized and protected by laws appeared as a result of a lengthy evolution. In new democracies, this evolution is resumed, in a similar form, much faster and less difficult, less bloody. However, there must be a certain preparation for the new changes, a certain sedimentation, since any recognition and guarantee of values is a continuous conquest.

The fundamental legal values of the legal system

The evaluation of a legal system and its specific values[5] is also possible through a historical analysis, for example by studying the institutions of Romanian law and how they contributed to the creation of modern law.

From the point of view of comparative law, a historical analysis of legal systems is also possible by observing particular legal cultures, such as that of Oceania, for example, where some of the legal aspects of the cultures of this area are similar to particularities of European legal archaism.

In the case of "new democracies", it is not about unpredictable changes in an unknown direction. Although limited by the need to respect different legal cultures and local specifics, the direction in which this evolution takes place is known in advance, most of the time, being only about adapting certain models, about taking over certain influences and not about new discoveries.

In cases where legal systems have evolved, however, in such a way that they have reached unknown territory, for which they cannot find a model or even a source of

inspiration in the existing systems, the only way to evolve is to accept the guidance of principles and values, especially of values that cannot be subject to any negotiation or limitation - for example, the right to life, the right to health, etc. The superiority of the legal norm over any other human rules also implies an obligation, namely that of the promise that the state makes in the sense that it will enact and apply the legal norms in pursuit of an ideal of justice, which inevitably has the idea of equity as its foundation, this being the only way for a real, effective and efficient guarantee of fundamental human rights and freedoms, as well as for maintaining the rule of law and promoting fundamental values for any society in which the specific standards of the rule of law are achieved.

Comparative law elements of legal values

When drafting the French Civil Code, important conceptual clarifications were made in the sense that: "There is no need for unnecessary laws [...] nor should everything be simplified [...] nor everything provided [...], it would be a mistake to believe that there could be a body of laws that would provide for all possible cases and be suitable for the special case of each individual citizen [...] To govern too well is to govern badly".[6]

In this sense, the idea appeared that a government that would aim to predict any situation or to find solutions to problems that have not even appeared is not possible and it would not be efficient and effective. Such an abstraction as well as the major degree of generality that an effective legal rule must have can give rise to a challenge consisting in applying the provisions of the concrete legal rule to a concrete situation. This kind of issues can be resolved by the combination in the mathematical logic of the legal norm and what could be called the human factor, that is, the enforcement of legal norms on human beings, only by humans.

Therefore, the enforcement of the legal norm, necessarily also has a moral dimension, but it is not only the implementation and enforcement of the law that has a strong moral component, but also the elaboration and adoption of the legal norms.

However, it should also be mentioned that, in the case of constitutional legal norms, due to the very high degree of generality as well as the constitutional legal force, the legislator must provide, in general terms, the vast majority of situations that may arise later, at least for an average time period, as well as possible means of resolving potential conceptual conflicts that may arise.

In the constitution of any state, the fundamental principles for that form of state organization, cultural, economic, social, legal, etc. values are enshrined.

A fundamental law must contain the fundamental principles of organization and functioning of a state or of a group or confederation of states, from all areas of social life. Although not even a fundamental law can create fundamental principles of law, the constitution has a major role in affirming, recognizing and guaranteeing these principles. By recognizing, directly or indirectly, the fundamental principles of law in the constitution, they become constitutional principles at the same time, thus ensuring a wide spread as well as supreme legal force. Furthermore, the constitution can be recognized as having the role of "architect" regarding the creation of new fundamental values, including legal values. This is because neither the law, in general, nor the constitution in particular, can be considered as mere arbitrators or mediators of conflicts that may arise in society. As it emerges from the study of any constitution, it can be qualified as a real declaration of values specific to a particular legal culture.

Even in significantly different legal cultures, the constitutional legislator often chooses to protect fundamental values in a similar way.

As an example in the field of comparative law, the principle of equality appears in a similar form in the states where it is obeyed as follows:

- the Romanian Constitution, art. 16 paragraph (1), "Citizens are equal before the law and public authorities, without privileges and without discrimination";
- the Japanese Constitution, art. 14 paragraph (1), "All citizens are equal before the law and there is no discrimination based on race, religious belief, difference of sex, class or social origin, or arising from political, financial or social relationships";
- the German Constitution, art. 3 paragraph (1), "All people are equal before the law"; paragraph (2) "Men and women have equal rights. The state promotes the genuine achievement of equal rights for women and men and acts to remove the existing disadvantages"; paragraph (3) "Nobody can be disadvantaged or favoured as a result of sex, social origin, race, language, homeland or provenance, belief or religious or political views. No one can be disadvantaged because of a disability";
- the Indian Constitution, Part III, art. 14, "The State shall not deny to any person equality before the law, or equal protection afforded by law, on the territory of India."

Following the study of several national constitutions[7], it was demonstrated that there is an explicit constitutional reference to the principle of legality in quite a few states and that many other states adhere to this principle in judicial practice.

In this sense, the author who carried out the comparative examination believes that *nulla poena sine lege* can be considered a fundamental principle of law, according to the meaning given to this phrase by the Statute of the International Court of Justice.

Since the constitution appears in the form of a regulation[8], the existence and enforcement of its provisions would not be possible without obeying the principle of legality, this principle being in fact the foundation on which all other principles and fundamental values of the law are built[9]. The Constitution holds a central place, which ensures the stability of the entire legal system, of the legal order. State power as well as the role of coercion it fulfils are often based, and even legitimized, on the recognition of the supremacy of the law.

