

**Cherneva Boyka Ivaylova**

PhD, Associated professor, Academy of the Ministry of Interior,  
Varna Free University 'Chernorizec Hrabar'

## **Legal Security as a Principle in Lawmaking**

### **S u m m a r y**

Legal security is a philosophical concept of the modern thinking. Natural law theory, legal positivism and legal humanism design the notion of security in law. Contemporary meaning of the concept as a social security has been formulated by the german author Gustav Radbruch. Social security becomes legal security.

The concept of legal security in human right context consists of human security (security of person) and social security and security of legal system. As a principle legal security has specific normative function – to justify and to develop effective legislation. The main thesis is that legal security is a principle that generates systematisation and stability of legal order and guarantee human rights in the sense of human and social security.

Nowadays the idea of legal security extends its influence. It has become a principle inspiring the entire legal system. Contemporary legislator balances duties and freedoms taking into account the principle of legal security. Legisprudence as rational knowledge of law and Human Right theory are used in argumentation of the statement that security plays important (of principle) role in lawmaking. The article discusses the principle role of legal security in lawmaking, especially in legislative justification.

**Key words:** legal security, lawmaking, human rights, legisprudence, legislative justification

## Legal Security and Lawmaking

The definition of legal security is a difficult task, even impossible in a few pages. It's necessary to summarise some main concepts in relation to put the conclusions on theoretical and objective base. I agree that legal security is a philosophical concept of the modern thinking. Natural law theory, positivism and legal humanism design the notion of security in law. Like every other law subject different approaches are relevant, but from the theoretical point of view two main aspects stand out – *legal security as a natural right* and *legal security as an element of legal system*. In both cases the idea of security plays important (of principle) role in lawmaking.

Natural law theory considers legal security as a natural right of security and establishes a connection between human rights and the idea of material justice. Hobbes is the author that understands security as the peace that arises from the social contract and citizens hand his security over to the Power [1, pp. 127–41]. Legal security is a guarantee for human rights in global context [2, pp. 145–151] and I think this is *human and social security*.

Positivist idea of legal security scrutinizes and defends procedures and techniques that ensure and imply guarantees for the citizen. Legal security is understood as formal or procedural justice, material justice is not law matter. Gregorio Martinez correctly notes that 'this implies reducing justice to validity, and is as refutable as the opposite idea, which validates justice for extreme iusnaturalistic reasons' [3, p. 130; 4, p. 1–17]. In that sense the basic idea of positivism presents legal security in close relation to the legal system – a systematic conception of law as a set of rules. Legal security cannot be understood without a legal system or legal order. Every legal system exists by a certain level of legal security. This is much more security of the legal system – *international, regional or national system*.

Philosophical and theoretical explanation underlines that legal security is a historical and cultural idea. But the relevant issue here is the contemporary meaning of the concept of legal security that has been formulated by the german author Gustav Radbruch. He defines law as a reality whose meaning lies in subservient to justice. Legal security is really possible in the social state as the content of the relationship between man and his social needs. He justifies the reason to bring together ideas of security and justice. Social rights and stable law system are the elements of legal security [4]. Social security becomes legal security, since it is established by law in the new relationship between law and freedom in the social state. That's means that legal security is more or less social security in contemporary and developed societies. It's a new specific feature of the concept.

Rousseau writes about security as that protection which results in both order and certainty if we look at it from an objective point of view and as absence of fear and absence of doubt if we look at it from a subjective point of view. If we inter-

pret this statement in the meaning of different approaches, legal security can be analysed theoretically from objective and subjective point of view.

Nowadays the idea of legal security extends its influence in the sense of rule of law, constitutionalism and social state. It has become a 'principle inspiring the entire legal system' [5, p. 127]. Security is formal justice and material justice is freedom. Contemporary legislator balances duties and freedoms taking into account the principle of legal security. Lawmaking process organises freedom in society, social security and the stability of the law system. The conception of a generic legislation, unification of the sovereign, codification in law put forward the question of systematization in law and which is give rise to the normative basis of legal security. I have mainly focussed on the principle role of legal security in lawmaking, especially on legislative justification -rational and moral [6, 477–516].

## Security as a Human Rights Principle

Universal Declaration on Human Rights establishes that everyone has the right to life, liberty and security of person (Article 3), right to social security as a member of society (Article 22) and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Convention for Protection of Human Rights and Fundamental Freedoms European Convention on Human Rights (ECHR) uses terms 'security of person' and 'national security'. Article 5 of ECHR introduces a rule that 'everyone has the right to liberty and security of person.' Tree times Convention introduces national security as a criterion for limit the right to fair trail, freedom of thought, conscience and religion and freedom of movement. For example Article 6 (3) of ECHR establishes that judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society.

The review of Case Law of European Courte of Human Rights shows that under discussions is mainly social security. Security of person (human security) is related to the right to liberty and security [7, pp. 112–156]. In the Judgement of the case of De Tommaso v. Italy from 23 February 2017 the Court interprets the notion of 'security' and accept the definition in judgment no. 2 of 1956 of The Constitutional Court of Italy. 'An interpretation of 'security' as concerning solely physical integrity must be rejected, as this would be too restrictive; it thus appears rational and in keeping with the spirit of the Constitution to interpret the term 'security' as meaning a situation in which the peaceful exercise of the rights and freedoms so forcefully safeguarded by the Constitution is secured to citizens to the greatest extent possible. Security therefore exists when citizens can carry on their lawful activities without facing threats to their physical and mental integrity.