The constitutionalisation of European law[10], as a process that is at the centre of legal development in recent years, can become complete only by using a doctrine of principles, of common fundamental values. Also, a complete constitutionalisation of a legal order can be achieved exclusively through a constitution that can penetrate all legal relationships, a fact that is most easily achieved through constitutional principles, meaning that a doctrine of principles should participate in the transformation of "law integration" into a multifunctional and efficient legal framework.

Looking at the Draft for the Establishment of a Constitution for Europe, even if it lacked legal power, it still had an essential importance on the Treaty of Lisbon, being important mainly due to the fact that it represents a potential "axiological compromise"[11]. As it was known, the need to find common fundamental values in Europe was felt since the end of the Second World War. Thus, if the European Union wants to be an important factor in global politics, it is absolutely necessary to understand what the foundation of European culture[12] is and also what the mission and purpose of European culture in a globalised world is.

Constitutional guarantee of fundamental legal values

Axiology understood as a complex of historically accumulated social values seems to be a community of spirit and mind of European citizens, a basis for political unity in cultural diversity.

However, it should be taken into account that the idea of a solitary regulation is abstract enough to be accepted by litigants as recipients of legal norms[13]. It is also necessary and useful that each legal norm represents a recognition of at least one important social value. Likewise, fundamental values for society, such as equality, freedom or human rights, must be and can be guaranteed only by law.

It could be said that regulations are socio-legal values by themselves[14], in a democratic regime, however this statement must be viewed with some caution. Idealizing the laws and even the constitution can be somewhat dangerous especially if we look at the Roman legal system where, due to the fact that the law was considered sacred, most of Roman law had to develop through jurisprudence - through legal precedent. Although a law that is considered sacred is much less likely to be broken and is theoretically much better legitimized, changing such a law would become very difficult.

In cases where social needs demand more and more flexibility from a regulation, any legal norm must be considered important because it would not otherwise have authority and would not be obeyed, however it must not in any way be considered an axiom that what cannot be changed in a situation is similar to a constitution as a fundamental law.

The fundamental law must not be considered sacred, but it has intrinsic value because it is the main guarantor of the fundamental values in a democratic state and at the same time a value in itself, through the authority it has, through the social recognition that brings it very close, from certain points of view, to J.J. Rousseau's idea[15] of a social contract, a contract by which it is stipulated that the population delegates an important part of its sovereignty to very well-defined state bodies.

Conclusions

In conclusion, a constitution - as a fundamental document - in a democratic state must recognize the sovereignty of the people, but at the same time the constitution must limit this sovereignty to some extent. In essence, national sovereignty is a democratic

principle the achievement of which is dependent on the people's awareness of its vital interests resulting objectively from the conditions of its existence and development. The legitimacy of any constitution is sovereignty itself, but the sovereignty of the people is not absolute, just as the autonomy of will, in the case of the individual, is not absolute, a fact for which it is increasingly necessary for a constitution, in a democratic state, to be legitimized by certain values, which cannot be combated in any way.

References:

- [1] Calinoiu, C., Duculescu, V. (2008), *Drept constitutional si institutii publice*, Lumina Lex Publishing House, Bucharest, p.275.
- [2] Berkowitz, R. (2007). *Democratic Legitimacy and the Scientific Foundation of Modern Law, Theoretical Inquiries in Law*, vol. 8, No. 1, p. 16
- [3] Fuller L. Lon. (2021). *The Morality of the Rule of Law*. Published online by Cambridge University Press. 2021. pp. 642-643.
- [4] Maciu, M. (1995), *Stiinta valorilor in spatiul romanesc*. Academiei Romane Publishing House, Bucharest. p. 244.
- [5] Andrei. P.(1945). *Filozofia valorii*. Fundatia „Regele Mihai I“ Publishing House, Bucharest, p. 134.
- [6] Malaurie, Ph. (1997). *Antologia gândirii juridice*, Humanitas Publishing House, Bucharest, p. 187
- [7] Alen, A., Daout, Fr., Nihoul, P.(coord.). (2018) .*Libertés, (l)égalité, humanité. Mélanges offerts à Jean Spreutels*, Bruylant, Bruxelles, p.121.
- [8] Safta, M. (2014). *Drept constituțional și instituții politice*, Hamangiu Publishing House, Bucharest, p. 152.
- [9] Popescu, S. (2012). *About law and value with special regard on justice*, în *Valahia University Law Study*, vol. XIX, nr. 1, Bibliotheca Publishing House, Targoviste, p. 9.
- [10] Bogdany, A.v. (coord.), (2006). *Constitutional principles*, în *Principles of european constitutional law*, Hart Publishing House, p. 6.
- [11] Bunikowski, D. (2013) *Values and Axiology in the European Union Legal System in Context of the European Culture and the Constitution for Europe*, https://www.researchgate.net/publication/303971870_Values_and_Axiology_in_the_European_Union_Legal_System_In_Context_of_The_European_Culture_and_the_Constitution_for_Europe_Why_does_the_EU_need_the_axiology. p.6,
- [12] Micu, G. (2016). *European construction*. ProUniversitaria Publishing House, Bucharest, p.19.
- [13] Niemesch, M. (2019). *Teoria generala a dreptului, 3rd edition revised and added*. Hamangiu Publishing House, Bucharest, p. 97.
- [14] Vianu, T. (1942). *Introducere în filosofia valorilor*. Cugetarea Georgescu Delafras Publishing House, Bucharest, p.80.
- [15] Rousseau, J.J. (2016). *Contractul social*. Gramar Publishing House, Bucharest, pp.132-135.