‘Living together in harmony’ is undeniably the aim pursued by a free, democratic State based on the rule of law’ [8, § 45].

In contemporary European legal systems security is associated with human and social security in which could be seen the influence of the principle of social state and the rule of law. The Constitution of Republic of Bulgaria holds in his Preamble ‘as the highest principle the rights, dignity and *security of the individual*’. In the same part it proclaims ‘democratic and social state, governed by the rule of law’ and I think Bulgarian constitutional legislator understands security as a human right principle. Spanish Constitution mentions in the same meaning security in Preamble: ‘The Spanish Nation, desiring to establish justice, liberty, and security and to promote the well-being of all its members...’

Another example of the meaning of security as social security is Hungarian Constitution. Article 70/E establishes that ‘Citizens of the Republic of Hungary have the right to social security; they are entitled to the support required to live in old age, and in cases of sickness, disability, or being widowed or orphaned, and in the case of unemployment through no fault of their own’.

The concept of legal security in human right context *consist human security (security of person) and social security*. Security is precondition, condition and protection of all rights and freedoms. It’s relevant to lawmaking and to justice. That’s way security in human rights’ subjects means more than a fundamental right or let’s define legal security as a *right-principle* that develops entire legal system and that ‘generates that certainty, that absence of fear, that peace of mind that is the reflection in the individual of that objective situation, even though in some of its aspects, legal security also emerges as a human right’ [9, p. 133].

## Security of Legal System as a Principle in Lawmaking

The law is reasonable and it should be explained by rational arguments. It’s clear when we focus on judicial interpretation of valid legal norms. But it’s not so obvious in lawmaking as a part of political process while the argumentation concerns suggestions *de lege ferenda* (not valid law). Luc Wintgens sets out this idea in his work developing theoretical thinking in Legisprudence [10, pp. 1–7]. If we accept the rationality of law, we have to agree that the legislator is rational law actor and not only political one. Rational Legislator is obliged to „give” law but good law and it’s much more an obligation to justify suggestions *de lege ferenda* with rational arguments according to the principles of legislation than just to create legal norms.

As a principle legal security has specific normative function – generates systematisation and stability of legal order and I would like to focus my attention on legislative justification. There are legislative criterions that every lawmaker should

follow. It's not only a question of procedures and techniques. Legisprudential approach shows the importance of legislative justification as an element of security of legal system.

Legisprudence is a rational knowledge of legislation and regulation. It enlarges the field of legal studies with creation of law by the legislator [11, pp. 1–7]. Legisprudence can be compared with Jurisprudence that takes into account the application of law by the judge. Both, Legisprudence and Jurisprudence are prudential knowledge. They provide theoretical and practical tools for analysing the process of rational lawmaking. Legisprudence puts the stress on the effectiveness, efficiency or acceptability of legislation – the core problem of lawmaking in contemporary democracies. The Law of European Union and all legal systems of European countries produce a huge amount of norms which decrease the systematicity of the legislation and its function to regulate effectively. It's pretty much the issue of sociology of law, but the theory of law has specific role in the subject of legislative justification.

The contemporary Theory of legislation is developed based on legisprudential interpretation of the role of legislator – 'good legislator' who creates rational norms and provides the public with reasons for them. From this broader point of view law aims to create security through guiding human behaviour and legislative justification is a condition for legal security. Lawmaking manages social and legal security through all forms of normative systematization.

Legislative justification follows the principles of legislation that organise the legal system in terms of legal security. It's enough to mention some of them to illustrate their importance to the issue. For example the *principle of alternatively* requires the ruler to justify the suggestions *de lege ferenda* [12, pp. 313–314]. The *principle of subsidiarity* „requires the ruler to act on the lowest level possible” and not to interfere too much in the freedom of citizens and their possibilities of self-organisation. The *principle of prognosis* and the *principle of correction* require the ruler to formulate the expected results of new ruling. If the real effects are different from the expected effects, the legislation should be corrected [13, pp. 312–314]. Here could be mentioned another principles, but it's not the core issue of the article. The principles of legislation secure the legal system in the meaning of its systematization and effectiveness of legal system. They are *objective elements of legal security in lawmaking*.

There is a tendency in theory of law and constitutional law of entailing an *obligation of public justification* on the part of lawmakers. There is an ongoing discussion in Germany among legal scholars and constitutional judges over the issue. The German Court has started to apply legisprudential criterion when reviewing parliamentary laws that affect fundamental rights and key constitutional norms such as the principles of proportionality and subsidiarity in order to secure legal system

[12, p. 1–19]. Other jurisdictions as the Court of Justice of the European Union and the European Court of Human Rights have similar approach [14, § 124].

## Conclusions

Security concerns every aspect of the organisation of society and every fundamental right of citizens. It could be seen from objective point of view in relation with society systems – political system, legal system and even moral system. That's the reason that under discussions are the notions of international security, regional security and national security. The organisational aspect is the main content of the security in terms of effectiveness. Legal security guarantees effectiveness of the normative function of the entire legal system – systematisation and stability of legal order.

Lawmaking process forms the political decisions in legal norms. Effectiveness of legal system depends on the level of implementation of the principles of legislation. On that level legal security contains fulfilment of the obligation to justify legal norm as a part of social and legal system.

From the point of view of individuals and their rights as citizens (subjective aspect) legal security guarantee human rights in the sense of human and social security. It's more than a fundamental right – a human right principle (a security right principle).

Legal security is a principle that generates systematisation and stability of legal order and guarantee human rights in the sense of human and social security through lawmaking and justice.

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